man, regulates the industrial relations, exercises control over the production, manufacture and distribution of essential commodities, starts many enterprises, tries to achieve equality for all and ensures equal pay for equal work. It improves slums, looks after the health and morals of the people, provides education to children and takes all the steps which social justice demands. All these developments have widened the scope and ambit of administrative law.[1]

2. DEFINITION OF ADMINISTRATIVE LAW

It is indeed difficult to evolve a scientific, precise and satisfactory definition of Administrative Law. Many jurists have made attempts to define it, but none of the definitions has completely demarcated the nature, scope and content of administrative law. Either the definitions are too broad and include much more than necessary or they are too narrow and do not include all the necessary ingredients. The literature on Administrative Law presents the reader with considerable diversity of opinion. For some it is the law relating to the control of powers of the government. The main object of this law is to protect individual rights. Others place greater emphasis upon rules which are designed to ensure that the administration effectively performs the tasks assigned to it. Yet others see the principal objective of Administrative Law as ensuring governmental accountability, and fostering participation by interested parties in the decision-making process.[2]

Ivor Jennings

Administrative Law is the law relating to the administration. It determines the organisation, powers and duties of the administrative authorities.[3]

This is the most widely-accepted definition. But according to Griffith and Street[4], there are two difficulties:

(*i*) It does not distinguish administrative law from constitutional law; and

(*ii*) It is a very wide definition, for the law which determines the powers and functions of administrative authorities may also deal with the substantive aspects of such powers, for example, legislations relating to public health services, houses, town and

1. *U.P. Warehousing Corpn.* v. *Vajpayee*, (1980) 3 SCC 459 (468-69): AIR 1980 SC 840 (846): (1980) 2 SCR 773.
2. Craig: *Administrative Law*, 1993, p. 3.
3. *The Law and the Constitution*, 1959, p. 217.
4. *Principles of Administrative Law*, 1967, p. 3.

country planning, etc.; but these are not included within the scope and ambit of administrative law.

Again, it does not include the remedies available to an aggrieved person when his rights are adversely affected by the administration.

Wade

According to Wade, Administrative Law is 'the law relating to the control of governmental power'.[5] According to him, the primary object of Administrative Law is to keep powers of the Government within their legal bounds so as to protect the citizens against their abuse.

Undoubtedly, this definition places considerable emphasis on the object of Administrative Law by touching the 'heart of the subject'. It does not, however, define the subject. It also does not deal with the powers and duties of administrative authorities nor with the procedure required to be followed by them.

K.C. Davis

"Administrative Law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action."[6]

In one respect, this definition is proper as it puts emphasis on *procedure* followed by administrative agencies in exercising their powers. However, it does not include the substantive laws prepared by these agencies. According to Davis, an administrative agency is a governmental authority, other than a court and a legislature which affects the rights of private parties either through administrative adjudication or rule-making. The difficulty in accepting this definition is that it does not include many non-adjudicative and yet administrative functions of the administration which cannot be characterised as legislative or quasi-judicial. Another difficulty with this definition is that it puts an emphasis on the control of the administrative functions by the judiciary, but does not study other equally important controls, e.g. parliamentary control of delegated legislation, control through administrative appeals and revisions and the like.

Garner

Garner also adopts the American approach advocated by K.C. Davis. According to him, Administrative Law may be described as "those rules which are recognised by the courts as law and which relate to and regulate the administration of Government".[7]

5. *Administrative Law*, 1994, p. 4.
6. *Administrative Law Text*, 1959, p. 1.
7. *Administrative Law*, 1985, p. 4.

Griffith and Street

According to Griffith and Street[8], the main object of administrative law is the operation and control of administrative authorities. It must deal with the following three aspects:

(1) What sort of power does the administration exercise ?

(2) What are the limits of those powers ?

(3) What are the ways in which the Administration is kept within those limits ?

According to the Indian Law Institute[9], the following two aspects must be added to have a complete idea of present-day administrative law:

(4) What are the procedures followed by the administrative authorities ?

(5) What are the remedies available to a person affected by administration ?

M.P. Jain

> "Administrative Law deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation."[10]

Administrative Law, according to this definition, deals with four aspects. Firstly, it deals with composition and the powers of administrative authorities. Secondly, it fixes the limits of the powers of those authorities. Thirdly, it prescribes the procedure to be followed by these authorities in exercising such powers. And fourthly, it controls these administrative authorities through judicial and other means.

Author

Taking into account the ambit and scope, I venture to define Administrative Law thus:

> "Administrative Law is that branch of Constitutional Law which deals with powers and duties of administrative authorities, the procedure followed by them in exercising the powers and discharging the duties and the remedies available to an aggrieved person when his rights are affected by any action of such authorities."

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8. *Principles of Administrative Law*, 1967, p. 3.
9. *Cases and Materials on Administrative Law in India*, 1966, Vol. I, p. 53.
10. *Treatise on Administrative Law*, 1996, Vol. I, p. 13.

3. NATURE AND SCOPE OF ADMINISTRATIVE LAW

Administrative Law deals with the powers of the administrative authorities, the manner in which the powers are exercised and the remedies which are available to the aggrieved persons, when those powers are abused by these authorities. As discussed above, the administrative process has come to stay and it has to be accepted as a necessary evil in all progressive societies, particularly in a welfare State, where many schemes for the progress of society are prepared and administered by the Government. The execution and implementation of this programme may adversely affect the rights of citizens. The actual problem is to reconcile social welfare with the rights of individual subjects. As has been rightly observed by Lord Denning:[11] "Properly exercised, the new powers of the executive lead to the Welfare State; but abused they lead to the Totalitarian State." The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.[12]

4. REASONS FOR GROWTH OF ADMINISTRATIVE LAW

The following factors are responsible for the rapid growth and development of administrative law:

(1) There is a radical change in the philosophy as to the role played by the State. The negative policy of maintaining 'law and order' and of '*laissez faire*' is given up. The State has not confined its scope to the traditional and minimum functions of defence and administration of justice, but has adopted the positive policy and as a welfare State has undertaken to perform varied functions.

(2) The judicial system proved inadequate to decide and settle all types of disputes. It was slow, costly, inexpert, complex and formalistic. It was already overburdened, and it was not possible to expect speedy disposal of even very important matters, e.g. disputes between employers and employees, lock-outs, strikes, etc. These burning problems could not be solved merely by literally interpreting the provisions of any statute, but required consideration of various other factors and it could not be done by the ordinary courts of law. Therefore, industrial tribunals and labour courts were established, which possessed the techniques and expertise to handle these complex problems.

11. *Freedom under the Law*, 1949, p. 126.
12. For detailed discussion *see* C.K. Thakker: *Administrative Law*, 1996, pp. 4-7.

(3) The legislative process was also inadequate. It had no time and technique to deal with all the details. It was impossible for it to lay down detailed rules and procedures, and even when detailed provisions were made by the legislature, they were found to be defective and inadequate, e.g., rate fixing. And, therefore, it was felt necessary to delegate some powers to the administrative authorities.

(4) There is scope for experiments in administrative process. Here, unlike legislation, it is not necessary to continue a rule until commencement of the next session of the legislature. Here a rule can be made, tried for some time and if it is found defective, it can be altered or modified within a short period. Thus, legislation is rigid in character while the administrative process is flexible.

(5) The administrative authorities can avoid technicalities. Administrative law represents functional rather than a theoretical and legalistic approach. The traditional judiciary is conservative, rigid and technical. It is not possible for the courts to decide the cases without formality and technicality. The administrative tribunals are not bound by the rules of evidence and procedure and they can take a practical view of the matter to decide complex problems.

(6) Administrative authorities can take preventive measures, e.g. licensing, rate fixing, etc. Unlike regular courts of law, they have not to wait for parties to come before them with disputes. In many cases, these preventive actions may prove to be more effective and useful than punishing a person after he has committed a breach of any provision of law. As Freeman says, "Inspection and grading of meat answers the consumer's need more adequately than does a right to sue the seller after the consumer is injured."[13]

(7) Administrative authorities can take effective steps for enforcement of the aforesaid preventive measures; e.g. suspension, revocation and cancellation of licences, destruction of contaminated articles, etc. which are not generally available through regular courts of law.

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13. Cited in *Cases and Materials on Administrative Law in India*, 1966, Vol. I, pp. 3-4.

5. HISTORICAL GROWTH AND DEVELOPMENT OF ADMINISTRATIVE LAW

(A) England

In England, by and large, the existence of Administrative Law as a separate branch of law was not accepted until the advent of the 20th century. In 1885, Dicey in his famous thesis on rule of law observed that there was no Administrative Law in England. He had pronounced to Robson: "In England, we know nothing of Administrative Law and we wish to know nothing about it."[14] But while saying this, he ignored the existence of administrative discretion and administrative justice which were current even in his days. In a large number of statutes discretionary powers were conferred on the executive authorities and administrative tribunals which could not be called into question by the ordinary courts of law. But he disregarded them altogether. It appears that his contemporary Maitland was quite conscious of the true position and he observed in 1887: "If you take up a modern volume of the reports of the Queen's Bench Division, you will find that about half of the cases reported have to do with rules of administrative law."[15]

In 1914, however, Dicey changed his views. In the last edition of his famous book '*Law and the Constitution*', published in 1915, he admitted that during the last thirty years, due to increase of duties and authority of English officials, some elements of *droit* had entered into the law of England. But even then, he did not concede that there was administrative law in England. However, after two decisions of the House of Lords in *Board of Education* v. *Rice*[16] and *Local Govt. Board* v. *Arlidge*[17], in his article "The Development of Administrative Law in England"[18] he observed: "Legislation had conferred a considerable amount of quasi-judicial authority on the administration which was a considerable step towards the introduction of administrative law in England."

According to Friedmann[19], unfortunately, Dicey misunderstood the scope and ambit of administrative law. He thought administrative law to be inconsistent with the maintenance of the rule of law. Hence, while studying the rule of law, he excluded altogether administrative law and a special system of administrative courts.

14. Robson: *Administrative Law in England*, pp. 85-86.
15. Maitland: *The Constitutional History of England*, 1908, p. 505.
16. 1911 AC 179: 80 LJKB 496: 104 LT 689.
17. 1915 AC 120: 84 LJKB 72: 111 LT 905.
18. (1915) 31 LQR 148.
19. *American Administrative Law*, 1962, p. 21.

As observed by Griffith and Street[20], the study of administrative law had to suffer a lot because of Dicey's conservative approach. Of course, in due course, scholars made conscious efforts to know the real position. But even to them, the study of administrative law was restricted only to two aspects, viz. delegated legislation and administrative adjudication. Even in 1935, Lord Hewart, Chief Justice of England described the term 'Administrative Law' as 'continental jargon'.

In 1929, the Committee on Minister's Powers headed by Lord Donoughmore was appointed by the British Government to examine the problems of delegated legislation and the judicial and quasi-judicial powers exercised by the officers appointed by the ministers and to suggest effective steps and suitable safeguards to ensure the supremacy of the rule of law.

In 1932, the Donoughmore Committee submitted its report and made certain recommendations with regard to better publication and control of subordinate legislation, which were accepted by Parliament with the passage of the Statutory Instruments Act, 1946. In 1947, the Crown Proceedings Act was passed by the British Parliament which made the Government liable to pay damages in cases of tortious and contractual liability of the Crown. Thus, the abandonment of the famous doctrine "The King can do no wrong" considerably expanded the scope of administrative law in England. In 1958, the Tribunals and Inquiries Act was passed for the purpose of better control and supervision of administrative decisions, and the decisions of the administrative authorities and tribunals were made subject to appeal and supervisory jurisdiction of the regular courts of law.

(B) U.S.A.

Administrative Law was in existence in America in the 18th century, when the first federal administrative law was embodied in the statute in 1789, but it grew rapidly with the passing of the Inter-State Commerce Act, 1877. In 1893, Frank Goodnow published a book on '*Comparative Administrative Law*' and in 1905, another book on the '*Principles of Administrative Law of the United States*' was published. In 1911, Ernst Freund's '*Case-Book on Administrative Law*' was published. The Bench and the Bar also took interest in the study of administrative law. In his address to the American Bar Association in 1946, President Elihu Root warned the country by saying: "There is one special field of law, development of which has manifestly become inevitable. We are entering

20. *Principles of Administrative Law*, 1963, p. 3; *see also* Lord Hewart: *Not Without Prejudice*, 1935, p. 96.

upon the creation of a body of administrative law, quite different in its machinery, its remedies and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts.... If we are to continue a Government of limited powers, these agencies of regulation must themselves be regulated....'' Unfortunately, this advice of a wise counsel was ignored by the leaders of the Bar. The powers of the administrative bodies continued to increase day by day and they became a 'Fourth Branch' of the Government.

After the New Deal, it was felt necessary to take effective steps in this field. A special committee was appointed in 1933 which called for greater judicial control over administrative agencies. After the report of Roscoe Pound Committee of 1938 and Attorney General's Committee in 1939, the Administrative Procedure Act, 1946 was passed which contained many provisions relating to the judicial control over administrative actions.

(C) France

French administrative law or *droit administratif* is a branch of law which deals with the powers and duties of various administrative agencies and officials. According to Dicey[21], *droit administratif* is that portion of French law which determines (*i*) position and liabilities of State officials; (*ii*) rights and liabilities of private individuals in their dealings with officials as representatives of the State; and (*iii*) procedure by which these rights and duties are enforced. According to him, this system is based on two principles, namely, (1) an individual in his dealings with the State does not, according to the French legal system, stand on the same footing as that on which he stands in dealing with his neighbour; and (2) the Government and its officials are independent of and free from the jurisdiction of the ordinary civil courts.

From the above two principles, the following consequences ensue; (1) the relation of the Government and its officials towards private citizens must be regulated by a body of rules which may differ considerably from the laws which govern the relation of one private person to another; (2) the ordinary courts which determine disputes between private individuals have no jurisdiction to decide disputes between a private individual and the State but they are determined by administrative courts; (3) in case of conflict of jurisdiction between two sets of courts, the said dispute will be decided by the administrative court; and (4) *droit administratif* has a tendency to protect from the supervision or control of the

21. *Law and the Constitution*, 1915, p. 330. For detailed discussion of *droit administratif* see Lecture II (*infra*).

ordinary law courts any servant of the State who is guilty of an act, however illegal, whilst acting *bona fide* in obedience to the orders of his superiors and in the discharge of his official duties.

Dicey did not favour *droit administratif*. According to him, the object of two sets of courts and two types of laws is to protect Government officials from the consequences of their acts. According to him, there was no rule of law in France. In view of the fact that there was (1) supremacy of law, and (2) equality before the law, there was much more effective control over administrative action in England than in France.

However, as we will see, Dicey was not right in drawing certain inferences. As a matter of fact, *Conseil d'Etat* afforded much more protection to the aggrieved parties in France than regular courts afforded to such persons in England. The popular conception that in France, the State officials in their official dealings with private citizens are above the law, or are a law unto themselves, is erroneous. The official transgressing the bounds of law or acting contrary to the rules of natural justice in his dealings with the citizen is subject to a greater and more effective control in France than in some Anglo-Saxon countries.

(D) India

Administrative Law was in existence in India even in ancient times. Under the Mauryas and Guptas, several centuries before Christ, there was well-organised and centralised administration in India. The rule of *Dharma* was observed by the kings and administrators and nobody claimed any exemption from it. The basic principles of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by *Dharma*, which was even a wider word than 'Rule of Law' or 'Due process of Law'. Yet, there was no administrative law in existence in the sense in which we study it today.

With the establishment of the East India Company and the advent of the British Rule in India, the powers of the Government had increased. Many Acts, statutes and legislations were passed by the British Government, regulating public safety, health, morality, transport and labour relations. The practice of granting administrative licence began with the State Carriage Act, 1861. The first public corporation was established under the Bombay Port Trust Act, 1879. Delegated legislation was accepted by the Northern India Canal and Drainage Act, 1873 and the Opium Act, 1878. Proper and effective steps were taken to regulate the trade and traffic in explosives by the Indian Explosives Act, 1884. In many statutes, provisions were made regarding holding of permits and

licences and for the settlement of disputes by the administrative authorities and tribunals.

During the Second World War, the executive powers tremendously increased. The Defence of India Act, 1939 and the Rules made thereunder conferred ample powers on the executive to interfere with life, liberty and property of an individual with little or no judicial control over them. In addition to this, the Government issued many orders and ordinances covering several matters by way of administrative instructions.

Since Independence, the activities and the functions of the Government have further increased. Under the Industrial Disputes Act, 1947, the Minimum Wages Act, 1948, the Factories Act, 1948 and the Employees' State Insurance Act, 1948, important social security measures have been taken for those employed in industries.

The philosophy of a welfare State has been specifically embodied in the Constitution of India. In the Constitution itself provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so distributed as best to subserve the common good. The operation of the economic system should not result in the concentration of wealth and means of production. For the implementation of all these objects the State is given power to impose reasonable restrictions even on the Fundamental Rights guaranteed by the Constitution. In fact, to secure these objects, several steps have been taken by Parliament by passing many Acts, e.g. the Industrial (Development and Regulation) Act, 1951, the Requisitioning and Acquisition of Immovable Property Act, 1952, the Essential Commodities Act, 1955, the Companies Act, 1956, the Maternity Benefit Act, 1961, the Payment of Bonus Act, 1965, the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969, the Equal Remuneration Act, 1976, the Urban Land (Ceiling and Regulation) Act, 1976, the Beedi Workers' Welfare Fund Act, 1976, etc.

Markose studied the reported cases of the Supreme Court of three years (1953, 1954 and 1955) and found that about half of the cases dealt with matters of administrative law. Out of 250 reported cases, 119 belonged to administrative law category. Of 275 pages of Supreme Court judgments, 229 related to the subject of administrative law.[22] Obviously, it has increased considerably thereafter.

22. *Administrative Law in India*, (1961), p. 257 cited by Fazal: *Judicial Control of Administrative Action in India, Pakistan and Bangladesh*, (1990), p. 9.

Even while interpreting all these Acts and the provisions of the Constitution, the judiciary started taking into consideration the objects and ideals of social welfare. Thus, in *Vellukunnel* v. *Reserve Bank of India*[23], the Supreme Court held that under the Banking Companies Act, 1949, the Reserve Bank was the sole judge to decide whether the affairs of a banking company were being conducted in a manner prejudicial to the depositors' interest and the Court had no option but to pass an order of winding up as prayed for by the Reserve Bank. Again, in *State of A.P.* v. *C.V. Rao*[24], dealing with a departmental inquiry, the Supreme Court held that the jurisdiction to issue a writ of *certiorari* under Article 226 is supervisory in nature. It is not an appellate court and if there is some evidence on record on which the tribunal had passed the order, the said findings cannot be challenged on the ground that the evidence for the same is insufficient or inadequate. The adequacy or sufficiency of evidence is within the exclusive jurisdiction of the tribunal. In *M.P. Srivastava* v. *Suresh Singh*[25], the Supreme Court observed that in matters relating to questions regarding adequacy or sufficiency of training, the expert opinion of the Public Service Commission would be generally accepted by the Court. In *State of Gujarat* v. *M.I. Haider Bux*[26], the Supreme Court held that under the provisions of the Land Acquisition Act, 1894, ordinarily, the Government is the best authority to decide whether a particular purpose is a public purpose and whether the land can be acquired for that purpose or not.

Similarly, in *Maharashtra State Board of Education* v. *Paritosh*[27] also, the Supreme Court held that "the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and the departments controlling them".

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23. AIR 1962 SC 1371: (1962) Supp (3) SCR 632; see also *Peerless General Finance and Investment Comp. Ltd.* v. *Reserve Bank of India*, (1992) 2 SCC 343 (375): AIR 1992 SC 1033.
24. (1975) 2 SCC 557: AIR 1975 SC 2151; see also *K.L. Shinde* v. *State of Mysore*, (1976) 3 SCC 76: AIR 1976 SC 1080; *U.P. Warehousing Corpn.* v. *Vajpayee*, (1980) 3 SCC 459: AIR 1980 SC 840.
25. (1977) 1 SCC 627: AIR 1976 SC 1404; see also *Shyam Babu* v. *Union of India*, (1994) 2 SCC 521.
26. (1976) 3 SCC 536: AIR 1977 SC 594.
27. (1984) 4 SCC 27(56-57): AIR 1984 SC 1543(1559).

In *Javid Rasool* v. *State of J&K*[28], the Supreme Court observed that a member of the Selection Committee can ask even irrelevant questions to explore the candidates' capacity to detect irrelevancies.

Thus, on the one hand, the activities and powers of the Government and administrative authorities have increased and on the other hand, there is greater need for the enforcement of the rule of law and judicial review over these powers, so that the citizens should be free to enjoy the liberty guaranteed to them by the Constitution. For that purpose, provisions are made in the statutes giving right of appeal, revision, etc. and at the same time extraordinary remedies are available to them under Articles 32, 226 and 227 of the Constitution of India. The principle of judicial review is also accepted in our Constitution and the orders passed by the administrative authorities can be quashed and set aside if they are *mala fide* or *ultra vires* the Act or the provisions of the Constitution. And if the rules, regulations or orders passed by these authorities are not within their powers, they can be declared *ultra vires*, unconstitutional, illegal or void.

6. CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

Sometimes, a question is asked as to whether there is any distinction between constitutional law and administrative law. Till recently, the subject of administrative law was dealt with and discussed in the books of constitutional law and no separate and independent treatment was given to it. In many definitions of administrative law, it was included in constitutional law. Though in essence constitutional law does not differ from administrative law inasmuch as both are concerned with functions of the Government and both are a part of public law in the modern State and the sources of both are the same, yet there is a distinction between the two. According to Maitland[29], while constitutional law deals with structure and the broader rules which regulate the functions, the details of the functions are left to administrative law. According to Hood Phillips:[30]

> "Constitutional law is concerned with the organisation and functions of Government *at rest* whilst administrative law is concerned with that organisation and those functions *in motion*."

But the opinion of the English and American authors is that the distinction between constitutional law and administrative law is one of degree, convenience and custom rather than that of logic and principle.

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28. (1984) 2 SCC 631(637): AIR 1984 SC 873(877).
29. *Constitutional History*, 1955, p. 526; see also Holland: *Jurisprudence*, 10th Edn., p. 506.
30. *Constitutional and Administrative Law*, 1962, p. 13; *see also* Garner: *Administrative Law*, 1963, pp. 1-2.

It is not essential and fundamental in character. Keith rightly remarks: "It is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial."[31]

India has a written Constitution. While constitutional law deals with the general principles relating to the organisation and power of the legislature, executive and judiciary and their functions *inter se* and towards the citizens, administrative law is that part of constitutional law which deals in detail with the powers and functions of the administrative authorities, including civil services, public departments, local authorities and other statutory bodies. Thus, while constitutional law is concerned with constitutional status of ministers and civil servants, administrative law is concerned with the organisation of the services and the proper working of various departments of the Government.

7. ENGLISH ADMINISTRATIVE LAW AND INDIAN ADMINISTRATIVE LAW

There is an important difference between English Administrative Law and Indian Administrative Law. In England, Parliament is supreme and sovereign. It can do everything, 'but make woman a man and a man a woman'. The Law enacted by the British Parliament is the highest form of law and prevails over every other form of law.[32] Any administrative action, therefore, can be challenged there only if it is *ultra vires* the statute under which it was taken. In India, on the other hand, as there is a written Constitution and the power of judicial review is conferred by the Constitution on the Supreme Court and the High Courts, the same can be challenged as *ultra vires* the Constitution also. In India, administrative action will have to be tested on four anvils — (*i*) the action must have been taken in accordance with the Rules and Regulations; (*ii*) the Rules and Regulations should be in accordance with the relevant statute, i.e. the parent Act; and (*iii*) the action, the Rules and Regulations and the parent Act must be in consonance with the provisions of the Constitution; and (*iv*) if it is a constitutional amendment, such amendment of the Constitution should also be in conformity with the basic structure of the Constitution.

It is submitted that the following observations of Pathak, C.J.[33] lay down the correct law on the point and are worth quoting:

> "*The range of judicial review recognised in the superior judiciary in India is perhaps the widest and the most extensive known*

31. Basu: *Administrative Law*, 1996, p. 1.
32. *Cheney* v. *Conn.*, (1968) 1 All ER 779: (1968) 1 WLR 242.
33. *Union of India* v. *Raghubir Singh*, (1989) 2 SCC 754: AIR 1989 SC 1933.

to the world of law. The power extends to examining the validity of even an amendment to the Constitution, for now it has been repeatedly held that no constitutional amendment can be sustained which violates the basic structure of the Constitution."[34]

(emphasis supplied)

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34. *Id.*, p. 766 (SCC): 1938 (AIR); see also *Kesavananda Bharati* v. *State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461; *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299; *Minerva Mills Ltd.* v. *Union of India*, (1980) 2 SCC 591: AIR 1980 SC 1789.

Lecture II

Basic Constitutional Principles

No free man shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go or send for him, except under a lawful judgment of his peers and by the law of the land.

—MAGNA CARTA

Englishmen are ruled by the law, and by the law alone; a man with us may be punished for a breach of law, but can be punished for nothing else.

—DICEY

The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny.

—MADISON

SYNOPSIS

1. Rule of Law
   - (A) General
   - (B) Meaning
     - (*i*) Supremacy of law
     - (*ii*) Equality before law
     - (*iii*) Predominance of legal spirit
   - (C) Application of doctrine
   - (D) Comments
   - (E) Importance
   - (F) Droit Administratif
     - (*i*) Meaning
     - (*ii*) Comments
     - (*iii*) Concrete cases
   - (G) Modern concept of Rule of Law
   - (H) Rule of Law under Constitution of India
   - (I) Habeas Corpus case
2. Separation of Powers
   - (A) General
   - (B) Meaning
   - (C) Historical background
   - (D) Montesquieu's doctrine
   - (E) Effect
   - (F) Defects
   - (G) Importance
   - (H) Separation of Powers in practice
     - (*i*) U.S.A.

(*ii*) England
(*iii*) India

1. RULE OF LAW

(A) General

One of the basic principles of the English Constitution is the Rule of Law. This doctrine is accepted in the Constitution of U.S.A. and also in the Constitution of India. The entire basis of Administrative Law is the doctrine of the rule of law. Sir Edward Coke, the Chief Justice in James I's reign was the originator of this concept. In a battle against the King, he maintained successfully that the King should be under God and the Law, and he established the supremacy of the Law against the executive. Dicey developed this theory of Coke in his classic book '*The Law and the Constitution*' published in the year 1885.

(B) Meaning

According to Dicey, the rule of law is one of the fundamental principles of the English Legal System. In the aforesaid book he attributed the following three meanings to the said doctrine:

(*i*) Supremacy of law;
(*ii*) Equality before law; and
(*iii*) Predominance of legal spirit.

(*i*) *Supremacy of law*

Explaining the first principle, Dicey states that rule of law means the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power or wide discretionary power. It excludes the existence of arbitrariness, of prerogative or even wide discretionary authority on the part of the Government. According to him the Englishmen were ruled by the law and law alone. A man may be punished for a breach of law, but can be punished for nothing else.[1] In his words, "Wherever there is discretion, there is room for arbitrariness and that in a republic no less than under a monarchy discretionary authority on the part of the Government must mean insecurity for legal freedom on the part of its subjects."[2] As Wade[3] says the rule of law requires that the Government should be subject to the law, rather than the law subject to the Government.

In other words, according to this doctrine, no man can be arrested, punished or be lawfully made to suffer in body or goods except by due

1. *The Law and the Constitution*, 1915, p. 202.
2. *Id.*, p. 184.
3. *Administrative Law*, 1994, pp. 34-36.

process of law and for a breach of law established in the ordinary legal manner before the ordinary courts of the land. Dicey described this principle as 'the central and most characteristic feature' of Common Law.

(ii) Equality before law

Explaining the second principle of the rule of law, Dicey states that there must be equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. According to him, in England, all persons were subject to one and the same law, and there were no extraordinary tribunals or special courts for officers of the Government and other authorities. He criticised the French legal system of *droit administratif* in which there were separate administrative tribunals for deciding cases between the officials of the State and the citizens. According to him, exemption of the civil servants from the jurisdiction of the ordinary courts of law and providing them with the special tribunals was the negation of *equality*. Of course, Dicey himself saw that administrative authorities were exercising 'judicial' functions though they were not 'courts'. He, therefore, asserted: "Such transference of authority saps the foundation of the rule of law which has been for generations a leading feature of the English Constitution."

According to Dicey[4], any encroachment on the jurisdiction of the courts and any restrictions on the subject's unimpeded access to them are bound to jeopardize his rights. In the words of Lord Denning[5]: "Our English law does not allow a public officer to shelter behind a *droit administratif*."

(iii) Predominance of legal spirit

Explaining the third principle, Dicey states that in many countries rights such as right to personal liberty, freedom from arrest, freedom to hold public meetings are guaranteed by a written Constitution; in England, it is not so. Those rights are the result of judicial decisions in concrete cases which have actually arisen between the parties. The Constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey emphasised the role of the courts of law as guarantors of liberty and suggested that the rights would be secured more adequately if they were enforceable in the courts of law than by mere declaration of those rights in a document, as in the latter case, they can be ignored, curtailed or trampled upon. He stated: "The Law of the Constitution, the rules which in foreign countries naturally form part of

4. Cited by V.G. Ramachandran: *Administrative Law*, 1984, p. 6.
5. *Ministry of Housing* v. *Sharp*, (1970) 2 QB 223(226): (1970) 1 All ER 1009.

a constitutional Code, are not the source but the consequences of the rights of individuals, as defined and enforced by the courts."

According to him, mere incorporation or inclusion of certain rights in the written constitution is of little value in the absence of effective remedies of protection and enforcement. He propounded: "Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty."[6]

(C) Application of doctrine

In England, the doctrine of the rule of law was applied in concrete cases. According to Wade[7], if a man is wrongfully arrested by the police, he can file a suit for damages against them as if the police were private individuals. In *Wilkes* v. *Wood*[8], it was held that an action for damages for trespass was maintainable even if the action complained of was taken in pursuance of the order of the Minister. In the famous case of *Entick* v. *Carrington*[9], a publisher's house and papers were ransacked by the King's messengers sent by the Secretary of State. In an action for trespass, damages to the tune of £ 300 were awarded to the publisher. In the same manner, if a man's land is compulsorily acquired under an illegal order, he can bring an action for trespass against any person who tries to disturb his possession or attempts to execute the said order.

(D) Comments

Dicey's thesis had its own advantages and merits. The doctrine of rule of law proved to be an effective instrument in confining the administrative authorities within their limits. It served as a kind of touchstone to judge and test administrative actions.

According to Wade[10], the British Constitution is founded on this doctrine. Yardley[11] also says that in broad principle the rule of law is accepted by all as a necessary constitutional safeguard. Dicey's theory has thwarted the recognition and growth of administrative law in England. Although, in the 20th century, complete absence of discretionary powers with the administration is not possible, yet this doctrine puts an effective control over the increase of executive and administrative powers and keeps those authorities within their bounds. As the supremacy of the

6. *The Law and the Constitution*, 1915, p. 195.
7. *Administrative Law*, 1994, p. 35.
8. (1763) 19 St Tr 1153.
9. (1765) 19 St Tr 1030.
10. *Administrative Law*, 1994, p. 24.
11. *A Source Book of English Administrative Law*, 1970, p. 3.

ordinary courts of law is accepted, they have power to control the actions taken by the administrative authorities. They must act according to law and cannot take any action as per their whims or caprice. It is the duty of the courts to see that these authorities must exercise their powers within the limits of the law.

The doctrine of the rule of law expounded by Dicey was never fully accepted in England even in his days. Wade[12] rightly says that if he had chosen to examine the scope of administrative law in England, he would have to admit that even in 1885 there existed 'a long list of statutes which permitted the exercise of discretionary powers which could not be called in question by courts' and the Crown enjoyed the immunity under the maxim '*The King can do no wrong*'. The shortcoming of Dicey's thesis was that he not only excluded arbitrary powers but also insisted that the administrative authorities should not be given wide discretionary powers, as according to him, 'wherever there is discretion, there is room for arbitrariness'. Thus, Dicey failed to distinguish *arbitrary power* from *discretionary power*. Though arbitrary power is inconsistent with the concept of rule of law, discretionary power is not, if it is properly exercised. The modern welfare State cannot work properly without exercising discretionary power. As Wade and Phillips[13] observed: "If it is contrary to the rule of law that the discretionary authority should be given to Government departments or public officers then the rule of law is inapplicable to any modern constitution." As Mathew, J. stated: "If it is contrary to the rule of law that discretionary authority should be given to Government departments or public officers, then there is no rule of law in any modern State."[14] In fact, many administrative tribunals have come into existence which adjudicate upon the rights of the subjects not according to common law and the procedure of the ordinary courts but according to special laws applied to special groups. John Dickinson[15] says: "Insofar as administrative adjudication is coming in certain fields to take the place of adjudication by the law courts, the supremacy of law as formulated by Dicey's first proposition is overridden."

It is also stated, that, in fact, Dicey misunderstood the real nature of the French *droit administratif*. The French system in many respects proved to be more effective in controlling the administrative powers than

12. *Administrative Law*, 1994, pp. 27-28.
13. *Constitutional Law*, 1960, pp. 64-65.
14. *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1, para 340: AIR 1975 SC 2299.
15. *Administrative Justice and Supremacy of Law*, 1927, pp. 36-37.

the common law system. Although, *Conseil d'Etat* technically speaking was a part of administration, in practice and reality, it was very much a court. The actions of the administration were not immune from the judicial control of this institution.

(E) Importance

One thing must be noted. In modern times, Dicey's rule of law has come to be identified with the concept of rights of citizens. As Wade and Phillips[16] rightly state, it is accepted in almost all the countries outside the Communist world with some variations. It is invoked in modern democratic countries to keep control over the oppressive, capricious and arbitrary exercise of powers by the administrative authorities. The International Commission of Jurists, in their 'Delhi Declaration' made in the year 1959 accepted the idea of the rule of law as a modern form of law of nature.

(F) Droit Administratif

(i) Meaning

Under the French Legal System, known as *droit administratif*, there are two types of laws and two sets of courts independent of each other. The ordinary courts administer the ordinary civil law as between subjects and subjects. The administrative courts administer the law as between the subject and the State. An administrative authority or official is not subject to the jurisdiction of the ordinary civil courts exercising powers under the civil law in disputes between the private individuals. All claims and disputes in which these authorities or officials are parties fall outside the scope of the jurisdiction of ordinary courts and they must be dealt with and decided by the special tribunals. Though the system of *droit administratif* is very old, it was regularly put into practice by Napoleon in the 18th century.

(ii) Comments

If the French system did not adequately protect the individuals as against the State, it would be a serious criticism; but it was not so. The fact is that this system was able to provide expeditious and inexpensive relief and better protection to the citizens against administrative acts or omissions than the Common law system. Wade[17] says: "Once rid of the illusion that administrative courts must inevitably be biased, one can see

16. *Constitutional Law*, 1960, pp. 70-73.
17. *Administrative Law*, 1994, p. 27; *see also* Brown and Garner: *French Administrative Law*, 1967, p. 133; Yardley: *Principles of Administrative Law*, 1981, pp. 44-45.

that they hold the keys to some problems which are insoluble under the separation of powers as practised in England."

(iii) Concrete cases

Let us examine some concrete cases to illustrate this proposition:

(*a*) If an employee in a Government factory is injured by an explosion, according to the administrative courts in France, the risk should fall on the State, but the English courts will not hold the State liable unless the injured proves negligence of some servant of the Crown. Thus, English courts still apply the conservative and traditional approach that there should be no liability without fault; on the other hand, French administrative courts adopt the theory that 'justice requires that the State should be responsible to the workman for the risk which he runs by reason of his part in the public service'.

(*b*) On one hand, when a passer-by chased a thief and was stabbed, the *Conseil d'Etat* held that he was entitled to recover damages which would not have been done under English Law. On the other hand, as the French administrative courts are recognised as guardians of public servants, the latter also get better protection from their employers. Thus, where a Rector of Strasbourg Academy was asked to take up some other duties and relieved from his post without in fact new duties being assigned to him, the administrative court held that he was removed from service and gave him redress. According to Denning[18], in England, the ordinary courts of law could not have protected him because as a rule, public servants can be dismissed by the Crown at pleasure.

(*c*) Under the Act of 1872, the French Government had a right to have a monopoly of manufacturing matches and for that purpose it could acquire the factories run by private persons. A provision to pay the compensation for compulsory acquisition was also made in the Act. However, if a factory was ordered to be closed on the ground of improvement of health, no compensation was required to be paid. In one case, an order to close the factory was passed by a Minister on the ground of improvement of health, but in reality, the motive was to avoid payment of compensation to the owner of the factory. An ordinary court could not have given any redress to the owner in this case, but the

18. I.L.I.: *Cases and Materials on Administrative Law in India*, 1966, Vol. I, p. 56.

Conseil d'Etat held that the power was abused by the Minister and awarded £ 20,000 to the victim factory owner.

(*d*) *A*, a private gas company entered into an agreement with the Town Planning Council to supply gas at a particular rate for a period of 30 years. The agreement was made on the basis of the rates of coal in the year 1904. But after the First World War, the rates shot up. An application was filed by the gas company before the *Conseil d'Etat* for revision of rates. An ordinary court would have rejected this application and would not have granted the relief prayed for, but the *Conseil* accepted it and revised the rates. According to the *Conseil*, it was in the interest of the public at large that the company should continue to work rather than be wound up and if compelled to provide gas at the fixed rates, it amounted to compelling the works into liquidation.

(*e*) *Barel case*: The Minister concerned did not permit certain candidates to appear at the civil service examination. It was reported in the newspaper that the Government had refused permission to candidates who were Communists. The Minister, however, denied it. The candidates approached the *Conseil d'Etat*, which quashed the order, since no reasons were recorded by the Minister for refusing such permission. The *Conseil* presumed that there were no reasons which would justify such a refusal. Thus, the *Conseil d'Etat* took the view in 1954 which was taken by English Courts in 1968.[19]

(*f*) *Fortune case*: *A* wanted to appear at a competitive examination. He was not permitted to appear on the ground that his confidential file contained certain adverse remarks. In an action by *A*, the *Conseil d'Etat* went through the records and called upon the Secretary to justify the order. The Secretary pleaded that it was an '*Act de Government*' (Act of State) and that the court had no jurisdiction to deal with the matter. He did not produce any document. The court passed an order to produce the entire file relating to the matter, went through it and quashed the order. In England, governed by the rule of law one cannot conceive of such a situation, for the ordinary courts of law have no right to interfere with any '*Act of State*', or with ministerial discretion nor can they have access to the secret documents.

19. *Padfield* v. *Minister of Agriculture*, 1968 AC 997: (1968) 1 All ER 694: (1968) 2 WLR 924.

(*g*) Again, when the decision of *Liversidge* v. *Anderson*[20] was brought to the notice of the French Administrative courts in which the principle of *subjective satisfaction* was upheld by the court in an ordinary court of law even in the case of a preventive detention, the Conseil d'Etat was unable to agree with the same. According to the French officials, the decision in *Liversidge case* cannot be accepted in any civilised country and more particularly in a country which had evolved the concept of rule of law.

(G) Modern concept of Rule of Law

As stated above, Dicey's concept of rule of law was not accepted fully even in 1885 when he formulated it, for even in that period, administrative law and administrative authorities were existent. Today, Dicey's theory of rule of law cannot be accepted in its totality. Davis[21] gives seven principal meanings of the term 'Rule of Law':— (1) Law and order; (2) Fixed rules; (3) Elimination of discretion; (4) Due process of law or fairness; (5) Natural law or observance of the principles of natural justice; (6) Preference for judges and ordinary courts of law to executive authorities and administrative tribunals; and (7) Judicial review of administrative actions.

(H) Rule of Law under Constitution of India

Dicey's rule of law has been adopted and incorporated in the Constitution of India. The preamble itself enunciates the ideals of justice, liberty and equality. In Chapter III of the Constitution these concepts are enshrined as fundamental rights and are made enforceable. The Constitution is supreme and all the three organs of the Government, viz. legislature, executive and judiciary are subordinate to and have to act in accordance with it. The principle of judicial review is embodied in the Constitution and the subjects can approach High Courts and the Supreme Court for the enforcement of fundamental rights guaranteed under the Constitution. If the executive or the Government abuses the power vested in it or if the action is *mala fide,* the same can be quashed by the ordinary courts of law. All rules, regulations, ordinances, bye-laws, notifications, customs and usages are 'laws' within the meaning of Article 13 of the Constitution and if they are inconsistent with or contrary to any of the provisions thereof, they can be declared as *ultra vires* by the Supreme Court and by High Courts. The President is required to take an oath to preserve, protect and defend the Constitution. No person shall be de-

20. 1942 AC 206: (1941) 3 All ER 338.
21. *Administrative Law*, 1959, pp. 24-27.

rived of his life or personal liberty except according to *procedure established by law*[22] or of his property save by *authority of law*[23]. The xecutive and the legislative powers of the States and the Union have to e exercised in accordance with the provisions of the Constitution. The overnment and the public officials are not above the law. The maxim The King can do no wrong' does not apply in India. There is *equality efore the law* and *equal protection of laws*.[24] The Government and pubc authorities are also subject to the jurisdiction of ordinary courts of aw and for similar wrongs are to be tried and punished similarly. They re not immune from ordinary legal process nor is any provision made egarding separate administrative courts and tribunals.[25] In public service lso the doctrine of equality is accepted.[26] Suits for breach of contract nd torts committed by the public authorities can be filed in ordinary aw courts and damages can be recovered from the State Government or ie Union Government for the acts of their employees.[27] Thus, it appears iat the doctrine of rule of law is embodied in the Constitution of India, nd is treated as the basic structure of the Constitution.[28]

In spite of such apparently enviable position of subjects, in almost l the fields of industry, commerce, education, transport, banking, inurance, etc. there is interference by the administrative authorities with ie actions of the individuals, companies and other corporate and nonorporate bodies, observes Justice Ramaswamy.[29] From the constitutional oint of view there is large-scale delegation of legislative and judicial owers to these administrative authorities. These authorities have been xtending their tentacles into social, economic and political domains. Vide discretionary powers are conferred on these administrative authrities. For the purpose of national planning the executive is armed with ast powers in respect of land ceiling, control of basic industries, taxation,

2. Article 21, Constitution of India.
3. Article 300-A, Constitution of India.
4. Article 14, Constitution of India.
5. It may, however, be noted here that by the Constitution (42nd Amendment) Act, 1976, Parliament is empowered under Chapter XIV-A (Arts. 323-A and 323-B) to set up various administrative tribunals for dealing with subjects ranging from disputes of government servants to foreign exchange and production and distribution of foodstuffs and other essential commodities.
6. Article 16, Constitution of India.
7. *See* Lecture X (*infra*).
8. *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299; *Kesavanand Bharathi* v. *State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461; *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 1207; *Kannungo* v. *State of Orissa*, (1995) 5 SCC 96: AIR 1995 SC 1655.
9. (1958-59) 1 JILI, pp. 31-32.

mobilisation of labour, etc. Further, it is also erroneous to believe tha individual liberty can be protected only by the traditional doctrine of rul of law. Experience shows that not only the executive but even Parliamen elected by the people may pass some demonic statutes like the Preventiv Detention Act, or Maintenance of Internal Security Act, 1971 (MISA National Security Act, 1980 (NSA) and encroach upon the liberty of th subjects. Ultimately, as Prof. Harold Laski says: "Eternal vigilance i the price of liberty" and not a particular principle or doctrine of law.

At this juncture, we may consider the position prevailing in Indi vis-a-vis the third principle of Dicey's doctrine of rule of law, viz. predo minance of the legal spirit. Until recently this principle was being studie and examined in the context of interpreting the provisions of the Cor stitution. In *Chief Settlement Commr., Punjab* v. *Om Parkash*[30], the Su preme Court observed:

> "In our constitutional system, the central and most characteristi feature is the concept of the rule of law which means, in the prese context, the authority of the law courts to test all administrative actio by the standard of legality. The administrative or executive actio that does not meet the standard will be set aside if the aggrieve person brings the appropriate action in the competent court.[31]"

(I) Habeas Corpus case[32]

The position has, however, radically changed with the leading pro nouncement of the Supreme Court in the case of *A.D.M., Jabalpur* v *Shivakant Shukla*[31], popularly known as the *'Habeas Corpus case'*. I this case, the Supreme Court was confronted with the question whethe the third limb of Dicey's doctrine was an integral part of the India concept of rule of law.

On June 25, 1975 Emergency was proclaimed by Mrs Gandhi's Gov ernment on account of "internal disturbances". By virtue of Article 35 of the Constitution, the citizens' seven classic freedoms under Article 1 stood automatically suspended. On June 27, the President issued an orde under Article 359 suspending the enforcement of Articles 14, 21 and 2 also. On the night of June 25 and thereafter a large number of perso were detained under the Maintenance of Internal Security Act, 197 (MISA). Many of them were not even informed of the grounds for the detention. Some of them filed writ petitions in different High Cour challenging the detention orders as illegal and praying for the issue of

30. AIR 1969 SC 33: (1968) 3 SCR 655.
31. *Id.* at p. 36 (AIR).
32. *A.D.M., Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 120

writ of *Habeas Corpus*. When those petitions came up for hearing, the Government raised a preliminary objection regarding maintainability of the petitions on the ground that in asking for release by writ of *Habeas Corpus*, the petitioners (detenus) were in substance claiming that they had been deprived of their personal liberty in violation of the *procedure established by law* but that was a plea available to them only under Article 21 of the Constitution and since enforcement of Article 21 was suspended by the Presidential Order of June 27, 1975, the petitions were liable to be dismissed at the threshold.

This preliminary objection was overruled for one reason or the other by various High Courts.[33] The Governments of the States concerned (e.g. the Government of Madhya Pradesh through the Additional District Magistrate, Jabalpur) and the Government of India filed appeals in the Supreme Court against the decisions of those High Courts. The case was heard by a Constitutional Bench of five judges consisting of Ray, C.J., Khanna, Beg, Chandrachud and Bhagwati, JJ.

To simplify the point, it may be stated that the narrow issue before the Supreme Court was whether there was any 'Rule of Law' in India apart from Article 21 of the Constitution of India.

The majority of the Bench (Ray, C.J., Beg, Chandrachud and Bhagwati, JJ.) answered the issue in the negative and observed:

> "The Constitution is the mandate. The Constitution is the rule of law. There cannot be any rule of law other than the constitutional rule of law. There cannot be any pre-Constitution or post-Constitution rule of law which can run counter to the rule of law embodied in the Constitution, nor can there be any invocation to any rule of law to nullify the constitutional provisions during the time of Emergency. Article 21 is our rule of law regarding life and liberty. No other rule of law can have separate existence as a distinct right. The rule of law is not merely a catchword or incantation. It is not a law of nature consistent and invariable at all times and in all circumstances. There cannot be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution."[34]

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33. All., A.P., Bom., Del., Karn., M.P., Mad., Punj. and Raj.
34. For detailed discussion *see* SCC paras (per Ray, C.J. 41-52, 103, 136-39; Beg, J. 165, 176-93, 242-44, 278-80; Chandrachud, J. 330, 347-50, 369-75, 419; Bhagwati, J. 435-39, 458-66, 472, 485-87. For a scathing criticism of the majority view *see* H.M. Seervai: *Habeas Corpus case: Emergency and Future Safeguards*, 1977.

Justice Khanna, however did not agree with the majority view. In a powerful dissent, His Lordship observed:

> "Rule of law is the antithesis of arbitrariness. [It is accepted] in all civilised societies. [It] has come to be regarded as the mark of a free society. It seeks to maintain a balance between the opposite notions of individual liberty and public order. *Even in the absence of Article 21 in the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law.* This is the essential postulate and basic assumption of the rule of law and not of men in all civilised nations. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning.... As observed by Friedmann, in a purely formal sense, any system of norm based on a hierarchy of orders, even the organised mass murders of Nazi regime qualify as law. This argument, cannot, however, disguise reality of the matter that hundreds of innocent lives have been taken because of the absence of rule of law. A State of negation of rule of law would not cease to be such a State because of the fact that such a State of negation of rule of law has been brought about by statute. *Absence of rule of law would nevertheless be absence of rule of law even though it is brought about by a law to repeal all laws.*"[35]
>
> (emphasis supplied)

It is submitted that the majority judgment in the *Habeas Corpus case* is clearly erroneous, unjust and contrary to the doctrine of Rule of Law. It is further submitted that the majority failed to consider in its proper perspective the most important fact that Article 21 (i.e. the written Constitution) does not *confer* a right to life or personal liberty. The said right *inheres* in the body of every living person and Article 21 or for that purpose any written Constitution is not the sole repository of the right to life and personal liberty and in these circumstances, the said right can never be taken away by the executive.[36]

2. SEPARATION OF POWERS

(A) General

According to M.P. Jain[37]: "If the 'Rule of Law' as enunciated by Dicey affected the growth of Administrative Law in Britain, the doctrine

35. *A.D.M., Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521, paras 525-36, 575, 593.

36. For detailed discussion of the *Habeas Corpus case*, see C.K. Thakker: *Administrative Law*, 1996, pp. 406-14.

37. *Treatise on Administrative Law*, 1996, Vol. 1, p. 30.

of 'Separation of Powers' had an intimate impact on the development of Administrative Law in the U.S.A." Davis[38] also stated: "Probably, the principal doctrinal barrier to the development of the administrative process has been the theory of separation of powers."

(B) Meaning

It is generally accepted that there are three main categories of governmental functions — (*i*) the Legislative, (*ii*) the Executive, and (*iii*) the Judicial. At the same time, there are three main organs of the Government in a State — (*i*) the Legislature, (*ii*) the Executive, and (*iii*) 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. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power and the judiciary cannot exercise legislative or executive power of the Government.

(C) Historical background

The doctrine of separation of powers has emerged in several forms at different periods. Its origin is traceable to Plato and Aristotle. In the 16th and 17th centuries, French philosopher John Bodin and British politician Locke respectively had expressed their views about the theory of separation of powers. But it was Montesquieu who for the first time formulated this doctrine systematically, scientifically and clearly in his book '*Esprit des Lois*' (The Spirit of the Laws), published in the year 1748.

(D) Montesquieu's doctrine

Writing in 1748, Montesquieu[39] said:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty if the judicial power be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Where it joined with the executive power, the judge might behave with violence and oppression.

38. *Administrative Law Treatise*, 1958, Vol. I, p. 68.
39. *The Spirit of the Laws* (trans. Nugent), pp. 151-52.

> Miserable indeed would be the case, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals."

Lord Acton rightly said: "Every power tends to corrupt and absolute power tends to corrupt absolutely." In the 18th century, there was complete and full-fledged monarchy in France. Louis XIV was well-known for his absolute and autocratic powers. The King and his administrators were acting arbitrarily. The subjects had no right or liberty at all. On the other hand, Montesquieu was very much impressed by the liberal thoughts of Locke and he also based his doctrine on analysis of the British Constitution during the first part of the 18th century, as he understood it. According to him, the secret of an Englishman's liberty was the separation and functional independence of the three departments of the Government from one another.

According to Wade and Phillips[40], separation of powers may mean three different things—

(*i*) that the same persons should not form part of more than one of the three organs of Government, e.g. the Ministers should not sit in Parliament;

(*ii*) that one organ of the Government should not control or interfere with the exercise of its function by another organ, e.g. the Judiciary should be independent of the Executive or that Ministers should not be responsible to Parliament; and

(*iii*) that one organ of the Government should not exercise the functions of another, e.g. the Ministers should not have legislative powers.

(E) Effect

The doctrine of separation of powers as propounded by Montesquieu had tremendous impact on the development of administrative law and functioning of Governments. It was appreciated by the English and American jurists and accepted by politicians. In his book '*Commentaries on the Laws of England*', published in 1765, Blackstone had observed that if the legislative, the executive and the judicial functions were given to one man, there was an end of personal liberty. Madison also proclaimed: "The accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective may justly be pronounced the very

40. *Constitutional Law*, 1960, pp. 22-34.

definition of tyranny." The Constituent Assembly of France had declared in 1789 that there would be nothing like a Constitution in the country where the doctrine of separation of powers was not accepted.

(F) Defects

Though, theoretically, the doctrine of separation of powers was very sound, many defects surfaced when it was sought to be applied in real-life situations. Mainly, the following defects were found in this doctrine:

(*a*) Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. At no point of time, this doctrine was adopted therein. As Prof. Ullman says: "England was not the classic home of separation of powers." Donoughmore Committee also observed: "In the British Constitution there is no such thing as the absolute separation of the legislative, executive and judicial powers." It is said: "*Montesquieu looked across foggy England from his sunny vineyard in Paris and completely misconstrued what he saw.*"

(emphasis supplied)

(*b*) This doctrine is based on the assumption that the three functions of the Government, viz. legislative, executive and judicial are distinguishable from one another. But in fact, it is not so. There are no watertight compartments. It is not easy to draw a demarcating line between one power and another with mathematical precision. As President Woodrow Wilson stated: "The trouble with the theory is that Government is not a machine, but a living thing.... No living thing can have its organs offset against each other as checks, and live. On the contrary, its life is dependent upon their quick cooperation, their ready response to the commands of instinct or intelligence, their amicable community of purpose. *Their cooperation is indispensable, their warfare fatal*' (emphasis supplied).[41] According to Friedmann and Benjafield, 'the truth is that each of the three functions of the Government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in Government'.

(*c*) It is impossible to take certain actions if this doctrine is accepted in its entirety. Thus, if the legislature can only legislate, then it cannot punish anyone, committing a breach of its privilege; nor can it delegate any legislative function even though it does not

41. Friedmann: *Law in a Changing Society*, 1996, p. 382.

know the details of the subject-matter of the legislation and the executive authority has expertise over it; nor could the courts frame rules of procedure to be adopted by them for the disposal of cases. Separation of powers, thus, can only be relative and not absolute.

(*d*) Modern State is a welfare State and it has to solve many complex socio-economic problems and in this state of affairs also, it is not possible to stick to this doctrine. As Justice Frankfurter says: "Enforcement of a rigid conception of separation of powers would make modern Government impossible." Strict separation of powers is a theoretical absurdity and practical impossibility.[42]

(*e*) According to Basu[43], in modern practice, the theory of separation of powers means an *organic* separation and a distinction must be drawn between 'essential' and 'incidental' powers and that one organ of the Government cannot usurp or encroach upon the *essential* functions belonging to another organ, but may exercise some *incidental* functions thereof.

(*f*) The fundamental object behind Montesquieu's doctrine was the liberty and freedom of an individual; but that cannot be achieved by mechanical division of functions and powers. In England, theory of separation of powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be rule of law and impartial and independent judiciary and eternal vigilance on the part of the subjects.

(G) Importance

Thus, on the whole, the doctrine of separation of powers in the strict sense is undesirable and impracticable and, therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent an abuse of enormous powers of the executive. The object of the doctrine is to have "a Government of law rather than of official will or whim". Montesquieu's great point was that if the total power of Government is divided among autonomous organs, one will act as a check upon the other and in the check liberty can survive.[44] Again, almost all the jurists accept one feature of this doctrine that the judiciary must be independent of and

42. Friedmann: *Law in a Changing Society*, 1996, pp. 382-83.
43. *Administrative Law*, 1996, p. 24.
44. Jaffe and Nathanson: *Administrative Law*, 1961, p. 34.

separate from the remaining two organs of the Government, viz., legislature and executive.

The most important aspect of the doctrine of separation of powers is judicial independence from administrative discretion. "There is no liberty, if the judicial power be not separated from the legislative and executive."[45] The judiciary is beyond comparison the weakest of the three departments of power. It has no influence over either the sword or the purse; no direction either of the strength or of the wealth of society and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment. *There is no liberty, if the judicial power be not separated from the legislative and the executive.*
(emphasis supplied)[46]

(H) Separation of Powers in practice

(i) U.S.A.

The doctrine of separation of powers has been accepted and strictly adopted by the Founding Fathers of the Constitution of the United States of America. There the legislative powers are vested in the Congress, the executive powers in the President and the judicial powers in the Supreme Court and the courts subordinate thereto. In the American Constitution, there is a system of 'checks and balances' and the powers vested in one organ of the Government cannot be exercised by any other organ. In theory, no one organ of the Government can trench upon or encroach upon the power of the other. Jaffe and Nathanson stated: "The division of our Government into three great establishments is an indisputable fact—writ large and clear in the basic documents."[47]

Jefferson said: "The concentration of legislative, executive and judicial powers in the same hands is precisely the definition of despotic Government. It would be no alleviation that these powers will be exercised by a plurality of hands and not by a single person. *One hundred and seventy-three despots would surely be as oppressive as one.*"[48]
(emphasis supplied)

Though, in 1787, when the American Constitution was drafted, the doctrine of separation of powers was adopted, with the growth of administrative process the rigours of the doctrine have been relaxed. The

45. Friedmann: *Law in a Changing Society*, 1996, p. 383.
46. *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1, para 320: AIR 1975 SC 2299 (Per Mathew, J.).
47. *Administrative Law*, 1961, p. 33.
48. Works: 3, p. 223: cited in *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1 (para 319): AIR 1975 SC 2299.

President now exercises legislative functions by sending messages to the Congress and by exercise of the right of veto. The Congress has judicial power of impeachment and the Senate exercises executive powers regarding treaties and in the making of certain appointments. The Congress has delegated legislative powers to various administrative authorities and regulatory agencies and these bodies exercise all types of functions. Thus, a single agency acts 'successively as legislator, investigator, prosecutor, jury, judge and appellate tribunal' and the Supreme Court has never held that the combination of all the powers in one agency is unconstitutional.

(ii) England

Although Montesquieu has based his doctrine of separation of powers taking into account the British Constitution, as a matter of fact at no point of time was this doctrine accepted in its strict sense in England. On the contrary, in reality, the theory of integration of powers has been adopted in England. Though the three powers are vested in three organs and each has its own peculiar features, it cannot be said that there is no 'sharing out' of the powers of the Government. Thus, the Lord Chancellor is the Head of the Judiciary, Chairman of the House of Lords (legislature), a member of the Executive and often a member of the Cabinet. The Judges exercise executive functions under the Trust Act and in supervision of wards of court and also legislative functions in making rules of courts regulating their own procedure. Members of the Cabinet are also members of the Legislature and are responsible to it and they play a very important part in legislative activities. Powers are conferred on them to make subordinate legislations and they also exercise judicial powers in different forms of administrative tribunals. The House of Commons is not exclusively concerned with legislative activities, as it exercises judicial powers also in cases of breach of its own privileges.

(iii) India

On a casual glance at the provisions of the Constitution of India, one may be inclined to say that the doctrine of separation of powers is accepted in India. Under the Indian Constitution, the executive powers are with the President,[49] the legislative powers with Parliament[50] and the judicial powers with the judiciary[51] (the Supreme Court, High Courts and subordinate courts). The President holds his office for a fixed period. His functions and powers are enumerated in the Constitution itself. Parliament

49. Article 53(1), *Constitution of India.*

50. *Delhi Laws Act, 1912, In re,* AIR 1951 SC 332 (346-47): 1951 SCR 747.

51. *Id.* at p. 386 (AIR), see also *Indira Nehru Gandhi* v. *Raj Narain,* 1975 Supp SCC 1: AIR 1975 SC 2299 (2435).

is competent to make any law subject to the provisions of the Constitution and there is no other limitation on its legislative power. It can amend the law prospectively or even retrospectively but it cannot declare a judgment delivered by a competent court void or of no effect. Parliament has also inherited all the powers, privileges and immunities of the British House of Commons. Similarly, the judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or by the legislature. The Supreme Court and High Courts are given the power of judicial review and they can declare any law passed by Parliament or Legislature as *ultra vires* or unconstitutional. Taking into account these factors, some jurists are of the opinion that the doctrine of separation of powers has been accepted in the Constitution of India and is a part of the basic structure of the Constitution.[52] Separation of functions is not confined to the doctrine of separation of powers. It is a part of essential structure of any developed legal system. In every democratic society, the process of administration, legislation and adjudication are more clearly distinct than in a totalitarian society.[53] In *Kartar Singh* v. *State of Punjab*[54] K. Ramaswamy, J. stated: "It is the basic postulate under the Indian Constitution that the legal sovereign power has been distributed between the legislature to make the law, the executive to implement the law and the judiciary to interpret the law within the limits set down by the Constitution." In *Golak Nath* v. *State of Punjab*[55], Subba Rao, C.J. observed:

> "The Constitution brings into existence different constitutional entities, namely, the Union, the States, and the Union Territories. It creates three major instruments of power, namely, the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them."[56]

But if we study the constitutional provisions carefully, it is clear that the doctrine of separation of powers has not been accepted in India in its strict sense. There is no provision in the Constitution itself regarding the division of functions of the Government and the exercise thereof.

52. *Indira Nehru Gandhi* v. *Raj Narain*, 1975 Supp SCC 1: AIR 1975 SC 2299.
53. *Kesavananda Bharathi* v. *State of Kerala*, (1973) 4 SCC 225: AIR 1973 SC 1461; *ADM, Jabalpur* v. *Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 1207; *Supreme Court Advocates on Record Assn.* v. *Union of India*, (1993) 4 SCC 441: AIR 1994 SC 268.
54. (1994) 3 SCC 569(736): AIR 1995 SC 1726; *Managing Director, ECIL* v. *B. Karunakar*, (1993) 4 SCC 727 (778): AIR 1994 SC 1074.
55. AIR 1967 SC 1643: (1967) 2 SCR 762.
56. *Id.* at p. 1655 (AIR).

Though, under Articles 53(1) and 154(1), the executive power of the Union and of the States is vested in the President and the Governors respectively, there is no corresponding provision vesting the legislative and judicial power in any particular organ. The President has wide legislative powers.[57] He can issue ordinances, make laws for a State after the State Legislature is dissolved, adopt the laws or make necessary modifications and the exercise of this legislative power is immune from judicial review. He performs judicial functions also. He decides disputes regarding the age of a judge of a High Court or the Supreme Court for the purpose of retiring him[58] and cases of disqualification of members of any House of Parliament.[59]

Likewise, Parliament exercises legislative functions and is competent to make any law not inconsistent with the provisions of the Constitution, many legislative functions are delegated to the executive. In certain matters, Parliament exercises judicial functions also. Thus, it can decide the question of breach of its privilege and, if proved, can punish the person concerned.[60] In case of impeachment of the President, one House acts as a prosecutor and the other House investigates the charges and decides whether they were proved or not. The latter is a *purely judicial* function.[61] On the other hand, many powers which are strictly judicial have been excluded from the purview of courts.

Though judiciary exercises all judicial powers, at the same time, it exercises certain executive or administrative functions also. The High Court has supervisory powers over all subordinate courts and tribunals[62] and also power to transfer cases. High Courts and the Supreme Court have legislative powers also and they frame rules regulating their own procedure for the conduct and disposal of cases.[63]

Thus, the doctrine of separation of powers is not accepted fully in the Constitution of India, and we agree with the observations of Justice Mukherjea in *Ram Jawaya* v. *State of Punjab*[64]:

57. Articles 123 and 356, Constitution of India; *see also* Article 213, Constitution of India.
58. Articles 124(2-A), 217(3), Constitution of India; see also *Union of India* v. *Jyoti Prakash Mitter*, (1971) 1 SCC 396: AIR 1971 SC 1093.
59. Article 103, Constitution of India. *See also* Article 192, Constitution of India.
60. Article 105, Constitution of India.
61. Article 61, Constitution of India.
62. Article 227, Constitution of India; *see also* Lecture X (*infra*).
63. Articles 145, 225, Constitution of India.
64. AIR 1955 SC 549: (1955) 2 SCR 225.

"The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."[65]

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65. *Id.* at p. 556 (AIR); see also *Jayantilal* v. *F. N. Rana*, AIR 1964 SC 648, 655-56; *Chandra Mohan* v. *State of U.P.*, AIR 1966 SC 1987 (1992-93); *Mallikarjuna* v. *State of A.P.*, (1990) 2 SCC 707 (714): AIR 1990 SC 1251.

Lecture III

Classification of Administrative Actions

It is customary to divide functions of Government into three classes: legislative, executive (or administrative) and judicial.

—WADE AND PHILLIPS

The dividing line between an administrative power and quasi-judicial power is quite thin and is being gradually obliterated.... In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.

—JUSTICE HEGDE

Duty to act judicially would arise from the very nature of the functions intended to be performed; it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power.

—JUSTICE SHAH

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12. Administrative Instructions

1. GENERAL

As observed in Lecture II, there are three organs of Government — (1) Legislature, (2) Executive, and (3) Judiciary. These three organs essentially perform three classes of governmental functions — (1) Legislative, (2) Executive or administrative, and (3) Judicial. The function of the legislature is to enact the law; the executive is to administer the law and the judiciary is to interpret the law and to declare what the law is. But as observed by the Supreme Court in *Jayantilal Amratlal* v. *F. N. Rana*[1], it cannot be assumed that the legislative functions are exclusively performed by the legislature, executive functions by the executive and judicial functions by the judiciary. In *Halsbury's Laws of England*[2] also, it is stated that howsoever the term 'the Executive' or 'the Administration' is employed, there is no implication that the functions of the executive are confined exclusively to those of an executive or administrative character. Today, the executive performs variegated functions, viz. to investigate, to prosecute, to prepare and to adopt schemes, to issue and cancel licences, etc. (administrative); to make rules, regulations and bye-laws, to fix prices, etc. (legislative); to adjudicate on disputes, to impose fine and penalty, etc. (judicial). Schwartz rightly states that rule-making (quasi-legislative) and adjudication (quasi-judicial) have become the chief weapons in the administrative armoury.[3] *'Quasi'* is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.[4]

2. NEED FOR CLASSIFICATION

A question which arises for our consideration is whether the functions performed by the executive authorities are purely administrative, quasi-judicial or quasi-legislative in character. The answer is very difficult, as there is no precise, perfect and scientific test to distinguish these functions from one another. A further difficulty arises in a case in which a single proceeding may at times combine various aspects of the three functions. The courts have not been able to formulate any definite test for the purpose of making such classification. Yet, such classification is essential and inevitable as many consequences flow from it, e.g. if the executive authority exercises a judicial or quasi-judicial function, it must follow the principles of natural justice and is amenable to the writ of *certiorari* or prohibition, but if it is an administrative, legislative or quasi-

1. AIR 1964 SC 648 (655): (1964) 5 SCR 294.
2. *Halsbury's Laws of England*, 4th Edn., Vol. 1, p. 20.
3. *French Administrative Law and the Common Law World*, 1954, p. 89.
4. *Federal Trade Commission* v. *Ruberoid Co.*, (1952) 343 US 470 (488): 96 L. Ed. 1081.

legislative function, this is not so. If the action of the executive authority is legislative in character, the requirement of publication, laying on the table, etc. should be complied with, but it is not necessary in the case of a pure administrative action. Again, if the function is administrative, delegation is permissible, but if it is judicial, it cannot be delegated. An exercise of legislative power *may* not be held invalid on the ground of unreasonableness, but an administrative decision can be challenged as being unreasonable. It is, therefore, necessary to determine what type of function the administrative authority performs.

3. LEGISLATIVE, EXECUTIVE AND JUDICIAL FUNCTIONS —GENERAL DISTINCTION

In *Vora Fida Ali* v. *State*[5], a Division Bench of the Gujarat High Court quoted with approval the general distinction between legislative, executive and judicial functions, as pointed out by Willis in his '*Treatise on Constitutional Law*', in the following words:

> "Mr Green has defined the legislative power as the power to create rights, powers, privileges, or immunities, and their correlatives, as well as status, not dependent upon any previous rights, duties, etc. (or for the first time), that is, apparently, the power of creating antecedent legal capacities and liabilities. He defines judicial power as the power to create some right or duty dependent upon a previous right or duty, that is, apparently the power to create remedial legal capacities and liabilities. He finds difficulty in defining executive power, except as including all governmental power which is not a part of the process of legislation or adjudication, that is, the power which is concerned mostly with the management and execution of public affairs."[6]

It was observed by the Court: "All that the Court can do is to consider the act in question and to decide on an application of broad and general considerations whether the act is a legislative or an executive or a judicial act without making any attempt to formulate rigid or exhaustive tests for determining the nature or character of the act." It is accepted that any attempt to rigidly define and demarcate three functions of the Government is almost impossible. However, for review of actions of executive Government, this conceptual distinction is meaningful.[7] The Constitution of India has not made an absolute or rigid division of functions between the three agencies of the State.[8]

5. AIR 1961 Guj 151: (1961) 2 Guj LR 343.
6. *Id.* at pp. 170-71 (AIR): 380-81 (GLR).
7. Benjafield and Whitmore: *Australian Administrative Law*, 1966, p. 102.
8. *Jayantilal* v. *F.N. Rana* (*supra*).

4. LEGISLATIVE FUNCTIONS

Legislative functions of the executive consists of making rules, regulations, bye-laws, etc. It is, no doubt, true that any attempt to draw a distinct line between legislative and administrative functions is difficult in theory and impossible in practice. Though difficult, it is necessary that the line must be drawn as different legal rights and consequences may ensue. As Schwartz[9] said: "If a particular function is termed 'legislative' or 'rule-making' rather than 'judicial' or 'adjudication', it may have substantial effects upon the parties concerned. If the function is treated as legislative in nature, there is no right to a notice and hearing unless a statute expressly requires them."[10] In the leading case of *Bates* v. *Lord Hailsham*[11], Megarry, J. observed that "the rules of natural justice do not run in the sphere of legislation, primary or delegated". Wade[12] also said: "There is no right to be heard before the making of legislation, whether primary or delegated, unless it is provided by statute." Fixation of price, declaration of a place to be a market yard, imposition of tax, establishment of Municipal Corporation under the statutory provision, extension of limits of a town area committee, etc. are held to be legislative functions.

5. LEGISLATIVE AND JUDICIAL FUNCTIONS — DISTINCTION

In *Prentis* v. *Atlantic Coast Line Co.*[13], Justice Holmes points out the distinction between legislative and judicial functions in the following words:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power."[14]

According to Justice Holmes, the main aspect is the element of *time*. A rule (legislative function) prescribes *future* pattern of conduct and cre-

9. *Administrative Law*, 1976, pp. 143-44; *see also* de Smith: *Judicial Review of Administrative Action*, 1995, pp. 1006-08.
10. *Union of India* v. *Cynamide India Ltd.*, (1987) 2 SCC 720 (741-42): AIR 1987 SC 1802 (1806-11).
11. (1972) 3 All ER 1019 (1023-24): (1972) 1 WLR 1373 (1378); see also *Union of India* v. *Cynamide India Ltd.*, (1987) 2 SCC 720: AIR 1987 SC 1802.
12. *Administrative Law*, 1994, p. 570.
13. (1908) 211 US 210: (1908) 53 L Ed 150.
14. *Id.* at pp. 226-27 (US): 158-59 (L Ed); see also *Express Newspaper (P) Ltd.* v. *Union of India*, AIR 1958 SC 578 (610): 1959 SCR 12.

ates *new* rights and liabilities, whereas a decision (judicial function) determines rights and liabilities on the basis of *present or past* facts, and declares the *pre-existing* rights and liabilities. In the words of Green: "The legislative function then is general and relates to the future, whereas the judicial function is specific, final and ordinarily relates to the past."

On the other hand, according to some jurists, the element of *applicability* must be taken into account in distinguishing a legislative function from a judicial function. Prof. Dickinson says: "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the *abstract* and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates *concretely* upon individuals in their individual capacity." In other words, "Legislature usually acts by determinations of *general* applicability addressed to indicated but unnamed and unspecified persons and situations. A court of law, on the other hand, acts by decisions that are *specific* in applicability and addressed to particular individuals or situations".[15] Green states: "Perhaps it would be better to say that it is a legislative function to make all substantive law, and a judicial function finally to determine constitutional jurisdiction and the application of substantive law to specific facts."

No doubt, in most of the cases, the aforesaid two theories help in distinguishing legislative and judicial functions, but in certain cases they create some difficulties and seem to be defective, e.g. sometimes administrative adjudication creates some future rights; yet it cannot be said to be performing a legislative function. On the other hand, if the test of *applicability* is adopted, rate-making, price-fixing, etc. which are required to be done after hearing the parties, may be classified as judicial, while, in fact, they are legislative in character and the object of hearing is only to collect necessary information.[16]

6. LEGISLATIVE AND ADMINISTRATIVE FUNCTIONS — DISTINCTION

The distinction between legislative and administrative functions is very difficult to draw. However, different tests have been formulated. Griffith and Street[17] have suggested two tests — (1) As per the institutional test, that which the Legislature enacts is legislation. But the word 'enacts' includes all kinds of actions taken by Parliament and thus, this

15. *Administrative Justice and Supremacy of Law*, 1927, p. 21.
16. *Union of India* v. *Cynamide India Ltd.*, (1987) 2 SCC 720: AIR 1987 SC 1802.
17. *Principles of Administrative Law*, 1973, p. 50.

test is not appropriate. (2) According to the second test, the extent of applicability of the act should be determined. A power to make rules of *general application* is a legislative power and the rule is a legislative rule, while a power to give an order in *specific cases* is an executive power and the order is an executive action. de Smith[18] also says that a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases, while an administrative act is the application of a general rule to a particular case. But this test is also not complete. The difficulty here is that of distinguishing what is '*general*' from what is '*specific*' or '*particular*', as the difference is only a matter of degree.

Thus, on the one hand, in *Blackpool Corpn.* v. *Locker*[19], under the provisions of the Defence Regulations, 1939, the Minister of Health by a circular delegated requisitioning powers. One of the conditions was that there should not be requisitioning of furniture. This condition was violated when *A's* house was requisitioned. The question was whether the instructions in the circular were legislative, restricting the delegated power, or merely administrative directions as to how the power should be exercised. The Court of Appeal held that the conditions were legislative in character and must be complied with. As it was not done, the requisition was bad. On the other hand, in *Lewisham Borough Council* v. *Roberts*[20], the power to requisition a part of a particular house was delegated to a local authority. The Court of Appeal held it to be an administrative act and not a legislative act. In *Union of India* v. *Cynamide India Ltd.*[21], price fixation was held to be legislative action, whereas in *State of Haryana* v. *Ram Kishan*[22], an action of premature termination of a mining lease was held to be administrative action.

According to the Committee on Ministers' Powers, the chief characteristics of a legislative function are its generality and prospectivity. A legislative act looks to the *future* and changes the existing conditions by making a new rule to be applied thereafter to all or some part of those subject to his power and determines what shall in future be the mutual rights and responsibilities of the parties by prescribing a binding rule of conduct, while an administrative order is issued to *specific* persons only. But this test is also not sufficient. Thus, a power vested in a Board of Education to make grants to secondary schools if they satisfied the

18. *Judicial Review of Administrative Action*, 1995, p. 1006.
19. (1948) 1 KB 349: (1948) 1 All ER 85.
20. (1949) 2 KB 608: (1949) 2 All ER 815.
21. (1987) 2 SCC 720: AIR 1987 SC 1802.
22. (1988) 3 SCC 416: AIR 1988 SC 1301.

Board that they were being efficiently maintained might appear, on the face of it, to be plainly executive or administrative but, if the Board were to elaborate in detail the conditions under which it would regard a school as qualifying for a grant, and issue circulars setting out such conditions for the information of schools, this would seem to be in substance the formulation of a general rule. *Thus, the function of the Board may be regarded as legislative from one point of view and as administrative from another.*[23] (emphasis supplied)

The Committee has rightly observed: "It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative function on the one hand and purely administrative on the other."[24]

According to de Smith[25], the following legal consequences flow from the aforesaid distinction:

(1) If an order is legislative in character, it has to be published in a certain manner, but this is not necessary if it is of an administrative nature.

(2) If an order is legislative in character, the court will not issue a writ of *certiorari* to quash it, but if an order is an administrative order and the authority was required to act judicially, the court can quash it by issuing a writ of *certiorari*.

(3) Generally, subordinate legislation cannot be held invalid for unreasonableness, unless its unreasonableness is evidence of *mala fide* or otherwise shows the abuse of power. But in case of unreasonable administrative order, the aggrieved party is entitled to a legal remedy.

(4) Only in most exceptional circumstances can legislative powers be sub-delegated, but administrative powers can always be sub-delegated.

(5) Duty to give reasons applies to administrative orders but not to legislative orders.

7. JUDICIAL FUNCTIONS

According to the Committee on Ministers' Powers[26], a pure judicial function presupposes an existing dispute between two or more parties and it involves four requisites—

23. Friedmann and Benjafield: *Principles of Australian Administrative Law*, 1962, p. 41.
24. *Union of India* v. *Cynamide India Ltd.*, (1987) 2 SCC 720 (735): AIR 1987 SC 1802 (1806-07).
25. *Judicial Review of Administrative Action*, 1980, pp. 71-73.
26. *Report of the Committee on Ministers' Powers*, 1932, CMD 4060 (4073-74).

(1) the presentation (not necessarily oral) of their case by the parties to the dispute;

(2) if the dispute is a question of fact, the ascertainment of fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties, on evidence;

(3) if the dispute between them is a question of law, the submission of legal argument by the parties; and

(4) a decision which disposes of the whole matter by finding upon the facts in dispute and 'an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law'.

Thus, in a pure judicial function, the aforesaid four requisites must be present. If these requisites are present, the decision is a judicial decision even though it might have been made by any authority other than a court, e.g. by a Minister, Board, Executive Authority, Administrative Officer or Administrative Tribunal.

8. QUASI-JUDICIAL FUNCTIONS

The word 'quasi' means 'not exactly'. Generally, an authority is described as 'quasi-judicial' when it has some of the attributes or trappings of judicial functions, but not all. In the words of the Committee on Ministers' Powers, "the word 'quasi', when prefixed to a legal term, generally means that the thing, which is described by the word, has some of the legal attributes denoted and connoted by the legal term, but that it has not all of them"[27], e.g. if a transaction is described as a quasi-contract, it means that the transaction in question has some but not all the attributes of a contract.

According to the Committee, a quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2) above but does not necessarily involve (3) and never involves (4). The place of (4) is, in fact, taken by administrative action, the character of which is determined by the Minister's choice.

For instance, suppose a statute empowers a Minister to take action if certain facts are proved, and in that event gives him an absolute discretion whether or not to take action. In such a case he must consider the representations of the parties and ascertain the facts — to that extent the decision contains a judicial element. But, the facts once ascertained, his decision does not depend on any legal or statutory direction, for *ex*

27. *Province of Bombay* v. *Khushaldas Advani*, AIR 1950 SC 222: 1950 SCR 621.

hypothesi he is left free within the statutory boundaries to take such administrative action as he may think fit: that is to say that the matter is not finally disposed of by the process of (4).

This test has, however, been subject to criticism by jurists. It does not give a complete and true picture. It is based on a wrong hypothesis. The Committee characterised the judicial function as being devoid of any discretionary power but obliged to merely apply the law to the proved facts. In reality, it is not so. The courts of law also exercise discretion. It may be more pervasive in administrative actions than in judicial functions but the difference is of degree only. A quasi-judicial function stands mid-way between a judicial function and an administrative function. *A quasi-judicial decision is nearer the administrative decision in terms of its discretionary element and nearer the judicial decision in terms of procedure and objectivity of its end-product.*[28] (emphasis supplied)

It is also not true that in all quasi-judicial decisions, two characteristics are common, viz. (1) presentation of their case by the parties; and (2) the decision on questions of fact by means of evidence adduced by the parties. Firstly, in many cases, the first characteristic is absent and the authority may decide a matter not between two or more contesting parties but between itself and another party, e.g. an authority effecting compulsory acquisition of land. Here the authority itself is one of the parties and yet it decides the matter. It does not represent its case to any court or authority. Secondly, there may be cases in which no evidence is required to be taken and yet the authority has to determine the questions of fact after hearing the parties, e.g. rate-making or price-fixing. Thirdly, after ascertainment of facts, unlike a regular court, an authority is not bound to apply the law to the facts so ascertained, and the decision can be arrived at according to considerations of public policy or administrative discretion, which factors are unknown to an ordinary court of law.

9. QUASI-JUDICIAL FUNCTIONS DISTINGUISHED FROM JUDICIAL FUNCTIONS

A quasi-judicial function differs from a *purely* judicial function in the following respects:[29]

(*i*) A quasi-judicial authority has some of the trappings of a court, but not all of them; nevertheless there is an obligation to act judicially.

28. Griffith and Street: *Principles of Administrative Law*, 1973, p. 141.
29. Basu: *Administrative Law*, 1996, pp. 214-16.

(*ii*) A *lis inter partes* is an essential characteristic of a judicial function, but this may not be true of a quasi-judicial function.

(*iii*) A court is bound by the rules of evidence and procedure while a quasi-judicial authority is not.

(*iv*) While a court is bound by precedents, a quasi-judicial authority is not.

(*v*) A court cannot be a judge in its own cause (except in contempt cases), while an administrative authority vested with quasi-judicial powers may be a party to the controversy but can still decide it.

The distinction between judicial and quasi-judicial functions rests mainly on the fact that in deciding cases, courts apply pre-existing law whereas administrative authorities exercise discretion. This is, however, fallacious. "*The most that can be said is that the discretions of the courts may differ in nature and extent from the discretions of the administrator. Nevertheless, the asserted discretion is reduced to one of degree only.*"[30]

(emphasis supplied)

10. ADMINISTRATIVE FUNCTIONS

In *Ram Jawaya* v. *State of Punjab*[31], speaking for the Supreme Court, Mukherjea, C.J. observed: "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes *the residue of governmental functions that remain after legislative and judicial functions are taken away.*"[32]

(emphasis supplied)

Thus, administrative functions are those functions which are neither legislative nor judicial in character. Generally, the following ingredients are present in administrative functions:

(1) An administrative order is generally based on governmental policy or expediency.

(2) In administrative decisions, there is no legal obligation to adopt a judicial approach to the questions to be decided, and the decisions are usually *subjective* rather than *objective*.

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30. Benjafield and Whitmore: *Principles of Australian Administrative Law*, 1966, p. 105.

31. AIR 1955 SC 549: (1955) 2 SCR 225.

32. *Id.* at p. 555 (AIR). See also *Jayantilal* v. *Rana*, AIR 1964 SC 648 (655): (1964) 5 SCR 294; *Madhav Rao Scindia* v. *Union of India*, (1971) 1 SCC 85: AIR 1971 SC 530 (565); *Central Inland Water Transport Corpn.* v. *Brojo Nath Ganguly*, (1986) 3 SCC 156: AIR 1986 SC 1571 (para 45).

(3) An administrative authority is not bound by the rules of evidence and procedure unless the relevant statute specifically imposes such an obligation.

(4) An administrative authority can take a decision in exercise of a statutory power or even in the absence of a statutory provision, provided such decision or act does not contravene provisions of any law.

(5) Administrative functions may be delegated and sub-delegated unless there is a specific bar or prohibition in the statute.

(6) While taking a decision, an administrative authority may not only consider the evidence adduced by the parties to the dispute, but may also use its discretion.

(7) An administrative authority is not *always* bound by the principles of natural justice unless the statute casts such duty on the authority, either expressly or by necessary implication or if it is required to act judicially or fairly.

(8) An administrative order may be held to be invalid on the ground of unreasonableness.

(9) An administrative action will not become a quasi-judicial action merely because it has to be performed after forming an opinion as to the existence of any objective fact.

(10) The prerogative writs of *certiorari* and prohibition are not *always* available against administrative actions.

11. ADMINISTRATIVE AND QUASI-JUDICIAL FUNCTIONS — DISTINCTION

(i) General

Acts of an administrative authority may be purely administrative or may be legislative or judicial in nature. Decisions which are purely administrative stand on a wholly different footing from judicial as well as quasi-judicial decisions and they must be distinguished. This is a very difficult task. "Where does the administrative end and the judicial begin? The problem here is one of demarcation and the courts are still in the process of working it out."[33]

(ii) Object

With the increase of power of administrative authorities, it may be necessary to provide guidelines for the just exercise thereof. To prevent abuse of power and to see that it does not become a 'new despotism',

33. MacDermott, cited by Basu: *Commentary on the Constitution of India*, Vol. B, 1975, p. 151.

courts have evolved certain principles to be observed by adjudicating authorities.

(iii) Lis

To appreciate the distinction between administrative and quasi-judicial functions, we have to understand two expressions: (*i*) 'lis', and (*ii*) 'quasi-lis'.

In *Province of Bombay* v. *Khushaldas Advani*[34], Das, J. observed: "[I]f a statute empowers an authority ... to decide disputes arising out of a claim made by one party under the statute, which claim is opposed by another party and to determine the respective rights of the contesting parties, who are opposed to each other, there is a *lis*...."[35]

One of the major grounds on which a function can be called 'quasi-judicial' as distinguished from pure '*administrative*' is when there is a *lis inter partes* and an administrative authority is required to decide the dispute between the parties and to adjudicate upon the lis. *Prima facie*, in such cases the authority will be regarded as acting in a quasi-judicial manner.

Certain administrative authorities have been held to be quasi-judicial authorities and their decisions regarded as quasi-judicial decisions, wherein such *lis* was present, e.g. a Rent Tribunal determining 'fair rent' between a landlord and his tenant,[36] an Election Tribunal deciding an election dispute between rival candidates,[37] an Industrial Tribunal deciding an industrial dispute,[38] a Licensing Tribunal granting a licence or permit to one of the applicants.[39]

(iv) Quasi-lis

As discussed above, it is not in all cases that the administrative authority is to decide a *lis inter partes*. There may be cases in which an administrative authority decides a *lis* not between two or more contesting parties but between itself and another party. But there also, if the authority is empowered to take any decision which will prejudicially affect any person, such decision would be a quasi-judicial decision provided the authority is required to act judicially.

34. AIR 1950 SC 222: 1950 SCR 621.
35. *Id.* at p. 260 (AIR).
36. *R.* v. *Fulham Rent Tribunal*, (1950) 2 All ER 211.
37. *Sangram Singh* v. *Election Tribunal*, AIR 1955 SC 425: (1955) 2 SCR 1.
38. *Bharat Bank Ltd.* v. *Employees*, AIR 1950 SC 188: 1950 SCR 459.
39. *Raman & Raman* v. *State of Madras*, AIR 1959 SC 694: (1959) Supp (2) SCR 227; *Mahabir Prasad* v. *State of U.P.*, (1970) 1 SCC 764: AIR 1970 SC 1302.

Thus, where an authority makes an order granting legal aid,[40] dismissing an employee,[41] refusing to grant, revoking, suspending or cancelling a licence,[42] cancelling an examination result of a student for using unfair means,[43] rusticating of a student,[44] etc. such decisions are quasi-judicial in character.

In all these cases there are no two parties before the administrative authority, 'and the other party to the dispute, if any, is the authority' itself. Yet, as the decision given by such authority adversely affects the rights of a person there is a situation resembling a *lis*. In such cases, the administrative authority has to decide the matter *objectively* after taking into account the objections of the party before it, and if such authority has exceeded or abused its powers, a writ of *certiorari* can be issued against it. Therefore, Lord Greene, M.R.[45] rightly calls it a '*quasi-lis*'.

(v) Duty to act judicially

The real test which distinguishes a quasi-judicial act from an administrative act is the *duty to act judicially*, and therefore, in considering whether a particular statutory authority is a quasi-judicial body or merely an administrative body, what has to be ascertained is whether the statutory authority has the duty to act judicially.

The question which may arise for our consideration is as to when this duty to act judicially arises. As observed by Parker, J. "the duty to act judicially may arise in widely different circumstances which it would be impossible, and indeed, inadvisable, to attempt to define exhaustively".[46]

Whenever there is an express provision in the statute itself which requires the administrative authority to act judicially, the action of such authority would necessarily be a quasi-judicial function. But this proposition does not say much, for it is to some extent a tautology to say that the function is quasi-judicial (or judicial) if it is to be done judi-

40. *R.* v. *Manchester Legal Aid Committee*, (1952) 1 All ER 480: (1952) 2 QB 413.
41. *Ridge* v. *Baldwin*, 1964 AC 40: (1963) 2 All ER 66: (1963) 2 WLR 935.
42. *Fedco Ltd.* v. *S.N. Bilgrami*, AIR 1960 SC 415: (1960) 2 SCR 408.
43. *Board of High School* v. *Ghanshyam*, AIR 1962 SC 1110; *Board of High School* v. *Kumari Chitra*, (1970) 1 SCC 121: AIR 1970 SC 1039.
44. *Suresh Koshy* v. *University of Kerala*, AIR 1969 SC 198; *Hira Nath Mishra* v. *Principal, Rajendra Medical College*, (1973) 1 SCC 805: AIR 1973 SC 1260.
45. *Johnson* v. *Minister of Health*, (1947) 2 All ER 395.
46. *R.* v. *Manchester Legal Aid Committee*, (1952) 1 All ER 480 (489): (1952) 2 QB 413.

cially.[47] Therefore, the real question is: Is it necessary that for an action to be quasi-judicial, the relevant statute must expressly require the administrative authority to act judicially?

Before we discuss this question, it will be necessary to quote the following observations of Atkin, L.J. in *R.* v. *Electricity Commissioners*[48], as subsequent development of law on this aspect is based on varying interpretations placed by subsequent cases thereon:

> "Whenever any body of persons *having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially* act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."[49] (emphasis supplied)

In 1928, Lord Hewart, C.J.[50] read the aforesaid observations of Atkin, L.J. to mean that the duty to act judicially should be an additional requirement existing independently of the "authority to determine questions affecting the rights of the subjects" — something superadded to it. The gloss placed by Lord Hewart, C.J. on the dictum of Lord Atkin, L.J. was improper and it stultified the growth of the principles of natural justice. It has led to many anomalies and inequitable situations. In every case that came before it the court had to make a search for duty to act judicially in interpreting the provisions of the statute which resulted in confusion and uncertainty in law. But as Wade[51] rightly says, in the correct analysis it was simply a corollary, the automatic consequence of the power 'to determine questions affecting the rights of subjects'. Where there is any such power, there must be the duty to act judicially.

The law was finally settled in the historic case of *Ridge* v. *Baldwin*[52], wherein Lord Reid pointed out how Hewart, C.J. misunderstood the observations of Atkin, L.J. and observed:

> "If Lord Hewart meant that it is never enough that a body simply has a duty to determine what the rights of an individual should be, but that there must always be something more to impose on it a duty to act judicially before it can be found to observe the principles of

47. Das, J. in *Province of Bombay* v. *Khushaldas Advani*, AIR 1950 SC 222: 1950 SCR 621.
48. (1924) 1 KB 171: 93 LJKB 390: 130 LT 164.
49. *Id.* at p. 205 (KB).
50. *R.* v. *Legislative Committee of the Church Assembly*, (1928) 1 KB 411 (415).
51. *Administrative Law*, 1994, p. 632.
52. (1964) AC 40: (1963) 2 All ER 66: (1963) 2 WLR 935.

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natural justice, then that appears to me impossible to reconcile with the earlier authorities."[53]

Generally, statutes do not expressly provide for the duty to act judicially and, therefore, even in the absence of express provisions in the statutes the duty to act judicially should be inferred from "the cumulative effect of the nature of the rights affected, the manner of the disposal provided, the objective criterion to be adopted, the phraseology used, the nature of the power conferred, of the duty imposed on the authority and the other indicia afforded by the statute".[54]

(vi) Leading cases

Let us consider some leading cases to illustrate this proposition:

In *Nakkuda Ali* v. *Jayaratne*[55], the Controller of Textiles cancelled a licence of a textile dealer on the ground that the holder was unfit to continue as a dealer. Before passing the impugned order, he was not heard by the Controller. In an action against the Controller, the Privy Council held that the action by the Controller of cancellation of a licence was an executive action of withdrawal of privilege and the dealer had no right to hold the licence and the Controller was not under a duty to act judicially.

Similarly, in *R.* v. *Metropolitan Police Commissioner, ex p Parker*[56], a cab-driver's licence was revoked on the ground of alleged misconduct without giving reasonable opportunity to him to rebut the allegations made against him. The court upheld the order on the ground that the licence was merely a permission which could be revoked at any time by the grantor, and in doing so he was not required to act judicially.

But as Schwartz[57] says, for an individual to lose his licence is to suffer an 'economic death sentence' and is wholly contrary to the spirit of Anglo-American Administrative Law and this is an unwarranted restriction upon the application of the rules of natural justice. de Smith[58] also states: "Demolition of a property-owner's uninhabitable house might be for him a supportable misfortune; deprivation of a licence to trade might mean a calamitous loss of livelihood; but the judicial flavour detected in the former function was held to be absent from the latter."

53. (1964) AC 40, 75: (1963) 2 All ER 66, 80.
54. Per Subba Rao, J. in *Dwarka Nath* v. *ITO*, AIR 1966 SC 81 (86).
55. (1951) AC 66 (78-79): 54 Cal WN 853.
56. (1953) 1 WLR 1150: (1953) 1 All ER 717.
57. *Administrative Law*, p. 115.
58. *Judicial Review of Administrative Action*, 1980, p. 172.

Province of Bombay v. *Khushaldas Advani*[59] was the first leading Indian decision on the point. Under Section 3 of the Bombay Land Requisition Ordinance, 1947, the Provincial Government was empowered to requisition any land for any public purpose "if in the opinion of the Government" it was necessary or expedient to do so. It was contended that the Government while deciding whether requisition was for a public purpose, had to act judicially. The High Court of Bombay upheld the said contention. Reversing the decision of the High Court, the Supreme Court held by a majority that the governmental function of requisitioning property was not quasi-judicial, for the decision was based on the *subjective satisfaction* of the Government and it was not required to act judicially.

In *Radheshyam* v. *State of M.P.*[60], the Supreme Court was called upon to consider the C.P. and Berar Municipalities Act, 1922, which contained two provisions. Section 53-A empowered the Government to supersede a municipality for a temporary period not exceeding 18 months for securing "a general improvement in the administration of the municipality", while Section 57 empowered the Government to suspend the municipality for an indefinite period for an incompetent or *ultra vires* action. Section 57 expressly provided for a reasonable opportunity to be given to the municipality before making an order, while Section 53-A did not contain such provision. The majority held that unlike Section 57, the power under Section 53-A was administrative in nature. Subba Rao, J. (as he then was) in a dissenting judgment held that the order under Section 53-A was also quasi-judicial in nature.

However, after the historic pronouncement of the House of Lords in *Ridge* v. *Baldwin*[61], our Supreme Court has followed the ratio laid down therein. In *State of Orissa* v. *Binapani Dei*[62], speaking for the Court, Shah, J. (as he then was) observed:

> "Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed: it need not be shown to be superadded. *If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power.*"[63] (emphasis supplied)

59. AIR 1950 SC 222: 1950 SCR 621.
60. AIR 1959 SC 107: 1959 SCR 1440.
61. (1964) AC 40: (1963) 2 All ER 66: (1963) 2 WLR 935.
62. AIR 1967 SC 1269: (1967) 2 SCR 625.
63. *Id.* at p. 1271 (AIR).

Again, in *Maneka Gandhi* v. *Union of India*[64], the Court reiterated the said view and held that the duty to act judicially need not be superadded and it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person affected.

(vii) Test

No "dry and cut" formula to distinguish quasi-judicial functions from administrative functions can be laid down. The dividing line between the two powers is quite thin and being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power, one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised. The requirement of acting judicially in essence is nothing but a requirement to act justly and fairly and not arbitrarily or capriciously. The procedures which are considered inherent in the exercise of quasi-judicial power are merely those which facilitate if not ensure a just and fair decision. In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.[65]

Whether a particular function is administrative or quasi-judicial must be determined in each case on an examination of the relevant statute and the rules framed thereunder and the decision depends upon the facts and circumstances of the case.[66]

At one time prerogative remedies of *certiorari* and prohibition were confined to "judicial" functions pure and simple of public bodies. They both are now available in relation to functions which may be regarded as "administrative" or even "legislative". As it is said, it is not the label that determines the exercise of jurisdiction of the court but the quality and attributes of the decision. "*On the whole the test of justiciability has replaced that of classification of function as a determinant of*

64. (1978) 1 SCC 248, 287: AIR 1978 SC 597, 672; see also *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262: AIR 1970 SC 150; *S.L. Kapoor* v. *Jagmohan*, (1980) 4 SCC 379: AIR 1981 SC 136.

65. *A.K. Kraipak* v. *Union of India*, (1969) 2 SCC 262 (268-69): AIR 1970 SC 150 (154); *Tulsipur Sugar Co. Ltd.* v. *Notified Area Committee*, (1980) 2 SCC 295: AIR 1980 SC 882.

66. *Ibid*; see also *Nagendra Nath* v. *Commr., Hills Division*, AIR 1958 SC 398 (408).

the appropriateness of a decision for judicial review."[67]

(emphasis supplied)

(viii) Quasi-judicial functions: Illustrations

The following functions are held to be quasi-judicial functions:[68]

(*a*) Disciplinary proceedings against students.

(*b*) Dismissal of an employee on the ground of misconduct.

(*c*) Confiscation of goods under the Sea Customs Act, 1878.

(*d*) Cancellation, suspension, revocation or refusal to renew licence or permit by licensing authority.

(*e*) Determination of citizenship.

(*f*) Determination of statutory disputes.

(*g*) Power to continue the detention or seizure of goods beyond a particular period.

(*h*) Refusal to grant 'no objection' certificate under the Bombay Cinemas (Regulations) Act, 1953.

(*i*) Forfeiture of pension or gratuity.

(*j*) An order of assessment under a taxing statute.

(ix) Administrative functions: Illustrations

The following functions are held to be administrative functions:[69]

(*a*) An order of preventive detention.

(*b*) An order of acquisition or requisition of property.

(*c*) An order setting up a commission of inquiry.

(*d*) An order making or refusing to make a reference under the Industrial Disputes Act, 1947.

(*e*) An order granting sanction to prosecute a public servant.

(*f*) An order granting or refusing to grant permission of sale in favour of non-agriculturist under Tenancy Acts.

(*g*) An order of externment under the Bombay Police Act, 1951.

(*h*) Power to issue licence or permit.

(*i*) Entering names in Police register.

(*j*) Withdrawal from prosecution.

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67. de Smith: *Judicial Review of Administrative Action*, 1995, p. 1002.
68. For detailed discussion and case-law, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 59-60.
69. *Id.*, pp. 60-61.

12. ADMINISTRATIVE INSTRUCTIONS

Subject to the provisions of the Constitution, the Union and the States can exercise executive powers by issuing administrative instructions. Such administrative instructions are in the form of rules, regulations, notifications, etc. Broadly speaking, they have no statutory force and in *all* cases such administrative instructions may not confer a justiciable right which can be enforced in a court of law against the administration.[70] At the same time, it cannot be said that such administrative instructions *never* confer a justiciable right in favour of an aggrieved party. *It would be too wide a proposition of law.* There are certain administrative orders which confer rights and impose duties. If non-observance of non-statutory rule results in discrimination or arbitrariness, an aggrieved party can get relief from a competent court of law.[71]

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70. *Fernandez* v. *State of Mysore*, AIR 1967 SC 1753: (1967) 3 SCR 636; *Kumari Regina* v. *A.H. Elementary School*, (1972) 4 SCC 188: AIR 1971 SC 1920; *Raghupathy* v. *State of A.P.*, (1988) 4 SCC 364: AIR 1988 SC 1681.
71. *Union of India* v. *Indo-Afghan Agencies*, AIR 1968 SC 718: (1968) 2 SCR 366; *Amarpit Singh* v. *State of Punjab*, (1975) 3 SCC 503: AIR 1975 SC 984; *Sukhdev Singh* v. *Bhagat Ram*, (1975) 1 SCC 421, 425: AIR 1975 SC 1331.

Lecture IV

Delegated Legislation (General Principles)

It is sometimes said that Parliament makes the laws. It is true that Parliament makes the laws if by this we mean that Parliament has an essential role in the creation of Acts; but looking at the whole legislative process, it would perhaps be more realistic to say that the Government makes the laws subject to prior Parliamentary consent.

—GRIFFITH

The delegated legislation is so multitudinous that the statute book would not only be incomplete but misleading unless it be read along with the delegated legislation which amplifies and amends it.

—SIR CECIL CARR

'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.

—JUSTICE MUKHERJEA

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15. General principles

1. 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 previous lecture, as a matter of fact, apart from 'pure' administrative functions, the executive performs many legislative and judicial functions also. In England, theoretically it is only Parliament which can make laws. Looking to the legislative process, however, it is really the Government which makes the laws subject to parliamentary control.[1] Even in the United States of America where the doctrine of delegated legislation has

1. *Committee on Ministers' Power Report*, 1932, p. 33.

not been accepted in principle, in practice the legislature has entrusted egislative powers to the executive. Due to a number of reasons, particularly after two world wars, there is rapid growth of administrative legisation. In India, during 1973 to 1977, Parliament enacted about 300 statutes, but total number of statutory rules and orders reached more than 25,000.[2] In this lecture, we shall consider the legislative and quasi-legisative functions performed by the executive.

2. DEFINITION

It is very difficult to give any precise definition of the expression *delegated legislation*'. It is equally difficult to state with certainty the scope of such delegated legislation. Mukherjea, J.[3] rightly says:

> "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...."

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 M.P. Jain[4], the term 'delegated legislation' is used in two senses: it may mean (*a*) exercise by a subordinate agency of the egislative 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.

In its first application, it means that the authority making the legisation is subordinate to the legislature. The legislative powers are exercised by an authority other than the legislature in exercise of the powers delegated or conferred on them by the legislature itself. This is also known as 'subordinate legislation', because the powers of the authority which makes it are limited by the statute which conferred the power and consequently, it is valid only insofar as it keeps within those limits.[5]

In its second connotation, 'delegated legislation' means and includes all rules, regulations, bye-laws, orders, etc. Thus, the object of the Minimum Wages Act, 1948 is "to provide for fixing minimum wages in

2. Prof. Upendra Baxi, cited in *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137(160): AIR 1979 SC 321(336).
3. *Quoted* by Chakraverti: *Administrative Law*, 1970, p. 166.
4. *Treatise on Administrative Law*, 1996, Vol. 1, p. 51; *see also* Yardley: *A Source Book of English Administrative Law*, 1970, p. 36.
5. Basu: *Administrative Law*, 1996, p. 65.

certain employments''. The Act applies to employments mentioned in the Schedule. But the Central Government (executive) is empowered to add any other employment to the Schedule if, 'in the opinion of the Government' the Act should apply.

The Essential Commodities Act, 1955 enumerates certain commodities as 'essential commodities' under the Act. But the list given in the statute is not exhaustive and the Central Government is empowered to declare any other commodity as 'essential commodity' and to apply the provisions of the Act to it.

The Payment of Bonus Act, 1965 empowers the Central Government to exempt any establishment or a class of establishments from the operation of the Act, having regard to the financial position and other relevant considerations.

The Defence of India Act, 1962 authorized the Central Government to make ''such rules as appear to it to be necessary or expedient'' for the defence of India and maintenance of public order and safety.

The Income Tax Act, 1961 empowers the Board to make rules ''for carrying out the purposes of the Act and for the ascertainment and determination of any class of income''.

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'.

3. 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 the old 'police State' has now become a 'welfare State'. Because of this radical change in the philosophy as to the role to be played by the State, its functions have increased. Consequently, delegated legislation has become essential and inevitable. As the 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, ''it would be impossible to produce the amount and the kind of legislation which Parliament desires to pass and which the people of this country are supposed to want, if it became necessary to insert in the Acts of Parliament themselves any considerable

portion of what is now left to delegated legislation.''[6] In the opinion of the Committee, the factors responsible for the growth of delegated legislation are[7]:

(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'[8] — by issuing necessary rules, regulations, bye-laws, etc. In the words of Sir Cecil Carr[9], delegated legislation is ''a growing child called upon to relieve the parent of the strain of overwork and capable of attending to minor matters, while the parent manages the main business''. If the 525 parliamentarians are to focus on every minuscule legislative detail leaving nothing to subordinate agencies the annual output may be both unsatisfactory and negligible.[10] The Committee on Ministers' Powers has rightly observed:

> ''The truth is, that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass *the kind and quality of legislation which modern public opinion requires.*''
>
> (emphasis supplied)

(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.

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6. Cited in *Municipal Corpn., Delhi* v. *Birla Cotton Mills*, AIR 1968 SC 1232 at p. 1252.
7. See *Delhi Laws Act, 1912, Re*, AIR 1951 SC 332: 1951 SCR 747; *Municipal Corpn., Delhi* v. *Birla Cotton Mills*, AIR 1968 SC 1232: (1968) 3 SCR 251; *Gwalior Rayon Silk Mfg. Co.* v. *Asstt. Commr. of Sales Tax*, (1974) 4 SCC 98: AIR 1974 SC 1660; *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137: AIR 1979 SC 321; *Ramesh Birch* v. *Union of India*, 1989 Supp (1) SCC 430: AIR 1990 SC 560.
8. Garner: *Administrative Law*, 1985, p. 49.
9. *Delegated Legislation*, 1921, p. 2.
10. *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137: AIR 1979 SC 321.

(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. For that purpose, in many statutes, a 'removal of difficulty' clause is found empowering the administration to overcome 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.

(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 situation 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. By resorting to traditional legislative process, the entire object may be frustrated by vested interests and the goal of control and regulation over private trade and business may not be achieved at all.

"However one might deplore the 'New Despotism' of the Executive, the very complexity of the modern society and the demand it makes on its Government have set in motion forces which have made it absolutely

necessary for the Legislatures to entrust more and more powers to the Executive. *Textbook doctrines evolved in the 19th century have become out of date*''.[11] (emphasis supplied).

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

4. FORMS OF DELEGATED LEGISLATION

Delegated legislation may take several forms. They may be normal or of exceptional type; they may be usual or unusual; positive or negative; skeleton or Henry VIII clause. Broadly speaking, delegated legislation may be classified on the following principles;[12]

(i) Title-based classification

Delegated legislation may be in the forms of Rules, Regulations, Bye-laws, Notifications, Schemes, Orders, Ordinances, Directions, etc.

(ii) Discretion-based classification

A discretion may be conferred on the executive to bring the Act into operation on fulfilment of certain conditions. Such legislation is called ''conditional'' or ''contingent'' legislation.

(iii) Purpose-based classification

A classification may be based on nature and extent of power conferred and purposes for which such power can be exercised. Thus, executive can be empowered to fix appointed day for the Act to come into force, to supply details, to extend the provisions of the Act to other areas, to include or to exclude operation of the Act to certain territories, persons, industries, commodities, to suspend or to modify the provisions of the Act, etc.

(iv) Authority-based classification

A statute may also empower the executive to delegate further powers conferred on it to its subordinate authority. This is known as ''sub-delegation''.

5. DELEGATED LEGISLATION IN ENGLAND

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

11. *Sita Ram* v. *State of U.P.*, (1972) 4 SCC 485(487): AIR 1972 SC 1168(1169).
12. Wade: *Administrative Law*, 1994, p. 867: Benjafield and Whitmore: *Australian Administrative Law*, 1966, p. 116; M.P. Jain: *Treatise on Administrative Law*, 1996, p. 67; Massey: *Administrative Law*, 1995, p. 67.

striking in the legal and social history of the nineteenth century in England than the development of subordinate legislation.[13]

Maitland also said: "Year by year the subordinate Government of England is becoming more and more important. The new movement set in with the Reform Bill of 1832: it has gone far already and assuredly it will go farther. *We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes.*"[14] (emphasis supplied)

The reasons 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.

Traditionally, administrative legislation was looked upon as an evil, but gradually it came to be regarded as justifiable in principle also. It was realised that legislation and administration were not two fundamentally different forms of power. Tests formulated to distinguish legislative and administrative functions proved insufficient and inappropriate.[15]

But at the same time, administrative law had not been accepted as a developed and recognised branch of law. Taylor, therefore, observed: "Until August, 1914 a sensible law abiding Englishman could pass through life and hardly notice the existence of the State, beyond the post office and the policeman".[16]

During two world wars, there was tremendous increase in delegated legislation. In various fields massive inroads were made in comparatively personal matters of citizens, e.g. housing, education, employment, pension, health, planning, production, preservation and distribution of essential commodities, social security, etc. 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' Powers (Donoughmore Committee) in 1929. The Committee submitted its report in 1932. It observed, "We doubt, whether Parliament itself has

13. *Law in the Making*, (1993), p. 531.
14. *Constitutional History of England*, p. 501, cited by C.K. Allen.
15. Wade: *Administrative Law*, 1994, pp. 859-60. For distinction between legislative and administrative functions, *see* Lecture III, *supra*.
16. *English History* (1914-1945), p. 1; *see also* Committee on Ministers' Powers Report, 1932, p. 5; Wade: *Administrative Law*, 1994, p. 4.

fully realised how extensive the practice of delegated legislation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused."[17]

The Committee rightly stated;

"The system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits, and under certain safeguards."[18]

6. 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) 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*[19], the American Supreme Court observed:

"That Congress cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of Government ordained by the Constitution."[20]

(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. A power conferred upon an agent because of his fitness and the confidence reposed in 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.[21]

17. Committee on Ministers' Powers Report, 1932, p. 62.
18. Committee on Ministers' Powers Report, 1932, p. 51.
19. (1892) 143 US 649.
20. *Id.* at p. 692.
21. *Pennsylvania case*, (1873) 71 Locke's Appeal 491(497).

(b) In practice

Though, in theory, it was not possible for the Congress to delegat its legislative power to the executive, strict adherence thereto was nc practicable. Governmental functions had increased and it was impossibl for the Congress to enact all the statutes with all particulars. The Suprem Court could not shut its eyes to this reality and tried to create 'a balanc between the two conflicting forces: doctrine of separation of powers ba ring delegation and the inevitability of delegation due to the exigencie of the modern Government'.[22]

In *Panama Refining Co.* v. *Ryan*[23], popularly known as the *Hot O case*, under Section 9(*c*) of the National Industrial Recovery Act (NIRA) 1933, the President was authorised by the Congress to prohibit transport ation of oil in inter-State commerce in excess of the quota fixed by th State concerned. The policy of the Act was 'to encourage national in dustrial recovery' and 'to foster fair competition'. The Supreme Cour by majority held that the delegation was invalid. According to the Cour the Congress had not declared any legislative policy or standard.

In *Schechter Poultry Corpn.* v. *U.S.*[24] (*Sick Chicken case*), the Su preme Court unanimously struck down Section 3 of the National Indus trial Recovery Act (NIRA), 1933 which authorised the President t approve codes of fair competition and violation thereof was made pun ishable. The Court held that the discretion of the President was '*virtuall unfettered*'.[25]

After the above two cases, however, the Supreme Court took a libera view and in many cases, upheld delegation of legislative power. Thus in *National Broadcasting Co.* v. *U.S.*[26], vast powers were conferred upor the Federal Communication Committee (FCC) to licence broadcasting stations under the Communications Act, 1934. The criterion was 'public interest, convenience or necessity'. Though it was vague and ambiguous the Supreme Court held it to be a valid standard. Similarly, in *Yakus* v *U.S.*[27], under the Emergency Price Control Act, 1942, the Price Admin istrator was given the power to fix such maximum price which "in his judgment will be generally fair and equitable and will effectuate the pur poses of the Act". The Administrator was required, so far as practicable,

22. ILI: *Cases and Materials on Administrative Law in India*, 1966, Vol. I, pp. 188-89.
23. (1934) 293 US 388.
24. (1935) 295 US 495: 79 L Ed 1570.
25. *Id.* at pp. 541-42.
26. (1943) 319 US 190.
27. (1944) 321 US 414.

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 (supra)* was overruled. Again, in *Litcher* v. *U.S.*[28], the Reorganisation Act, 1942, empowered Administrative Officers to determine whether the prices were excessive and to recover profits which they determined to be excessive. The Supreme Court held the delegation valid observing that the statutory term 'excessive profits' was a sufficient expression of legislative policy and standards to render it constitutional.

Davis[29] 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) Conclusions

From the above discussion, it clearly emerges 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'.[30] Schwartz rightly says: "If the standards such as those contained in the Reorganisation and Communications Acts are upheld as adequate, it becomes apparent that the requirement of standards has become more a matter of form than substance."[30] 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.

7. DELEGATED LEGISLATION IN INDIA

The discussion can be divided into two stages—

(*a*) pre-Constitution period; and

(*b*) post-Constitution period.

28. (1947) 334 US 742.

29. *Administrative Law*, 1951, pp. 45-54.

30. Schwartz: *An Introduction to American Administrative Law*, 1984, p. 47.

(a) Pre-Constitution period

Queen v. *Burah*[31] is considered to be the leading authority on the subject. By Act XXII of 1869, Garro Hills was removed from the jurisdiction of civil and criminal courts, and by Section 9, the Lieutenant-Governor was empowered to extend *mutatis mutandis* all or any of the provisions of the Act applicable to Khasi, Jaintia and Naga Hills in the Garro Hills and to fix the date of such application. By a notification dated October 14, 1871, the Lieutenant-Governor extended all the provisions of the Act to the District of Khasi and Jaintia Hills. The appellants who were convicted of murder and sentenced to death, challenged the notification.

The High Court of Calcutta[32], by a majority upheld the contention of the appellants and held that Section 9 of the Act was *ultra vires* the powers of the Indian Legislature. According to the Court, the Indian Legislature was a delegate of the Imperial Parliament and, therefore, further delegation was not permissible.

On appeal, the Privy Council reversed the decision of the Calcutta High Court. It held that the Indian Legislature was not an agent or delegate of the Imperial Parliament and it had plenary powers of legislation as those of the Imperial Parliament itself. It agreed that the Governor-General in Council could not, by legislation, create a new legislative power in India not created or authorised by the Council's Act. But in fact it was not done. It was only a case of conditional legislation, as the Governor was not authorised to pass new laws, but merely to extend the provisions of the Act already passed by the competent legislature upon fulfilment of certain conditions.

In *Jatindra Nath Gupta* v. *Province of Bihar*[33], the Bihar Maintenance of Public Order Act, 1948 was to remain in force for one year. However, the power was conferred on the Provincial Government to extend the operation of the Act for a further period of one year. By a majority, the Federal Court held that the power to extend the operation of the Act beyond the period of one year was a legislative act, and therefore, could not be delegated. However, in a dissenting judgment, Fazl Ali, J.[34] upheld the provision as the extension of the Act, for a further period of one year could not amount to its re-enactment. It merely

31. (1878) 3 AC 889: (1878) 5 IA 178: ILR 4 Cal 172 (PC).
32. *Empress* v. *Burah and Book Singh*, ILR 3 Cal 64: 1 CLR 161 (FB).
33. AIR 1949 FC 175: 1949 FCR 595.
34. *Id.* at p. 194 (AIR).

mounted to a continuance of the Act for which the maximum period vas contemplated by the legislature itself.

It is submitted that the minority view was correct and subsequently n *Inder Singh* v. *State of Rajasthan*[35] the Supreme Court upheld the similar provision.

(b) Post-Constitution period

Delhi Laws Act, 1912, Re[36] is the first leading case decided by the Supreme Court on delegated legislation after the Constitution of India came into force. A reference was made to the Supreme Court by the President of India under Article 143 of the Constitution in the following circumstances:

The Central Government was authorised by Section 2 of the "Part 'C' States" (Laws) Act, 1950 to extend to any "Part 'C' State" with such modifications and restrictions as it thinks fit, any enactment in force in a "Part 'A' State"; and while doing so, it could repeal or amend any corresponding law (other than a Central Act) which might be in force in the "Part 'C' State".

The Supreme Court was called upon to decide the legality of the aforesaid provision. All the seven judges who heard the reference gave their separate answers 'exhibiting a cleavage of judicial opinion' on the question of limits to which the legislature in India should be permitted to delegate its legislative power. The majority held the provision valid subject to two limitations—

(*i*) the executive cannot be authorised to repeal a law in force and thus, the provision which empowered the Central Government to repeal a law already in force in the Part C State was bad; and

(*ii*) by exercising the power of modification, the legislative policy should not be changed; and thus, before applying any law to the Part C State, the Central Government cannot change the legislative policy.

The importance of the *Delhi Laws Act case* cannot be under-estimated inasmuch as, on the one hand, it permitted delegation of legislative power by the legislature to the executive; while on the other hand, it demarcated the extent of such permissible delegation of power by the Legislature.

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35. AIR 1957 SC 510: 1957 SCR 605; *see* also Lecture V, *infra*.
36. AIR 1951 SC 332: 1951 SCR 747.

Principle laid down in Delhi Laws Act case — As stated above, al the seven judges gave their separate opinions. Many a time a question is asked as to whether any principle was laid down by the majority opinion. There is difference of opinion amongst jurists regarding this.

According to Patanjali Sastri, C.J.[37], 'undoubtedly, certain definite conclusions were reached by the majority of the judges, it is difficult to say that any particular principle was laid down, which can be of assistance in the determination of other cases'. Seervai[38] is also of the same opinion.

On the other hand, Bose, J.[39] and Basu[40] are of the opinion that in spite of separate opinions, certain principles have been laid down by the Supreme Court in *Delhi Laws Act case*. M.P. Jain[41] is right when he states 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 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. The major difficulty was, and it was on this point that the Judges differed, where to set the limit, where to draw the line, what were to be the permissible contours within which an Indian legislature could delegate its legislative power?

In *Harishankar Bagla* v. *State of M.P.*[42], under Section 3 of the Essential Supplies (Temporary Powers) Act, 1946, the Central Government was empowered to issue an order for the regulation of production, distribution, etc. of essential commodities and by Section 6 it was provided that "an order made under Section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Act". Both the sections were challenged on the ground of excessive delegation of legislative power. The Supreme Court held that the object

37. *Kathi Raning Rawat* v. *State of Saurashtra*, AIR 1952 SC 123: 1952 SCR 435.
38. *Constitutional Law of India*, 1976, Vol. II, p. 1196.
39. *Rajnarain Singh* v. *Patna Admn. Committee*, AIR 1954 SC 569: (1955) 1 SCR 290.
40. *Commentaries on the Constitution of India*, Vol. IV, p. 141.
41. *Treatise on Administrative Law*, 1996, Vol. I, p. 62.
42. AIR 1954 SC 465: (1955) 1 SCR 380.

f Section 6 was not to repeal or abrogate any existing law, but to bypass ne same where the provisions thereof were inconsistent with the provisions f the Act. The court also held that the legislative policy was laid down in ne Act and, therefore, there was no excessive delegation. Thus, in fact, ery broad delegation of legislative power was judicially sanctioned.

Similarly, in *Edward Mills* v. *State of Ajmer*[43], the Schedule to the Minimum Wages Act, 1948, contained a list of industries to which the Act was made applicable by Parliament, but the appropriate Government vas authorised to add any other industry to the said Schedule. The matter f application of the provisions of the Act to any industry was left to ne 'opinion of the Government' but no norms were laid down for the xercise of such discretion and yet, the Supreme Court upheld the validity f the Act. According to the Court, the legislative policy was apparent n the face of the Act to fix minimum wages to avoid the chance of xploitation of labour. But 'the test for selecting industries to be included n the Schedule, which the court propounded, was nowhere mentioned n the Act but was formulated by the Court itself to uphold the Act'.[44]

After the *Delhi Laws Act case*, *Hamdard Dawakhana* v. *Union of ndia*[45] was probably the first case in which a Central Act was held *ultra ires* on the ground of excessive delegation. The Drugs and Magic Remedies Objectionable Advertisements) Act, 1954 was enacted by Parliament to ontrol advertisement of certain drugs. Section 3 laid down a list of diseases or which advertisement was prohibited and authorised the Central Govern- nent to include any other disease in the list. The Supreme Court held ection 3 invalid as no criteria, standards or principles had been laid own therein, and the power delegated was unguided and uncontrolled.

It is submitted that the view taken by the Supreme Court was erro- eous inasmuch as, the legislative policy had been laid down in the pre- mble and title of the Act. Certain diseases had been mentioned and the Government was empowered to include and to bring within its purview *any other disease*'. There is nothing objectionable in such a provision nd prior to this case as well as in subsequent cases, such a provision as been held valid by the Court in a number of cases.[46] It is not necess-

43. AIR 1955 SC 25: (1955) 1 SCR 735.
44. M.P. Jain: *Indian Constitutional Law*, 1987, p. 78.
45. AIR 1960 SC 554: (1960) 2 SCR 671.
46. *Edward Mills* v. *State of Ajmer*, AIR 1955 SC 25; *Banarsi Das* v. *State of M.P.*, AIR 1958 SC 909: 1959 SCR 427; *Sable* v. *Union of India*, (1975) 1 SCC 763: AIR 1975 SC 1172; *Babu Ram* v. *State of Punjab*, (1979) 3 SCC 616: AIR 1979 SC 1475; *Brij Sunder* v. *First Addl. District Judge*, (1989) 1 SCC 561: AIR 1989 SC 572.

ary that the legislature should "dot all the i's and cross all the t's" o its policy.[47]

In *Gwalior Rayon Silk Mfg. Co.* v. *Asstt. Commr.*[48], under Sectio 8(2)(*b*) of the Central Sales Tax Act, 1956, Parliament did not fix th rate of Central Sales Tax but adopted the rate applicable to the sale o purchase of goods within the appropriate State in case such rate exceed 10 per cent. The said section was challenged on the ground that Parlia ment in not fixing the rate itself and in adopting the rate applicable withi the appropriate State has not laid down any legislative policy and ha abdicated its legislative function.

The section was upheld by all the five judges[49], holding that sufficien guideline was provided in the Act by Parliament. But this case is note worthy for two diverse approaches adopted by Khanna, J. (for thre judges) and Mathew, J. (for two judges) in respect of the following con tention.

On behalf of the Sales Tax Department, a pre-emptive argument wa put forward that while conferring power upon a delegate to make sub ordinate legislation, the legislature need not disclose any policy, principl or standard because if the legislature can repeal an enactment, as it nor mally can, it retains sufficient control over the authority making the sub ordinate legislation.

Khanna, J. (for himself, Alagiriswami and Bhagwati, JJ.) rejecte the argument and reiterated that the legislature must lay down a policy principle or standard for the guidance of the delegate. The rule agains excessive delegation of legislative authority flows from the sovereignt of the people. The rule contemplates that it is not permissible to sub stitute, in the matter of legislative policy, the view of individual officer or other authorities, however competent they may be, for that of th popular will as expressed by the representatives of the people. The ac ceptance of the view canvassed by the department would lead to startlin results. If Parliament were to enact that as the crime situation in th country has deteriorated, criminal law to be enforced in the countr would be such as is framed by an officer mentioned in the enactmen can it be said that there has been no excessive delegation of legislativ power? To say that if Parliament does not approve the law made by th officer concerned, it can repeal the same or the parent Act is no answe

47. *Ramesh Birch* v. *Union of India*, 1989 Supp (1) SCC 430 (471): AIR 1990 S 560.

48. (1974) 4 SCC 98: AIR 1974 SC 1660.

49. Ray, C.J., Khanna, Mathew, Alagiriswami and Bhagwati, JJ.

The delegating section was, however, held valid on the ground that the Act was plainly enacted with a view to prevent evasion of the payment of central sales tax.

The concurring judgment of Mathew, J. (for himself and Ray, C.J.) accepted the said argument and observed that delegation involves the granting of discretionary power to another, but the ultimate power always remains with the legislature. What is prohibited is abdication, i.e. conferment of arbitrary power by the legislature upon a subordinate body without reserving to itself control over that body. Relying upon the decisions in *Queen* v. *Burah*[50] and *Cobb* v. *Kropp*[51], Mathew, J. observed that a legislature cannot be said to abdicate its legislative function if it could at any time repeal the legislation and withdraw the authority and discretion it had vested in the delegate.

Without referring to the majority or minority judgment in *Gwalior Rayon*, Mathew, J. reiterated his views in *M.K. Papiah* v. *Excise Commissioner*[52]. Section 22 of the Karnataka Excise Act, 1966 conferred on the Government a power to fix the rates of excise duty and Section 71 empowered the Government to make rules. Rules made under the Act were to be laid before the State legislature as soon as practicable after they had been made. Both the sections were challenged on the ground of impermissible delegation of legislative power. Mathew, J. speaking for a unanimous Court of three judges observed that the laying of the rules before the legislature was a sufficient check on the power conferred on the delegate. The petitioners thereupon argued that the rules would come into force as soon as they were framed and that the power of the legislature to repeal rules subsequently could not be regarded as sufficient control over delegated legislation. Rejecting this argument, Mathew, J. observed that considering the compulsions and complexities of modern life such control must be regarded as sufficient.

Welcoming this departure, Seervai[53] says that the unanimous judgment in *Papiah* shows that 'after twenty-five years of wandering in the legal maze of its own creation, the Supreme Court of India, like the Supreme Court of the United States has come round to the view expressed by the Privy Council in 1878'.[54]

50. (1878) 3 AC 889: (1878) 5 IA 178 (PC).
51. (1867) AC 141 (PC).
52. (1975) 1 SCC 492: AIR 1975 SC 1007.
53. *Constitutional Law of India*, 1976, Vol. II, pp. 1204-05.
54. *Queen* v. *Burah*, (1878) 3 AC 889: (1878) 5 IA 178 (PC).

Seervai's enthusiasm has, however, turned out to be short-lived for in *Kerala State Electricity Board* v. *Indian Aluminium Co.*[55] once again, a Bench of five Judges of the Supreme Court reiterated the majority view of *Gwalior Rayon*.

In *Shama Rao* v. *Union Territory of Pondicherry*[56], by enacting the Pondicherry General Sales Tax Act, 1965, the Pondicherry Legislature adopted the Madras Sales Tax Act, 1959, as in force in the State of Madras immediately before the commencement of the Act in Pondicherry. The Government was empowered to issue notification of commencement of the Act in Pondicherry. The effect of the said provision was that all the amendments in the Madras Act during the period of enactment and commencement of the Pondicherry Act *ipso facto* became applicable to the Union Territory of Pondicherry. Holding the Pondicherry Act void and stillborn, the Supreme Court by a majority of 3: 2[57] observed that there was total surrender, abdication and effacement of legislative power by the Pondicherry Legislature in favour of the Madras Legislature.

In *Brij Sunder* v. *First Addl. District Judge*[58], almost a similar provision was held to be valid by the Court. Distinguishing *Shama Rao* (*supra*) and following *Delhi Laws Act, 1912* the Court observed:

> "[T]he delegation of power to extend even future laws of another State will not be bad so long as, in the process and under the guise of alteration and modification, an alteration of the essential character of the law or a change of it in essential particulars is not permitted."[59]

8. EXCESSIVE DELEGATION

(a) General

It is well settled that essential and primary legislative functions must be performed by the legislature itself and they cannot be delegated to the executive. Essential legislative functions consist of determination of legislative policy and its formulation as a rule of conduct. In other words, a legislature has to discharge the primary duty entrusted to it. Once es-

55. (1976) 1 SCC 466: AIR 1976 SC 1031. For critical discussion of conflicting decisions of the Supreme Court, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 79-81.
56. AIR 1967 SC 1480: (1967) 2 SCR 650.
57. Subba Rao, C.J., Shelat and Mitter, JJ. (Shah and Bhargava, JJ. contra.); see also *Parasuraman* v. *State of T.N.*, (1989) 4 SCC 483: AIR 1990 SC 40.
58. (1989) 1 SCC 561: AIR 1989 SC 572.
59. *Id.*, at p. 582 (SCC): 587 (AIR).

sential legislative powers are exercised by the legislature, all ancillary and incidental functions can be delegated to the executive.[60]

(b) Nature and scope

It has been accepted that Parliament does not possess the legislative power as an inherent and original power. That power has been delegated to it by the Constitution. Parliament thus possesses not a right that it can delegate at its sweet will, but a competence that the Constitution obliges it to exercise itself. It cannot legally delegate its legislative functions to the executive. Such delegation would be unconstitutional.[61]

In Great Britain, excessive delegations of parliamentary powers are political concerns, in the United States (and in India), they are primarily judicial.

(c) Abdication

Abdication means abandonment of sovereignty. When the legislature does not legislate and entrusts that primary function to the executive or to an outside agency, there is abdication of legislative power. Abdication may be partial or total. The power of delegate is subject to the qualification that the legislature does not abdicate or efface itself by setting up a parallel legislature.[62]

But delegation of legislative power need not necessarily amount to abdication or complete effacement.

What constitutes abdication and what class of cases are covered by that expression is always a question of fact and it cannot be defined nor a rule of universal application can be laid down.[63]

(d) Principles

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

60. *Delhi Laws Act, Re*, AIR 1951 SC 332: 1951 SCR 747; *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*, AIR 1968 SC 1232: (1968) 3 SCR 251; *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137: AIR 1979 SC 321; *Brij Sunder* v. *First Addl. Distt. Judge*, (1989) 1 SCC 561: AIR 1989 SC 572; *Ramesh Birch* v. *Union of India*, 1989 Supp (1) SCC 430: AIR 1990 SC 560.

61. Bonnard cited by Schwartz: *French Administrative Law and the Common Law World*, 1954, p. 93.

62. *Gwalior Rayon Silk Mfg. Co.* v. *Asstt. Commissioner*, (1974) 4 SCC 98: AIR 1974 SC 1660; *Mahe Breach Trading Co.* v. *Union Territory of Pondicherry*, (1996) 3 SCC 741 (746).

63. *Id.*; See also, *Delhi Laws Act, Re (supra); Municipal Corpn. of Delhi* v. *Birla Cotton Mills (supra)*; *Sitaram* v. *State of U.P.*, (1972) 4 SCC 485: AIR 1972 SC 1168.

(1) Essential legislative functions to enact laws and to determine legislative policy cannot be delegated.

(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. The legislature, therefore, has to delegate certain functions provided it lays down legislative policy.

(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.[64]

(e) Test

In dealing with the challenge to the *vires* of any statute on the ground of excessive delegation it is necessary to enquire whether the impugned delegation involved surrender of essential legislative function and whether the legislature has left enunciation of policy and principle to the delegate. If the reply is in the affirmative, there is excessive delegation but if it is in the negative, the challenge must necessarily fail.

A statute challenged on the ground of excessive delegation must be subjected to two tests:

(*i*) Whether it delegates essential legislative function; and

(*ii*) Whether the legislature has enunciated its policy and principle for the guidance of the executive.[65]

(f) Powers and duties of Courts

The Founding Fathers of the Constitution have entrusted the power of legislation to the representatives of the people so that the power may be exercised not only in the name of the people but also by the people speaking through their representatives. The rule against excessive delegation thus flows from and is a necessary postulate of the sovereignty of the people.[66]

At the same time, however, it also cannot be overlooked that in view of multifarious activities of a modern welfare State, the legislature can

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64. *Jyoti Pershad* v. *Administrator, Union Territory of Delhi*, AIR 1961 SC 1605: (1962) 2 SCR 125; *Sitaram* v. *State of U.P. (supra)*; *Registrar, Co-op. Societies* v. *Kunjambu*, (1980) 1 SCC 340: AIR 1980 SC 350.

65. *Vasantlal* v. *State of Bombay*, AIR 1961 SC 4: (1961) 1 SCR 341; *Harishankar* v. *State of M.P.*, AIR 1954 SC 465: (1955) 1 SCR 380; *Mahe Breach Trading Co.* v. *Union Territory of Pondicherry (supra)*.

66. *Gwalior Rayon Silk Mfg. Co.* v. *Asstt. Commissioner*, (1974) 4 SCC 98 (108-09): AIR 1974 SC 1660; *Vasantlal* v. *State of Bombay (supra)*.

hardly find time and expertise to enter into matters of detail. Subordinate legislation within a prescribed sphere is a practical necessity and pragmatic need of the day. Delegation of law-making power is the dynamo of modern Government. If legislative policy is enunciated by the legislature and a standard has been laid down, the Court will not interfere with the discretion to delegate non-essential functions to the executive.[67]

(g) Conclusions

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. (emphasis supplied).[68]

It is submitted that the following observations of Subba Rao, J. (as he then was) in the leading case of *Vasantlal* v. *State of Bombay*[69] lay down correct law on the point and, therefore, are worth quoting:

> "The Constitution confers a power and imposes a duty on the legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously, it cannot abdicate its function in favour of another. But in view of multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid

67. *Gwalior Rayon Silk Mfg. Co.* v. *Asstt. Commissioner, id.*, at pp. 108, 121 (SCC).
68. *Municipal Corpn., Delhi* v. *Birla Cotton Mills*, AIR 1968 SC 1232 (1264): (1968) 3 SCR 251 (Per Shah, J.).
69. AIR 1961 SC 4: (1961) 1 SCR 341.

down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in a whole or in part is beyond the permissible limit of a delegation. *It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limit. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power on executive authorities. It is the duty of this Court to strike down without any hesitation any blanket power conferred on the executive by the legislature.*''[70] (emphasis supplied)

9. 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 e.g. Section 3 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 provides that the Act 'shall come into operation on such date as the State Government may by notification in the Official Gazette appoint in this behalf'. 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[71] remarks, ''*the legislature provides the gun and prescribes the target, but leaves to the executive the task of pressing the trigger*''. (emphasis supplied)

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 e.g. Section 3 of the All India Services Act, 1951 authorises the Central Government to make rules to regulate conditions of service in the All India Services.

Inclusion

Sometimes, the legislature passes an Act and 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., the Transfer of Property Act, 1882

70. AIR 1961 SC 4 at 11-12; see also *Avinder Singh* v. *State of Punjab (supra).*
71. *Concerning English Administrative Law*, 1941, p. 43.

was made applicable to the whole of India 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 as well. By Section 146 of the Indian Railways Act, 1890, the Government was authorised to apply the provisions to tramways.

Exclusion

There are some statutes which empower the Government to exempt from their operation certain persons, territories, commodities, etc. Section 30 of the Payment of Bonus Act, 1965 empowers the Government to exempt any establishment or a class of establishments from the operation of the Act.

Suspension

Some statutes authorise the Government to suspend or relax the provisions contained therein, e.g. under Section 48(1) of the Tea Act, 1953, the Central Government is empowered under certain circumstances to suspend the operation of all or any of the provisions of the said Act.

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.

Modification

Sometimes, provision is made in the statute authorising the executive to modify the existing statute before application. This is really a drastic power as it amounts to an amendment of the Act, which is a legislative act, but sometimes, this flexibility is necessary to deal with local conditions. Thus, under the powers conferred by the Delhi Laws Act, 1912, the Central Government extended the application of the Bombay Agricultural Debtors' Relief Act, 1947 to Delhi. The Bombay Act was limited in application to the agriculturists whose annual income was less than Rs 500 but that limitation was removed by the Government.

Prescribing punishments

In some cases the legislature delegates to the executive the power to take punitive action, e.g. under Section 37 of the Electricity Act, 1910, the Electricity Board is empowered to prescribe punishment for breach of the provisions of the Act subject to the maximum punishment laid

down in the Act. By Section 59(7) of the Damodar Valley Act, 1948, the power to prescribe punishment is delegated to a statutory authority without any maximum limit fixed by the parent Act.

According to the Indian Law Institute[72], this practice is not objectionable, provided two safeguards are adopted:

(*i*) the legislature must determine the maximum punishment which the rule-making authority may prescribe for breach of regulations; and

(*ii*) if such power is delegated to any authority other than the State or Central Government, the exercise of the power must be subject to the previous sanction or subsequent approval of the State or Central Government.

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.

Removal of difficulties (Henry VIII clause)

Power is sometimes conferred on the Government to modify the provisions of the existing statutes for the purpose of removing difficulties. When the legislature passes an Act, it cannot foresee all the difficulties which may arise in implementing it. The executive is, therefore, empowered to make necessary changes to remove such difficulties. Such provision is also necessary when the legislature extends a law to a new area or to an area where the socio-economic conditions are different.

Generally, two types of "removal of difficulties" clauses are found in statutes. A narrow one, which empowers the executive to exercise the power of removal of difficulties consistent with the provisions of the parent Act; e.g. Section 128 of the States Reorganisation Act, 1956 reads as under:

> "If any difficulty arises in giving effect to the provisions of this Act, the President may by order do anything not inconsistent with such provisions which appears to him to be necessary or expedient for the purpose of removing the difficulty."

Such a provision is not objectionable. According to the Committee on Ministers' Powers,[73] the sole purpose of Parliament in enacting such

72. *Delegated Legislation in India*, (ILI) 1964, p. 25.
73. *Committee on Ministers' Powers Report*, 1932, p. 36.

a provision is 'to enable minor adjustments of its own handiworks to be made for the purpose of fitting its principles into the fabric of existing legislation, general or local'. Sir Cecil Carr[74] rightly says, "the device is partly a draftman's insurance policy in case he has overlooked something, and partly due to the immense body of local Acts in England creating special difficulties in particular areas". By exercising this power the Government cannot modify the parent Act nor can it make any modification which is not consistent with the parent Act.

Another type of "removal of difficulties" clause is very wide and authorises the executive in the name of removal of difficulties to modify even the parent Act or any other Act. The classic illustration of such a provision is found in the Constitution itself.[75] Usually, such a provision is for a limited period.

This provision has been vehemently criticised by Lord Hewart[76] and other jurists. It is nicknamed as the *Henry VIII clause* to indicate executive autocracy. Henry VIII was the King of England in the 16th century and during his regime he enforced his will and got his difficulties removed by using instrumentality of a servile Parliament for the purpose of removing the difficulties that came in his way. According to the Committee on Ministers' Powers,[77] the King is regarded popularly as the impersonation of executive autocracy and such a clause 'cannot but be regarded as inconsistent with the principle of parliamentary Government'.[78]

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74. *Concerning English Administrative Law*, 1941, p. 44.
75. Article 372(2) reads as under:
"For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law." *See also* S. 35 of the Sick Industrial Companies (Special Provisions) Act, 1985.
76. *The New Despotism*, 1929, p. 60.
77. *Committee on Ministers' Powers Report*, 1932, p. 61.
78. Henry VIII (1491-1547), King of England from 1509 to 1547. He has been described as a "despot under the forms of law"; and it is apparently true that he committed no illegal act. His disposition consists not in any attempt to rule unconstitutionally but in the extraordinary degree to which he was able to use constitutional means in the furtherance of his own personal ends. His activity, his remarkable political insight, his lack of scruples and his combined strength of will and subtlety of intellect enabled him to utilize all the forces which tended at that time towards a strong Government throughout Western Europe. Encyclopaedia Britannica (1768), Vol. 11, pp. 367-69.

In *Jalan Trading Co.* v. *Mill Mazdoor Sabha*[79], the Supreme Court was called upon to decide the legality of such a clause. Section 37(1) of the Payment of Bonus Act, 1965 empowered the Central Government to make such orders, not inconsistent with the purposes of the Act, as might be necessary or expedient for the removal of any doubts or difficulties. Section 37(2) made the order passed by the Central Government under sub-section (1) final. The Court by a majority[80] of 3: 2 held Section 37 *ultra vires* on the ground of excessive delegation inasmuch as the Government was made the sole judge of whether any difficulty or doubt had arisen, whether it was necessary or expedient to remove such doubt or difficulty and whether the order made was consistent with the provisions of the Act. Again, the order passed by the Central Government was made 'final'. Thus, in substance, legislative power was delegated to the executive authority, which was not permissible.

The minority, however, took a liberal view and held that the functions to be exercised by the Central Government were not legislative functions at all but were intended to advance the purpose which the legislature had in mind. In the words of Hidayatullah, J. (as he then was): "Parliament has not attempted to set up another legislature. It has stated all that it wished on the subject of bonus in the Act. Apprehending, however, that in the application of the new Act doubts and difficulties might arise and not leaving their solution to Courts with the attendant delays and expense, Parliament has chosen to give power to the Central Government to remove doubts and differences by a suitable order."

It is submitted that the minority view is correct and after *Jalan Trading Co.*, the Supreme Court adopted a liberal approach. In *Gammon India Ltd.* v. *Union of India*[81] a similar provision was held constitutional by the Court. Distinguishing *Jalan Trading Co.*, the Court observed: "In the present case, neither finality nor alteration is contemplated in any order under Section 34 of the Act. Section 34 is for giving effect to the provisions of the Act. This provision is an application of the internal functioning of the administrative machinery."[82] It, therefore, becomes clear that after *Jalan Trading Co.*, the Court changed its view and virtually overruled the majority judgment.

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79. AIR 1967 SC 691: (1967) 1 SCR 15.
80. Wanchoo, Shah and Sikri, JJ. (Hidayatullah and Ramaswamy, JJ. *contra*).
81. (1974) 1 SCC 598: AIR 1974 SC 960.
82. *Id.* at p. 607 (SCC).

In *Patna University* v. *Amita Tiwari*,[83] the relevant statute enabled the Chancellor to issue directions to universities "in the administrative or academic interests." In exercise of that power, the Chancellor directed the University to regularise services of an ineligible teacher "on compassionate grounds." When the action was challenged, it was sought to be supported on the basis of "removal of difficulties" clause. Holding that the "removal of difficulties" clause had only limited application, the Supreme Court quashed the order.

It is submitted that by using a 'removal of difficulties' clause, the Government "may slightly tinker with the Act to round off angularities and smoothen the joints or remove minor obscurities to make it workable, but it cannot change features of the Act. *In no case can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.*"[84] (emphasis supplied) The Committee on Ministers' Powers rightly opined that it would be dangerous in practice to permit the executive to change an Act of Parliament and made the following recommendation:

> "The use of the so-called Henry VIII clause conferring power on a Minister to modify the provisions of Acts of Parliament should be abandoned in all but most exceptional cases and should not be permitted by Parliament except upon special grounds stated in a ministerial memorandum to the Bill. *Henry VIII clause should never be used except for the sole purpose of bringing the Act into operation but subject to the limit of one year.*"[85] (emphasis supplied)

10. FUNCTIONS WHICH CANNOT BE DELEGATED (IMPERMISSIBLE DELEGATION)

Essential legislative functions

Even though there is no specific bar in the Constitution of India 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.

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83. (1997) 7 SCC 198.

84. Per Sarkaria, J. in *Sinai* v. *Union of India*, (1975) 3 SCC 765: AIR 1975 SC 797 (809).

85. *Cited* by Mahajan J. in *Delhi Laws Act, 1912, Re*, AIR 1951 SC 332 (372). For detailed discussion: *see* C.K. Thakker: *Administrative Law*, 1992, pp. 86-91.

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*.

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. 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.

Removal of difficulties

Under the guise of enabling the executive to remove difficulties, the legislature cannot enact a *Henry VIII clause* and thereby delegate essential legislative functions to the executive, which could not otherwise have been delegated.

Retrospective operation

The legislature has plenary power of law making and in India, 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.[86]

Future Acts

The 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.

Imposition of tax[87]

Ouster of jurisdiction of courts

The legislature cannot empower the executive by which the jurisdiction of courts may be ousted. This is a pure legislative function.

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86. For detailed discussion *see* Lect. V (*infra*).
87. *See* Taxing Statutes (*infra*).

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.

11. DELEGATION IN FAVOUR OF LOCAL AUTHORITIES

(a) General

Local authorities are subordinate branches of governmental activities. They are democratic institutions managed by representatives of the people. They function for public purposes and take away a part of the government affairs in local areas. They are political sub-divisions and agencies which exercise a part of State functions.[88]

(b) Nature and scope

Where a legislature confers power of delegated legislation on local authorities such as municipalities, panchayats, local boards, etc. the question must be decided bearing in mind various considerations.

There is a wide area of delegation in the matter of imposition of taxes. Such taxes are for local needs for which local inquiries have to be made. They are usually left to the representatives of the local population, including those who pay taxes. Moreover, such taxes vary from place to place and from commodity to commodity. The problems of different local bodies may also be different. One local authority may require one kind of tax at a particular rate at a particular time while another local authority may need another kind of tax at another rate at some other time. It is impossible for the legislature to enact laws for the imposition of uniform taxes in all local areas. Regard being had to the democratic set up of local bodies which need the proceeds of such taxes for their own administration, it is appropriate to leave to the local authorities the power to impose and collect taxes. It is not necessary to specify all the situations in which taxes can be imposed. It is also not necessary to fix the rates at which taxes can be imposed and even fixation of rate can be left to such local authorities, provided the legislature has taken care to specify sufficient safeguards necessary in fixing the rate.[89]

88. *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*, AIR 1968 SC 1232 (1254): (1968) 3 SCR 251.
89. *Ibid.*, at pp. 1261-63 (AIR).

(c) Object

Local authorities have to perform various statutory functions. For discharging those functions, they need money. Their needs vary from time to time with the prevailing exigencies. The power to impose and collect tax, however, must necessarily be limited by the expenses required to discharge such functions. A local authority cannot spend anything for any purpose other than those specified in the Act which creates it.[90]

(d) Judicial approach

Judiciary has adopted liberal attitude in the matters of delegation of legislative power in favour of local authorities. In various cases, it has been held that the power to impose tax, to prescribe the maximum or minimum rate of tax, to fix class or classes of persons or the description or descriptions of articles or properties to be taxed and to lay down the system of assessment and exemptions, if any, to be granted can be left to local bodies and conferment of such power does not amount to excessive delegation.[91]

In *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*[92], Wanchoo, C.J. stated: "(I)t appears to us that the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation."[93]

(e) Limitations

Even if it is conceded that while deciding the question of constitutionality of a provision permitting delegated legislation the fact that delegation is made in favour of an elected body responsible to the people and is accountable to the local electorate is a relevant consideration, it is not the conclusive factor in holding the delegation valid and permissible. If that be true, Parliament may justifiably and indiscriminately delegate its power to other bodies by constituting them from among the representatives of the people.[94]

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90. *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*, supra; *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137: AIR 1979 SC 321.
91. *Ibid.*, see also *Gulabchand Bapalal* v. *Ahmedabad Municipal Corpn.*, (1972) 4 SCC: AIR 1971 SC 2100.
92. AIR 1968 SC 1232: (1968) 3 SCR 251.
93. AIR 1968 SC 1232 (1244): (1968) 3 SCR 251 (269-70). *See* also *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137 (151): AIR 1979 SC 321.
94. AIR 1968 SC 1232 (1243, 1264): (1968) 3 SCR 251.

(f) Principles

In the leading case of *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*,[95] after considering Foreign and Indian decisions on the point, the following principles have been laid down by Wanchoo, C.J.:

(1) that the delegation was to an elected body responsible to the people, including those who pay taxes and to whom the councillors have every four years to turn to for being elected;

(2) that the limits of taxation were to be found in the purposes of the Act for the implementation of which alone taxes could be raised and though this factor was not conclusive, it was nonetheless relevant and must be taken into account with other relevant factors;

(3) that the impugned Section 150 itself contained a provision which required that the maximum rate fixed by the Corporation should have the approval of the Government;

(4) that the Act contained provisions which required adoption of budget estimates by the Corporation annually; and

(5) that there was a check by the courts of law where the power of taxation is used unreasonably or in non-compliance or breach of the provisions and objects of the Act.[96]

(g) Conclusions

The doctrine of excessive delegation of legislative power applies to the conferment of such power on local authorities as well. The constitutional power to legislate in respect of a particular subject such as local Government[97] does not carry with it the power to delegate essential legislative functions. Authority to legislate in respect of powers of local bodies may include authority to confer power upon local bodies to impose and collect tax but such power cannot override constitutional limitations against abdication of essential legislative functions. The expression "*power*" does not include authority to delegate the essential legislative function without disclosing principles, policy or standard guiding the local bodies in the exercise of the power.

It is submitted that the following observations of Shah, J. (as he then was) in *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*[98] lay down

95. AIR 1968 SC 1232: (1968) 3 SCR 251.
96. AIR 1968 SC 1232 (1245-47): (1968) 3 SCR 251; see *Gulabchand Bapalal* v. *Municipal Corpn. of Ahmedabad City*, AIR 1971 SC 2100 (2106).
97. Constitution of India, Schedule VII, List II, Entry 5.
98. AIR 1968 SC 1232: (1968) 3 SCR 251.

correct law on the point. His Lordship rightly stated:

> "A local authority is undoubtedly an instrument of the State in the matter of local Government restricted to a particular area in which it functions. By investing a local authority with powers of legislation for administration of the Act relating to local Government, sovereign power of the State is entrusted to the body for limited purpose; but the entrustment of power is as a delegate, and must in our view be within the limits of permissible entrustment consistent with the constitutional scheme. *The power of the State to legislate in matters of taxation within the allotted field is plenary, but in entrusting that power to a local authority the legislature cannot confer unguided authority.*[1] (emphasis supplied)

12. TAXING STATUTES

With regard to delegation in taxing legislation, the following principles may be treated as well settled[2]:

(1) The power to impose a tax is essentially a legislative function. Under Article 265 of the Constitution 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. Therefore, the legislature cannot delegate the essential legislative function of imposition of tax to an 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 or to bring certain commodities under the levy of tax.

(3) The legislature is competent to enact two laws providing for two taxes of the same kind on the same commodity for different purposes.

(4) If a particular item is declared non-taxable under one enactment but is declared taxable under the other, there cannot be said to be conflict between the two enactments and one cannot repeal the other.

(5) The power to fix the rate of tax is a legislative function, but if the legislative policy has been laid down, the said power can be delegated to the executive. Commodities belonging to the same category should not, however, be subjected to different and discriminatory rates in absence of any rational basis.

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1. AIR 1968 SC 1232 at 1261.
2. For detailed discussion and case-law, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 93-95.

(6) 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.

(7) A taxing statute should be construed strictly. If a provision is ambiguous, the interpretations which favours the assessee should be accepted.

(8) A distinction, however, should always be made between charging provisions and machinery provisions. Machinery provisions should be construed liberally so as to make charging provisions effective and workable.

13. CONDITIONAL LEGISLATION

(a) Definition

Hart[3] defines conditional legislation as 'a statute that provides controls but specifies that they are to go into effect only when a given administrative authority fulfils the existence or conditions defined in the statute'.

(b) Nature and scope

In conditional legislation, legislature makes the law. It is full and complete. No legislative function is delegated to the executive. But the said Act is not brought into force and it is left to the executive to bring the Act into operation on fulfilment of certain conditions or contingencies and for that reason the legislation is called 'conditional legislation' or 'contingent legislation'.

Cooley[4] also says: "It is not always essential that a legislative act should be a completed statute which must in any event take effect as law at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event."

(c) Illustrative cases

In the leading case of *Field* v. *Clark*[5], the President was empowered to suspend the operation of an Act permitting free import of certain products in the U.S. on being satisfied that the duties imposed upon such products were reciprocally unequal and unreasonable. The Supreme

3. *An Introduction to Administrative Law with Selected Cases*, 2nd Edn., p. 810.
4. *A Treatise on the Constitutional Limitations*, 8th Edn., Vol. I, p. 227.
5. (1892) 143 US 649.

Court held the Act valid on the ground that the Act was complete and the President was a mere agent of Congress to ascertain and declare the contingency upon which the will of Congress was to take effect. The Court quoted with approval the following famous passage from a *Pennsylvania case*[6]:

> "The Legislature cannot delegate its powers to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things on which wise and useful legislation must depend which cannot be known to the law-making power and must, therefore, be the subject of enquiry and determination outside the hall of the Legislature."

In *Emperor* v. *Benoari Lal*[7], by promulgating an Ordinance, the Governor-General was empowered to set up special courts. But the operation of the Ordinance was left to the Provincial Government on being satisfied that emergency had come into existence. The High Court of Calcutta[8] held that there was excessive delegation and the Ordinance was, therefore, invalid. The Federal Court[9] confirmed the decision of the Calcutta High Court, but the Privy Council reversed the decision and upheld the validity of the Act. According to the Privy Council, it was a piece of conditional legislation as the legislation was complete and what had been delegated was the power to apply the Act on fulfilment of certain conditions.

In *State of Bombay* v. *Narottamdas*[10], by the Bombay City Civil Court Act, 1948, an Additional Civil Court was established for Greater Bombay having jurisdiction to try all suits not exceeding Rs 10,000 but the State Government was authorised to raise the jurisdiction up to Rs 25,000. The Supreme Court held that the provision was merely a conditional legislation and upheld it. The legislature itself determined that the new court should be invested with the jurisdiction up to Rs 25,000 in value, but left it to the executive to determine when the said power could be exercised.

Again, in *Inder Singh* v. *State of Rajasthan*[11], the Rajasthan Tenants' Protection Ordinance was promulgated for two years, and under Section

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6. (1873) 71 *Locke's Appeal* 491.
7. AIR 1945 PC 48: 72 IA 57.
8. *Benoari Lal* v. *Emperor*, AIR 1943 Cal 285: 44 Cri LJ 673 (FB).
9. *Emperor* v. *Benoari Lal*, AIR 1943 FC 36: 208 IC 564.
10. AIR 1951 SC 69: 1951 SCR 51.
11. AIR 1957 SC 510: 1957 SCR 605.

thereof, the Rajpramukh was empowered to extend the life of the said Ordinance by issuing a notification, if required. The duration of the Ordinance was extended by issuing a notification which was challenged before the Supreme Court. The Court upheld the provision as being conditional legislation.

If we compare this case with *Jatindra Nath Gupta*[12], one thing seems to be clear, that before Independence, the Federal Court had taken a narrow view with regard to delegated legislation while the Supreme Court has taken a liberal view.

In *Tulsipur Sugar Co. Ltd.* v. *Notified Area Committee*[13], by issuing a notification under Section 3 of the U.P. Town Areas Act, 1914, the limits of Tulsipur Town were extended to village Shitalpur where the sugar factory of the plaintiff was situated. The notification was challenged on the ground that the procedure under the Act was not followed and the subordinate legislation was, therefore, bad. Negativing the contention and holding the case to be one of conditional legislation, the Supreme Court held that 'the effect of making the Act applicable to a geographical area is in the nature of conditional legislation' and that 'it cannot be characterised as a piece of subordinate legislation'.[14]

d) Conditional Legislation and Delegated Legislation: Distinction

Delegated legislation is sometimes distinguished from conditional legislation on the anvil of *discretion*. In conditional legislation, it is the duty of the executive to apply the law after performing the function of *fact-finding* (e.g. to inquire whether facts requiring operation of the Act exist); on the other hand, in case of delegated legislation, it is left to the *discretion* of the Government whether to exercise the power delegated to it or not. In *Hamdard Dawakhana* v. *Union of India*[15], the Supreme Court pointed out the distinction between the two in the following terms:

> "The distinction between conditional legislation and delegated legislation is that in the former the delegate's power is that of determining when a legislative-declared rule of conduct shall become effective... and the latter involves delegation of rule-making power which constitutionally may be exercised by the administrative agent."

However the question is: Can it be said that there is total absence of discretion in conditional legislation ? As a matter of fact, whether

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12. *Jatindra Nath Gupta* v. *Province of Bihar*, AIR 1949 FC 175: 1949 FCR 595.
13. (1980) 2 SCC 295: AIR 1980 SC 882.
14. *Id.* at p. 306 (SCC).
15. AIR 1960 SC 554 (566): (1960) 2 SCR 671.

emergency exists or not, or whether tariff rates are high or low or whethe the application of law is reasonable or unreasonable cannot be decide on *mere facts* and the element of *discretion* definitely creeps in.

(e) Conclusions

It is submitted that in view of the rapid growth of Administrativ Law and acceptance of the doctrine of delegated legislation, now it i not necessary to stick to the artificial distinction between 'delegated legis lation' and 'conditional legislation'. When the courts were not readil accepting or approving the doctrine of delegated legislation, in the guis of conditional legislation, they were upholding the legislative measures *'Contingent formula'* was merely a fiction employed by the Suprem Court of the U.S. to get away from the doctrine of separation of powers This doctrine had some validity in pre-Constitution India because the the courts were not willing to concede to the non-sovereign legislatures power of delegated legislation, and therefore, the term *'conditional legis lation'* was applied in order to uphold a limited delegation of legislativ power. What can be upheld by conditional legislation can be easil upheld as delegated legislation. The capacity of the legislature to dele gate having been recognised now, the doctrine of conditional legislatio appears to have become redundant because the greater would include lesser. *Subordinate legislation* is a broader term which would includ a narrower term *'conditional legislation'* inasmuch as, conditiona legislation is 'a form of delegation' and 'a very common instance c delegated legislation'.

14. SUB-DELEGATION

(a) Definition

When a statute confers some legislative powers on an executive auth ority and the latter further delegates those powers to another subordinat authority or agency, it is called 'sub-delegation'.

Thus, in sub-delegation, a delegate further delegates. This process c sub-delegation may go through many stages. If we may call the enablin Act the 'parent' and the delegated and sub-delegated legislation th 'children', the parent, in his own lifetime may beget descendants up t four or five degrees.

(b) Illustration

An important illustration of sub-delegation is found in the Essenti Commodities Act, 1955. Section 3 of the Act empowers the Central Gov ernment to make rules. This can be said to be the first-stage delegatio Under Section 5, the Central Government is empowered to delega

powers to its officers, the State Governments and their officers. Usually under this provision, the powers are delegated to State Governments. This can be said to be the second-stage delegation (sub-delegation). When the power is further delegated by the State Governments to their officers, it can be said to be the third-stage delegation (sub-sub-delegation). Thus, under Section 3 of the Essential Commodities Act, 1955, the Sugar Control Order, 1955 was made by the Central Government (first-stage delegation). Under the Order, the functions and powers are conferred on the Textile Commissioner (second-stage delegation). Clause 10 empowered the Textile Commissioner to authorise any officer to exercise on his behalf all or any of his functions and powers under the Order (third-stage delegation).

(c) Object

The necessity of sub-delegation is sought to be supported, *inter alia*, on the following grounds:

(*i*) power of delegation necessarily carries with it power of further delegation; and

(*ii*) sub-delegation is *ancillary* to delegated legislation; and any objection to the said process is likely to subvert the authority which the legislature delegates to the executive.

Sub-delegation of legislative power can be permitted either when such power is expressly conferred by the statute or can be inferred by necessary implication.

(d) Express power

Where a statute itself authorises an administrative authority to sub-delegate its powers, no difficulty arises as to its validity since such sub-delegation is within the terms of the statute itself. Thus in *Central Talkies* v. *Dwarka Prasad*[16], the U.P. (Temporary) Control of Rent and Eviction Act, 1947 provided that no suit shall be filed for the eviction of a tenant without permission either of a District Magistrate or any officer authorised by him to perform any of his functions under the Act. An order granting permission by the Additional District Magistrate to whom the powers were delegated was held valid.

On the other hand, in *Allingham* v. *Minister of Agriculture*[17], under the relevant statute, the Committee was empowered by the Minister of Agriculture to issue directions. The Committee sub-delegated its power to its subordinate officer, who issued a direction, which was challenged.

16. AIR 1961 SC 606: (1961) 3 SCR 495.
17. (1948) 1 All ER 780.

The court held that sub-delegation of power by the committee was not permissible and the direction issued by the subordinate officer was, therefore, *ultra vires*.

In *Ganpati* v. *State of Ajmer*[18], the parent Act empowered the Chief Commissioner to make rules for the establishment of proper system of conservancy and sanitation at fairs. The rules made by the Chief Commissioner, however, empowered the District Magistrate to devise his own system and see that it was observed. The Supreme Court declared the rules *ultra vires* as the parent Act conferred the power on the Chief Commissioner and not on the District Magistrate and, therefore, the action of the Chief Commissioner sub-delegating that power to the District Magistrate was invalid.

Again, sometimes, a statute permits sub-delegation to authorities or officers not below a particular rank or in a particular manner only. As per settled law "if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited". In other words, '*where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all*'.[19] (emphasis supplied)

In *Ajaib Singh* v. *Gurbachan Singh*[20], under the relevant statute, the Central Government was empowered to make rules for detention of any person by an authority not below the rank of District Magistrate. Where the order of detention was passed by an Additional District Magistrate, the action was held bad. Again, if sub-delegation is to be made through regulations, it could not be effected by passing a resolution. In *Barium Chemicals Ltd.* v. *Company Law Board*[21], the rules framed by the Central Government empowered the Chairman to distribute the business of the Board among himself as well as other members. The Chairman passed an order vesting certain powers in himself alone. The Supreme Court by a majority of 3 : 2[22] upheld the said Act. In a dissenting judgment, Shelat, J., however, rightly observed: "The statute having permitted the delega-

18. AIR 1955 SC 188: (1955) 1 SCR 1065; see also *A.K. Roy* v. *State of Punjab*, (1986) 4 SCC 326: AIR 1986 SC 2160.
19. *Craies on Statute Law*, 6th Edn., p. 263; see also *Barium Chemicals* v. *Company Law Board* (*infra*).
20. AIR 1965 SC 1619: (1965) 2 SCR 845; see also *Hari Chand* v. *Batala Engg. Co.*, AIR 1969 SC 483: (1969) 2 SCR 201.
21. AIR 1967 SC 295: 1966 Supp SCR 311.
22. Sarkar, C.J., Mudholkar and Bachawat, JJ. (Hidayatullah and Shelat, JJ. *contra.*); *see* p. 329 (AIR).

tion of powers to the Board only as the statutory authority, the powers so delegated have to be exercised by the Board and *not by its components.*''[23] (emphasis supplied)

(e) Implied power

But what would be the position if there is no specific or express provision in the statute ? The answer is not free from doubt. In *Jackson* v. *Butterworth*[24], Scott, L.J. held that the method (of sub-delegating power to issue circulars to local authorities) was convenient and desirable, but the power so to sub-delegate was, unfortunately, absent.

The other view is that even if there is no provision in the parent Act about sub-delegation of power by the delegate, the same may be inferred by necessary implication. Griffith rightly states, ''if the statute is so widely phrased that two or more 'tiers' of sub-delegation are necessary to reduce it to specialised rules on which action can be based, then it may be that the courts will imply the power to make the necessary sub-delegated legislation''.

In *States* v. *Bareno*[25], the parent Act conferred on the President the power to make regulations concerning exports and provided that unless otherwise directed the functions of the President should be performed by the Board of Economic Welfare. The Board sub-delegated the power to its Executive Director, who further sub-delegated it to his assistant, who in turn delegated it to some officials. The court held all the sub-delegations valid.

(f) Criticism

The practice of sub-delegation has been heavily criticised by jurists. It is well established that the maxim *delegatus non potest delegare* (a delegate cannot further delegate) applies in the field of delegated legislation also and sub-delegation of power is not permissible unless the said power is conferred either expressly or by necessary implication. de Smith[26] says, 'there is strong presumption against construing a grant of delegated legislative power as empowering the delegate to sub-delegate the whole or any substantial part of the law-making power entrusted to

23. AIR 1967 SC 295 (329): 1966 Supp SCR 311; see also *Naraindas* v. *State of M.P.*, (1974) 4 SCC 788: AIR 1974 SC 1232.
24. (1948) 2 All ER 558.
25. 50 F Supp 520; see also *Harishankar Bagla* v. *State of M.P.*, AIR 1954 SC 465: (1955) 1 SCR 380.
26. *Judicial Review of Administrative Action*, 1995, pp. 357-58; see also *Halsbury's Laws of England*, (4th Edn.), Vol. 1, p. 354 cited in *Sahni Silk Mills (P) Ltd.* v. *ESI Corpn.*, (1994) 5 SCC 346.

it'. Bachawat, J. in the leading case of *Barium Chemicals Ltd.* v. *Company Law Board*[27] states: "The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him, and there is a presumption that he is required to do the act himself and cannot redelegate his authority."

It is also said, 'sub-delegation at several stages removed from the source dilutes accountability of the administrative authority and weakens the safeguards granted by the Act. It becomes difficult for the people to know whether the officer is acting within his prescribed sphere of authority. It also transfers power from a higher to a hierarchically lower authority. It is, therefore, necessary to limit in some way the degrees to which sub-delegation may proceed.'[28]

Finally, there are serious difficulties about publication of sub-delegated legislation. Such legislation, not being an Act of Legislature, there is no general statutory requirement of publicity. 'Though casually made by a minor official, sub-delegation creates a rule and sets up a standard of a conduct for all to whom the rule applies. No individual can ignore the rule with impunity.'[29] But at the same time the general public must have access to the law and they should be given an opportunity to know the law. In case of such delegated and sub-delegated legislation, proper publication is lacking.

(g) Conclusions

It is submitted that the following observations of Streatfield, J. in *Patchett* v. *Leathem*[30] 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 at 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."[31]

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27. AIR 1967 SC 295 (311-12): 1966 Supp SCR 311.
28. M.P. Jain: *Treatise on Administrative Law*, 1996, Vol. 1, p. 180.
29. Rao: *Administrative Law*, 1981, p. 72.
30. (1949) 65 TLR 69.
31. *Id.* at p. 70; *see also* Wade: *Administrative Law*, 1988, p. 861; *Srinivasan* v.

15. GENERAL PRINCIPLES

From various judgments of the Supreme Court the following general principles regarding delegated legislation emerge:[32]

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

State of Karnataka, (1987) 1 SCC 658: AIR 1987 SC 1059; *see further* Lecture V (*infra*).

32. For case-law *see* C.K. Thakker: *Administrative Law*, 1996, p. 103.

(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.

Lecture V

Delegated Legislation (Controls and Safeguards)

We doubt, however, whether Parliament itself has fully realised how extensive the practice of delegation has become, or the extent to which it has surrendered its own functions in the process, or how easily the practice might be abused.

—THE COMMITTEE ON MINISTERS' POWERS

Today the question is not whether delegated legislation is desirable or not, but it is what controls and safeguards can be introduced so that the power conferred is not misused or misapplied.

—THE COMMITTEE ON SUBORDINATE LEGISLATION

It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover dormant or latent legislative policy to sustain an arbitrary power conferred on the executive authorities. It is the duty of the Court to strike down without any hesitation any blanket power conferred on the executive by the legislature.

—JUSTICE SUBBA RAO

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1. INTRODUCTION

As discussed in Lecture IV, whatever prejudices might have existed against delegated legislation in the past, today it has come to stay. At present, in almost all the countries, the technique of delegated legislation is resorted to and some legislative powers are delegated by the legislature to the executive. Even in England the crusade against delegated legislation has been given up. It has to be conceded that in the present day legislative powers can validly be delegated to the executive *within the permissible limits.* At the same time, there is inherent danger of abuse of the said power by the executive authorities. The basic problem, therefore, is that of controlling the delegate in exercising his legislative powers. As the Committee on Ministers' Powers states, though the practice of delegated legislation is not bad, 'risks of abuse are incidental to it' and, therefore, safeguards are required 'if the country is to continue the advantages of the practice without suffering from its inherent dangers'. Thus, 'today the question is not whether delegated legislation is desirable or not, but what controls and safeguards can and ought to be introduced so that the rule-making power conferred on the Administration is not misused or misapplied'.[1]

It has been rightly said that one has to find out a middle course between two conflicting principles; one permitting very wide powers of delegation for practical reasons while the other that no new legislative bodies should be set up by transferring essential legislative functions to administrative authorities.[2] Delegated legislation has become inevitable but the question of control has become crucial.[3]

The control must be introduced at two stages: *firstly*, at the source, i.e. the safeguards must be provided when the legislature confers the legislative power on the executive. This aspect has already been discussed in Lecture IV; *secondly*, some safeguards must be provided in case of misuse or abuse of power by the executive. In this lecture, we will discuss certain controls and safeguards against the possible abuse of legislative power by the executive authorities.

Controls over the delegated legislation may be divided into three categories: (*a*) judicial control; (*b*) legislative control; and (*c*) other controls.

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1. Committee on Subordinate Legislation (First Lok Sabha), 1954 (3rd Report), p. 16; *see also* M.P. Jain: *Treatise on Administrative Law*, 1996, p. 93.
2. *Delhi Laws Act, 1912, Re*, AIR 1951 SC 332 (para 388): 1951 SCR 747.
3. *Committee on Ministers' Powers Report*, 1932, p. 54.

2. JUDICIAL CONTROL

Delegated legislation does not fall beyond the scope of judicial review and in almost all the democratic countries it is accepted that courts can decide the validity or otherwise of delegated legislation mainly applying two tests:—

(*a*) substantive *ultra vires*; and

(*b*) procedural *ultra vires*.

(*Ultra vires* means beyond powers).

(A) Substantive ultra vires

(*a*) *Definition*

When a subordinate legislation goes beyond what the delegate is authorised to enact, it is known as substantive *ultra vires*.

(*b*) *Principle explained*

Substantive *ultra vires* means that the delegated legislation goes beyond the scope of the authority conferred on it by the parent statute or by the Constitution. It is a fundamental principle of law that a public authority cannot act outside the powers; i.e. *ultra vires*, and it has been rightly described as the 'central principle' and 'foundation of large part of administrative law'. An act which is for any reason in excess of power is *ultra vires*.[4]

Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, *intra vires* the power granted and on relevant considerations. All his decisions, whether characterised as legislative, administrative or *quasi*-judicial, must be in harmony with the Constitution and other laws of the land. They must be reasonably related to the purposes of the enabling legislation. If they are manifestly unjust or oppressive or outrageous or directed to an unauthorised end or do not tend in some degree to the accomplishment of the objects of delegation court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*."[5]

(*c*) *Circumstances*

A delegated legislation may be held to be invalid on the ground of substantive *ultra vires* in the following circumstances:

(*i*) Where parent Act is unconstitutional.

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4. Wade: *Administrative Law*, 1994, p. 41.
5. *Sitaram Sugar Mills* v. *Union of India*, (1990) 3 SCC 223(251-52): AIR 1990 SC 1277.

(*ii*) Where delegated legislation is inconsistent with the parent Act.

(*iii*) Where delegated legislation is unconstitutional.

(*iv*) Unreasonableness.

(*v*) Mala fide: Bad faith.

(*vi*) Sub-delegation.

(*vii*) Exclusion of judicial review.

(*viii*) Retrospective effect.

Let us consider each ground in detail:

(*i*) *Where parent Act is unconstitutional*

For delegation to be valid, the first requirement is that the parent Act or enabling statute by which legislative power is conferred on the executive authority must be valid and constitutional, because if the delegating statute itself is *ultra virès* the Constitution and is bad for that reason, delegated legislation also is necessarily bad.

Thus, in *Tan Bug Taim* v. *Collector of Bombay*[6], under the Defence of India Act, 1939 the Central Government was empowered to make rules for requisition of immovable property. But the subject of requisition of immovable property was not within the field of the Federal legislature itself. On that ground, the rule was held invalid. Similarly, in *Chintamanrao* v. *State of M.P.*[7], the parent Act authorised the Deputy Commissioner to prohibit the manufacture of bidis in some areas during certain periods. The order passed by the Deputy Commissioner under the Act was held *ultra vires* inasmuch as the Act under which it was made violated the Fundamental Right to carry on any occupation, trade or business, guaranteed by Article 19(1)(*g*) of the Constitution of India. Likewise in *New Manek Chowk Mills* v. *Ahmedabad Municipality*[8], Rule 7(2) of the rules framed under the Bombay Provincial Municipal Corporations Act, 1949, imposing tax on machinery was held invalid on the ground that the State legislature had power to levy a tax only on lands and buildings and not on machinery.

However, when the parent Act is challenged on the ground that it is unconstitutional or *ultra vires* the powers of the legislature which enacted it, the true nature and character of the statute is required to be ascertained. To do that one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such exam-

6. AIR 1946 Bom 216: 47 Bom LR 1010.

7. AIR 1951 SC 118: 1950 SCR 759.

8. AIR 1967 SC 1801: (1967) 2 SCR 679; see also *Bharat Coking Coal Ltd.* v. *State of Bihar*, (1990) 4 SCC 557.

ination it is found that the legislation is in substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. For that purpose, courts have evolved the doctrine of 'pith and substance' or 'true nature and character' of the statute.[9]

Entries in the Seventh Schedule to the Constitution are legislative heads or fields of legislation. The legislature derives its power from Article 246 of the Constitution and not from the respective entries. The language of the respective entries, therefore, should be given widest scope of their meaning. It is well recognised that where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation, the rule of pith and substance has to be applied to determine the competence of the legislature. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be comprehended in it.[10] "It must be remembered that we are interpreting the Constitution and when the court is called upon to interpret the Constitution, it must not be construed in any narrow or pedantic sense and adopt such construction which must be beneficial to the amplitude of legislative powers. *The broad and liberal spirit should inspire those whose duty is to interpret the Constitution to find whether the impugned Act is relatable to any entry in the relevant list.*"[11] (emphasis supplied)

(ii) Where delegated legislation is inconsistent with parent Act

The validity of the delegated legislation can be challenged on the ground that it is *ultra vires* the parent Act or enabling statute or any general law. It is an accepted principle that delegated authority must be exercised strictly within the authority of law. Delegated legislation can be held valid only if it conforms exactly to the power granted.

Thus, in *U.S.* v. *Two Hundred Barrels of Whisky*[12], the parent Act provided for admitting duty-free animals especially imported for breeding purposes. The regulation made under the Act required the animals to be of a superior stock if they were to be admitted duty-free. The court held the regulation *ultra vires* as the parent Act included all animals while

9. *United Province* v. *Atiqa Begum*, AIR 1941 FC 16(25): 1940 FCR 110; *Krishna* v. *State of Madras*, AIR 1957 SC 297(303); *State of Rajasthan* v. *Chawla*, AIR 1959 SC 544 (546): 1959 Supp (1) SCR 904; *Jagannath* v. *State of U.P.*, AIR 1962 SC 1563(1568): (1963) 1 SCR 220.

10. *Goodricke Group Ltd.* v. *State of West Bengal*, 1995 Supp (1) SCC 707 (718-19)

11. *Jilubhai* v. *State of Gujarat*, 1995 Supp (1) SCC 596 (609): AIR 1995 SC 142

12. (1877) 95 US

the regulation confined its operation to animals of a particular stock alone.

Again, in *Chester* v. *Bateson*[13], a regulation issued under the parent Act prohibited a landlord from having access to courts to recover possession of a dwelling, occupied by a war-worker, except with the consent of a Minister and imposed penalty for taking such proceedings. The court held the regulation illegal as it deprived the King's subjects of their right of access to the Courts of Justice and rendered them liable to punishment in case they had the temerity to ask for justice in any of the King's Courts.

This principle is accepted in India also. In *Chandra Bali* v. *R*[14], the validity of certain rules framed under the Northern India Ferries Act, 1878 was questioned. The Act authorised the making of rules for the purpose of maintaining order and ensuring safety of passengers and property. The delegate, however, framed rules forbidding the establishment of private ferries within a distance of two miles from the boundaries of another ferry. The court held that the rules were outside the scope of the delegated power and therefore *ultra vires*.

Similarly, in *Mohd. Yasin* v. *Town Area Committee*[15], under the parent Act, the municipality was empowered to charge fee only for the use and occupation of some property of the committee, but the Town Area Committee framed bye-laws and imposed levy on wholesellers irrespective of any use or occupation of property by them. The Supreme Court held that the bye-laws were beyond the powers conferred on the committee and were *ultra vires*.

In *Municipal Corpn. of Greater Bombay* v. *Nagpal Printing Mills*[16], the parent Act empowered the corporation to levy charge only in respect of water supplied to and consumed by the consumer. The rule, however, authorised levy of charges on the basis of minimum quantity irrespective of consumption. The Supreme Court held the rule ultra vires and inconsistent with the parent Act.

Likewise, in *Indian Council of Legal Aid & Advice* v. *Bar Council of India*[17], a rule was framed by the Bar Council barring enrolment as advocates of persons who had completed 45 years of age. The parent

13. (1920) 1 KB 829.
14. AIR 1952 All 795.
15. AIR 1952 SC 115; see also *State of Karnataka* v. *Ganesh Kamath*, (1983) 2 SCC 402: AIR 1983 SC 550; *GOC-in-Chief* v. *Subhash Chandra Yadav*, (1988) 2 SCC 351: AIR 1988 SC 876.
16. (1988) 2 SCC 466: AIR 1988 SC 526.
17. (1995) 1 SCC 732: AIR 1995 SC 691.

Act enabled the Bar Council to lay down conditions subject to which an advocate "shall have right to practice". Declaring the rule ultra vires, the Supreme Court held that the Bar Council can make the rule only after a person is enrolled as an advocate, i.e. at post-enrolment stage. It cannot frame a rule barring persons from enrolment. The rule was thus inconsistent with the parent Act.

The question, however, is as to when a bye-law or any other delegated legislation can be said to be inconsistent with or repugnant to the parent Act or any general law and, therefore, bad. In *White* v. *Morley*[18], Channel, L.J. stated: "A bye-law ... is not bad because it deals with something that is not dealt with by the general law. But *it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful.*"

(emphasis supplied)

Whether a particular piece of delegated legislation is in excess of the power of subordinate legislation conferred on the delegate has to be determined with reference to the specific provisions contained in the relevant statute conferring the power to make the rule, regulation, etc. and also the object and purpose of the Act as can be gathered from various provisions of the enactment.

Thus, in *Tata Iron & Steel Co.* v. *Workmen*[19], the relevant statute empowered the Central Government to frame the bonus scheme for employees. In exercise of the power, the Central Government created a *quasi*-judicial tribunal to decide certain disputes. Rejecting the contention that such a tribunal can only be created by the legislature and not by an executive fiat, the Supreme Court observed that it was a matter of detail "which is subsidiary or ancillary to the main purpose of the legislative measure for implementing the Scheme".

Similarly, in *State of T.N.* v. *Hind Store*[20], the parent Act empowered the State Government to make rules for regulating the grant of mining leases. Rule 8-C framed by the State Government *totally* prohibited quarrying in black granite by private enterprise. It was contended that the rule was *ultra vires* the parent Act and was, therefore, bad. Negativing the contention and interpreting the connotation 'regulation' in a wider sense, the Supreme Court observed: "We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."

18. (1899) 1 QB 34 (39).
19. (1972) 1 SCC 383: AIR 1972 SC 1917.
20. (1981) 2 SCC 205: AIR 1981 SC 711.

In *Arlidge* v. *Islington Corpn.*[29], a bye-law made by a corporation required the landlord of a lodging house to cause the premises to be cleansed once a year, and penalty was imposed for breach of the said bye-law. The Court held the bye-law *ultra vires* as unreasonable, as the premises might have been leased by the landlord and he might be unable to carry out the work without committing trespass.

In the leading case of *Kruse* v. *Johnson*[30], in exercise of the power conferred by the parent Act on the County Council of Kent, a bye-law was made 'prohibiting any person from playing music or singing in any public place or highway within fifty yards of any dwelling-house'. It was held *ultra vires* on the ground that the same was unreasonable.

But the question is: when can a bye-law be said to be unreasonable? Lord Russell, C.J. propounds:

> "If, for instance, they (bye-laws) were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, *'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires'*."[31] (emphasis supplied)

But at the same time it should not be forgotten that such bye-laws must be 'benevolently construed' and they ought to be supported if possible. As Lord Russell says:

> "A bye-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient ... in matters which directly and mainly concern the people of the country who have the right to choose those whom they think best fitted to represent them in their local Government bodies, such representatives may be trusted to understand their own requirements better than judges."[32]

(*b*) *India*

The same principles are accepted in India also. In *Air India* v. *Nargesh Meerza*[33], a regulation framed by Air India providing for termination of services of an air hostess on her first pregnancy was held to be ex-

29. (1909) 2 KB 127.
30. (1898) 2 QB 91: 67 LJ QB 782: 79 LT 647.
31. *Id.* at pp. (99-100) (QB).
32. *Id.* at p. 100 (QB).
33. (1981) 4 SCC 335: AIR 1981 SC 1829.

tremely arbitrary, unreasonable, abhorrent to the notions of a civilized society and interfering with the ordinary course of human nature. It is "not a disability but one of the natural consequences of marriage and is an immutable characteristic of married life".[34]

Similarly, in *State of Maharashtra* v. *Chandrabhan Tale*[35], Rule 151(1)(*ii*)(*b*) of the Bombay Civil Services Rules, 1959 providing Re 1 as subsistence allowance after conviction of a government employee even if his appeal is pending is held to be 'unreasonable and void'. It also 'stultifies the right of appeal and is unfair and unconstitutional'. "The award of subsistence allowance at the rate of Re 1 per month can only be characterised as ludicrous."[36]

Reference, however, requires to be made to two decisions of the Supreme Court. In *Trustees, Port of Madras* v. *Aminchand*[37], the Scale of Rates fixed by the Board was challenged as unreasonable. The High Court of Madras held that the Scale of Rates fixed by the Board was in the nature of bye-laws and they can be declared *ultra vires* if they are unreasonable. Disagreeing with the High Court, the Supreme Court observed: "Those who desire to avail of the services of the Board are liable to pay for those services at prescribed rates...."[38] Such scale of rates, therefore, according to the court, would not be subject to the test of reasonableness.

Similarly, in *S. Narayan Iyer* v. *Union of India*[39], the Supreme Court 'washed off its hands' from the task of scrutinising the reasonableness of the telephone rates fixed by the Government. None of the reasons put forward by the court was at all convincing. The court observed that a subscriber to a telephone has option to enter into a contract or not. But if he does so, he has to pay the rates and he cannot contend that the rates are not fair. But the court ignored the material fact that the Government has a monopoly to provide telephone service and if any person wants such service, he has to apply for it. It does not, however, empower the Government to fix any rates arbitrarily, capriciously or at its sweet will even though they are unreasonable. Such an argument was negatived by the Supreme Court itself. In *Vaish Degree College* v. *Lakshmi Narain*[40] and in *Central Inland Water Transport Corpn.* v. *Brojo Nath Gan-*

34. *Id.* at p. 370 (SCC): 1852 (AIR).
35. (1983) 3 SCC 387: AIR 1983 SC 803.
36. *Id.* at p. 390 (SCC): 804 (AIR).
37. (1976) 3 SCC 167: AIR 1975 SC 1935.
38. *Id.* at p. 177 (SCC): 1941 (AIR).
39. (1976) 3 SCC 428: AIR 1976 SC 1986.
40. (1976) 2 SCC 58: AIR 1976 SC 888.

In *Supreme Court Employees' Welfare Assn.* v. *Union of India*[21], the Supreme Court, after referring to a number of leading cases, observed: 'Where the validity of a subordinate legislation (whether made directly under the Constitution or a statute) is in question, the court has to consider the nature, objects and the scheme of the instruments as a whole, and, on the basis of that examination, it has to consider what exactly was the area over which, and the purpose for which, power has been delegated by the governing law.'' In other words, the doctrine of 'pith and substance' which is applicable to Parliamentary Acts is applicable to delegated or subordinate legislation also.

(iii) Where delegated legislation is unconstitutional

Sometimes a parent Act or delegating statute may be constitutional and valid and delegated legislation may be consistent with the parent Act, yet the delegated legislation may be held invalid on the ground that it contravenes the provisions of the Constitution. It may seem paradoxical that a delegated legislation can be struck down on this ground because if the parent Act is constitutional and delegated legislation is consistent with the parent Act, how can the delegated legislation be *ultra vires* the Constitution? It was precisely this argument which the Supreme Court was called upon to deal with in *Narendra Kumar* v. *Union of India*[22].

In that case, the validity of the Non-Ferrous Metal Control Order, 1958 issued under Section 3 of the Essential Commodities Act, 1955 was challenged as unconstitutional. The petitioners had not challenged the validity of the parent Act. It was argued that if the enabling Act was not considered unconstitutional, the rules made thereunder could not be held to be unconstitutional. Rejecting this 'extravagant' argument, the Supreme Court held that even though a parent Act might not be unconstitutional, an order made thereunder (delegated legislation) can still be unconstitutional and can be challenged as violative of the provisions of the Constitution.

Das Gupta, J. rightly observed: ''It is clear that when Section 3 confers powers to provide for regulation or prohibition of the production, supply or distribution of any essential commodity it gives such power to make any regulation or prohibition insofar as such regulation and prohibition do not violate any Fundamental Rights granted by the Constitution of India.''[23]

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21. (1989) 4 SCC 187 (239): AIR 1990 SC 334 (336-67).
22. AIR 1960 SC 430: (1960) 2 SCR 375.
23. *Id.* at p. 433 (AIR).

Every order made under a statutory provision must not only be within the authority conferred by the statutory provision, but must also stand the test of constitutionality. Parliament cannot be presumed to have intended to confer power on an authority to act in contravention of constitutional provisions. It is a basic constitutional assumption underlying every statutory grant of power that the authority on which the power is conferred should act constitutionally and not in violation of the Constitution.[24]

In *Dwarka Prasad* v. *State of U.P.*[25], the U.P. Coal Control Order 1953 was issued under the Essential Supplies (Temporary Powers) Act, 1946. Even though the parent Act was constitutional, Clause 3(2)(*b*) of the Order was held *ultra vires* by the Supreme Court being violative of Article 19(1) not (*i*)(*g*) of the Constitution of India. Similarly, Rule 10 of the Punjab Superior Judicial Service Rules, 1963 conferring power on the Governor to confirm District Judges was held *ultra vires* the provisions of Articles 233 and 235 of the Constitution of India.[26] Likewise, a rule restricting voting right for the management of Jain temples to persons who had attained the age of 21 years, who had donated not less than Rs 500 to the temple and who were residing within the State for the last ten years was held discriminatory and, therefore, *ultra vires*.[27]

(*iv*) *Unreasonableness*

(*a*) *England*

In England, it is well-settled that the bye-laws made by corporations, boroughs and other local bodies may be declared as *ultra vires* on the ground of unreasonableness. This rule is based on a presumed intention of the legislature that the Common Law allows them to make only reasonable bye-laws. This is an implied limitation on the exercise of powers by such authorities, and, therefore, if the power is not reasonably exercised, the action is bad in law. As de Smith[28] says, "... there is no reason of principle why a manifestly unreasonable statutory instrument should not be held to be *ultra vires on that ground alone....*"

(emphasis supplied)

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24. *Maneka Gandhi* v. *Union of India*, (1978) 1 SCC 248 (314): AIR 1978 SC 597.
25. AIR 1954 SC 224: 1954 SCR 803.
26. *High Court of P&H* v. *State of Haryana*, (1975) 1 SCC 843: AIR 1975 SC 613.
27. *Labh Chandra* v. *State*, AIR 1975 Pat 206. For detailed discussion and conflicting decisions of the Supreme Court, *see* C.K. Thakker: *Administrative Law*, 1996, pp. 111-16.
28. *Judicial Review of Administrative Action*, 1980, pp. 354-55; *see also* Wade: *Administrative Law*, 1994, pp. 879-81.

guly[41], the rule providing termination of services of a permanent employee before the age of superannuation was held to be unreasonable, opposed to public policy and a "Henry VIII clause". Recently, in *Indian Council of Legal Aid & Advice* v. *Bar Council of India*[42], a rule framed by the Bar Council of India barring entry of persons who have completed 45 years of age from enrolment as advocates was held arbitrary and unreasonable.

(*v*) *Mala fide: Bad faith*

(*a*) *England*

In England, it is well-settled that an Act passed by the competent legislature cannot be questioned in court on the ground that the same was passed *mala fide* or with improper motive. Once it is held that the legislature was competent to pass such an Act, it is valid. But there is yet another principle. Whenever the legislature confers any legislative power on any administrative authority, the said power must be exercised in good faith by the latter and on proof of bad faith the court can hold the exercise of power *ultra vires*. In *R.* v. *Comptroller-General of Patents*[43], Clauson, J. observed:

> "If, on reading the Order in Council making the regulation, it seems in fact that it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulation, I agree that, on the face of the Order, it would be inoperative."[44]

Again, from the observations of Lord Russel, C.J. in *Kruse* v. *Johnson*[45], it becomes clear that if a bye-law discloses bad faith, it may be held *ultra vires* by courts on that ground also.

(*b*) *India*

The Indian view is reflected in some observations in *Narendra Kumar* v. *Union of India*[46]. In that case, while deciding the validity of the Non-Ferrous Metal Control Order, 1958, the Supreme Court observed: "*Mala fides have not been suggested* and we are proceeding on the assumption that the Central Government was honestly of the opinion that...."[47]

(emphasis supplied)

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41. (1986) 3 SCC 156: AIR 1986 SC 1571; see also *Delhi Transport Corpn.* v. *Mazdoor Congress*, 1991 Supp (1) SCC 600: AIR 1991 SC 101.
42. (1995) 1 SCC 732: AIR 1995 SC 691.
43. (1941) 2 KB 306.
44. *Id.* at p. 316.
45. (1898) 2 QB 91 (99-100): 67 LJ QB 782: 79 LT 647; *see* 'unreasonableness', (*supra*).
46. AIR 1960 SC 430: (1960) 2 SCR 375.
47. *Id.* at p. 433 (AIR).

From these observations an inference may be drawn that courts may consider the *mala fide* exercise of power by the statutory authority.

The point is now settled by the decision of the Supreme Court in *S. Shivdev Singh* v. *State of Punjab*[48]. Under the Pepsu Tenancy and Agricultural Lands Act, 1955, rules were framed by the State Government. It was contended that the standards of yields prescribed in Schedule C under Rule 31 were arbitrary, unreasonable, unrealistic, unattainable and the same was in mala fide exercise of power by the statutory authority. Negativing this contention, Wanchoo, J. (as he then was) observed:

> "[I]f the standard fixed in Schedule C is to be taken to apply to the best quality irrigated land and that standard is reduced to 80 per centum in view of Rule 31(2), we would hesitate to say that Schedule C had fixed an unattainable standard and so was a *mala fide exercise of power to frame rules with the object of defeating the intention of the legislature.*"[49] (emphasis supplied)

However, in *Nagraj* v. *State of A.P.*[50], an Ordinance issued by the Andhra Pradesh Government reducing the age of superannuation of government employees from 58 years to 55 years was challenged, *inter alia*, on the ground of *mala fide* exercise of power. The Supreme Court rejected the contention observing that this kind of "*transferred malice*" is unknown in the field of legislation.

It is submitted that the above observations are very wide and do not lay down correct law. When a statute enacted by a competent legislature can be challenged as *mala fide*, there is no reason why a delegated legislation is immune from such challenge.

In *D.C. Wadhwa* v. *State of Bihar*[51] the Supreme Court disapproved the practice of issuing Ordinances on a large scale being arbitrary and colourable exercise of power by the executive. Bhagwati, C.J. rightly stated: "If there is constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. *That would be clearly a fraud on the constitutional provision.*" (emphasis supplied)

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48. AIR 1963 SC 365: (1963) 3 SCR 426.
49. *Id.* at p. 372 (AIR).
50. (1985) 1 SCC 523 (550): AIR 1985 SC 551; see also *L.N. Misra* v. *State of Bihar*, (1988) 2 SCC 433 (458): AIR 1988 SC 1136.
51. (1987) 1 SCC 378 (393): AIR 1987 SC 579 (589); *A.K. Roy* v. *Union of India*, (1982) 1 SCC 271: AIR 1982 SC 710; *Mittal* v. *Union of India*, (1983) 1 SCC 51: AIR 1983 SC 1. For detailed discussion, *see* V.G. Ramachandran: *Law of Writs*, 1993, pp. 452-58.

(*vi*) *Sub-delegation*

This topic can be studied under three sub-heads:

(*a*) Sub-delegation of legislative power.

(*b*) Sub-delegation of judicial power.

(*c*) Sub-delegation of administrative power.

(*a*) *Sub-delegation of legislative power*

As discussed above[52], the maxim '*delegatus non potest delegare*' (a delegate cannot further delegate) applies to delegated legislation also and it is not possible for the delegate to sub-delegate the power conferred on him unless the parent Act authorises him to do so either expressly or by necessary implication. Assuming that the sub-delegation is permissible under the parent Act, what are the limitations and safeguards in this behalf ? Here, the following propositions may be laid down:

(1) If the parent Act permits sub-delegation to officers or authorities not below a particular rank, then the power can be delegated only to those officers or authorities.

Thus, in *Ajaib Singh* v. *Gurbachan Singh*[53], under Section 3 of the Defence of India Act, 1962, the Central Government was empowered to make rules authorising detention of persons by an authority not below the rank of a District Magistrate. Section 40 authorised the State Government to delegate its powers to any officer or authority subordinate to it. The Supreme Court held that the power of detention could be sub-delegated to any officer not below the rank of a District Magistrate and the exercise of power to the Additional District Magistrate was illegal.

But even if there is no provision in the parent Act that the sub-delegation should be made to an officer or an authority not below a particular rank, the courts have taken the view that the power can be sub-delegated 'only to competent and responsible persons'.

(2) The sub-delegate cannot act beyond the power conferred on him by the delegate.

Thus, in *Blackpool Corpn.* v. *Locker*[54], under the Defence Regulations, 1939, the Minister was empowered to take possession of land. By issuing circulars, he sub-delegated this power to the Blackpool Corporation, as was within his powers. The circulars contained certain conditions and one of them was that furniture should not be requisitioned. The corporation requisitioned the defendant's dwelling house with furniture.

52. Lecture IV (*supra*).
53. AIR 1965 SC 1619: (1965) 2 SCR 845.
54. (1948) 1 KB 349: (1948) 1 All ER 85.

The Court of Appeal held the impugned action *ultra vires* since it went beyond the power conferred by the Minister on the Corporation.

(3) If some conditions are imposed by the delegate which must be complied with by the sub-delegate before the exercise of power, those conditions must be fulfilled; otherwise exercise of power will be *ultra vires*.

In *Radhakishan* v. *State*[55], under Section 4 of the Essential Supplies (Temporary Powers) Act, 1946, certain powers were sub-delegated by the Central Government to the Provincial Government subject to the condition that before making any order, concurrence of the former must be obtained by the latter. An order was passed by the Provincial Government without obtaining concurrence of the Central Government. The order was held *ultra vires* as the condition was not satisfied.

Similarly, in *Naraindas* v. *State of M.P.*[56], the Supreme Court held that if sub-delegation can be made through regulations, it could not be effected by passing a resolution.

(*b*) *Sub-delegation of judicial power*

In England[57] and in America[58], it is well-established that a judicial or quasi-judicial power conferred on a particular authority by a statute must be exercised by that authority and cannot be delegated to anyone unless such delegation is authorised by the statute either expressly or by necessary implication. In *Morgan* (*I*) v. *U.S.*[59], the Supreme Court of America held that the duty to decide cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is akin to that of a judge. '*The one who decides must hear.*' (emphasis supplied)

de Smith[60] says: "the maxim (delegatus non potest delegare) is applied with the utmost rigour to the proceedings of the ordinary courts, and in the entire process of adjudication a judge must act personally, except insofar as he is expressly absolved from his duty by statute. '*Only in very exceptional circumstances may judicial functions be sub-delegated in the absence of express authorisation.*' "[61] (emphasis supplied)

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55. AIR 1952 Nag 387.
56. (1974) 4 SCC 788: AIR 1974 SC 1232.
57. *Halsbury's Laws of England*, 4th Edn., Vol. 1, p. 34; de Smith: *Judicial Review of Administrative Action*, 1995, pp. 360-61; *Local Govt. Board* v. *Arlidge*, (1915) AC 120: 84 LJKB 72; Wade: *Administrative Law*, 1994, pp. 352-54.
58. *Runkle* v. *U.S.*, (1887) 122 US 593.
59. (1936) 298 US 468 (481).
60. *Judicial Review of Administrative Action*, 1995, pp. 358-60.
61. *Id.* at p. 1079.

Lord Denning[62] rightly states: "While an administrative function can often be delegated, a judicial function rarely can be; no judicial tribunal can delegate its functions unless it is enabled to do so expressly or by necessary implication."

The same principle is accepted in India as the basic principle.[63] In the words of Hidayatullah, J. (as he then was) in *Bombay Municipal Corpn.* v. *Thondu*[64], "it goes without saying that judicial power cannot ordinarily be delegated unless the law expressly or by clear implication permits it". In the historic case of *Gullapalli Nageswara Rao* v. *A.P.S.R.T.C.*[65], under the relevant Act and the Rules the Minister was empowered to hear the parties and to pass the final order, but he delegated his function of hearing to his Secretary, who heard the parties and put up a note before the Minister for final decision and the order was passed by the Minister. Quashing the orders, passed by the Minister, Subba Rao, J. (as he then was) held that it was not a judicial hearing. "If one person hears and another decides, personal hearing becomes an empty formality."

At the same time, practical difficulties must also be appreciated. It is not possible for all judicial and quasi-judicial authorities to take the entire evidence in all cases, hear the parties and their representatives or advocates, and give decisions. In these circumstances courts have allowed some relaxation and held that it is permissible for judicial or quasi-judicial bodies to delegate certain functions, e.g. holding of inquiries, taking of evidence, hearing of parties and to appoint assistants for the said purposes, *provided always* that after receiving evidence in the aforesaid manner they give an opportunity to the parties to clarify their stand before a decision is finally arrived at by them.

It is submitted that the following observations of Mahajan, J. (as he then was) in the leading case of *Delhi Laws Act, 1912, Re*[66], lay down correct law on the point, wherein His Lordship stated:

> "No public functionary can himself perform all the duties he is privileged to perform, unaided by agents and delegates, but from this circumstance it does not follow that he can delegate the exercise of his judgment and discretion to others.... *[T]he Judges are not allowed*

62. *Barnard* v. *National Dock Labour Board*, (1953) 1 All ER 113, (1118-19): (1953) 2 QB 18: (1953) 2 WLR 995.
63. *Sahni Silk Mills* v. *ESI Corpn.*, (1994) 5 SCC 346(352).
64. AIR 1965 SC 1486 (1488): (1965) 2 SCR 929 (932).
65. AIR 1959 SC 308 (327): 1959 Supp (1) SCR 319.
66. AIR 1951 SC 332: 1951 SCR 747.

to surrender their judgment to others. It is they and they alone who are trusted with the decision of a case."[67] (emphasis supplied)

(*c*) *Sub-delegation of administrative power*[68]

(*vii*) *Exclusion of judicial review*

As discussed above, the validity of a delegated legislation can be challenged in a court of law. As early as 1877 in *Empress* v. *Burah*[69], the High Court of Calcutta had declared Section 9 of Act XXII of 1869 *ultra vires*. Though the decision of the Calcutta High Court was reversed by the Privy Council[70], neither before the High Court nor before the Privy Council it was contended that the court had no power of judicial review and, therefore, cannot decide the validity of the legislation. But sometimes, attempts are made by the legislature to limit or exclude judicial review of delegated legislation. Thus, in an Act a provision may be made that rules, regulations, bye-laws, etc. made under it "shall have effect as if enacted in the Act", "shall be conclusive evidence", "shall not be called in question in any court", "shall not be called in question in any legal proceedings whatsoever" and the like. The question is whether in view of these provisions judicial review of delegated legislation is ousted?

In *Institute of Patent* v. *Lockwood*[71], Lord Herschell observed that the jurisdiction of courts to question the validity of delegated legislation could be taken away. But this view was disapproved subsequently by the House of Lords in *Minister of Health* v. *R., ex p Yaffe*[72]. In that case Lord Dunedin observed: "It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether ... it is repugnant to common sense that the order would be protected...." In that case it was held that since the order was in conflict with the provisions of the Act, it was not an order within the meaning of the Act and was not saved by the clause (shall have effect as if enacted in this Act). According to Allen[73], the words 'as if enacted in the Act' do not preclude judicial consideration of '*vires*'.

67. AIR 1951 SC 332 at 386; see also *Pradyat Kumar* v. *Chief Justice of Calcutta*, AIR 1956 SC 285(291); *Marathwada University* v. *Seshrao*, (1989) 3 SCC 132: AIR 1989 SC 1582.
68. For detailed discussion *see* Lecture VIII (*infra*).
69. ILR 3 Cal 64: 1 CLR 161 (FB).
70. *Queen* v. *Burah*, (1878) 3 AC 889: 5 IA 178: 4 Cal 172 (PC).
71. (1894) AC 347: 63 LJPC 75: 71 LT 205.
72. (1931) AC 494 (501-02): 100 LJKB 306: 145 LT 98.
73. *Law and Orders*, 1965, p. 258.

The Committee on Ministers' Powers had also not favoured such clauses and has made the following recommendation:

> "The use of clauses designed to exclude the jurisdiction of the Courts to enquire into the legality of a regulation or order should be abandoned in all but the most exceptional cases, and should not be permitted by Parliament except upon special grounds stated in the ministerial memorandum attached to the Bill."[74]

The aforesaid clauses have been used in many statutes in India, but their legal effect is not free from doubt. In some cases, the Supreme Court has adopted the *Herschell doctrine*[75], while in some cases like *Yaffe*[76] is followed.

In *Chief Inspector of Mines* v. *K.C. Thapar*[77], speaking for the Supreme Court, Das Gupta, J. observed: "The true position appears to be that the Rules and Regulations do not lose their character as rules and regulations, even though they are to be of the same effect as if contained in the Act. They continue to be rules subordinate to the Act, and though for certain purposes, including the purpose of construction they are to be treated as if contained in the Act their true nature as subordinate rules is not lost."[78]

It is submitted that the following observations of Shah, J. (as he then was) in the case of *State of Kerala* v. *Abdulla & Co.*[79], lay down correct law on the point:

> "*Validity of a rule whether it is declared to have effect as if enacted in the Act or otherwise is always open to challenge on the ground that it is unauthorised.*"[80] (emphasis supplied)

It is submitted that the above view is correct particularly when under the Constitution of India the doctrine of judicial review is accepted and treated as basic structure and essential feature of the Constitution which cannot be taken away by any statutory provision or even by a constitutional amendment.

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74. Report of the Committee on Ministers' Powers, (1932), p. 65.
75. *Subba Rao* v. *CIT*, AIR 1956 SC 604: 1956 SCR 577; *Orient Weaving Mills* v. *Union of India*, AIR 1963 SC 98: 1962 Supp (3) SCR 481.
76. *Chief Commr. of Ajmer* v. *Radhe Shyam*, AIR 1957 SC 304: 1957 SCR 68; *Chief Inspector of Mines* v. *K.C. Thapar*, (*infra*); *State of Kerala* v. *Abdulla & Co.*, (*infra*).
77. AIR 1961 SC 838: (1962) 1 SCR 9.
78. *Id.* at p. 845 (AIR).
79. AIR 1965 SC 1585: (1965) 1 SCR 601.
80. *Id.* at p. 1589 (AIR).

(viii) Retrospective operation

It is well-settled that delegated legislation cannot have any retrospective effect unless such a power is conferred on the rule-making authority by the parent Act. The legislature can always legislate prospectively as well as retrospectively subject to the provisions of the Constitution. But the said rule will not apply to administrative authorities exercising delegated legislative power. Some statutes specifically confer power to the rule-making authority to frame rules with retrospective effect.[81]

The danger of conceding such a wide power to a delegated authority should not be overlooked. In *Howell* v. *Falmouth Boat Construction Co. Ltd.*[82], a licence was issued which was to operate retrospectively so as to cover the works already done under the oral sanction of the authority. Holding this to be invalid, the House of Lords observed:

> "It would be a dangerous power to place in the hands of Ministers and their subordinate officials to allow them, whenever they had power to licence, to grant the licence *ex post facto*; and a statutory power to licence should not be construed as a power to authorise or ratify what has been done unless the special terms of the statutory provisions clearly warrant the construction."[83]

The same principle is accepted in India. In *State of M.P.* v. *Tikamdas*[84], the Supreme Court observed: "There is no doubt that unlike legislation made by a sovereign legislature, *subordinate legislation made by a delegate cannot have retrospective effect unless the rule-making power in the concerned statute expressly or by necessary implication confers powers in this behalf.*"[85]

(emphasis supplied)

Thus, in *Vijayalakshmi Rice Mills* v. *State of A.P.*[86], the Court held that in the absence of express words or appropriate language from which

81. For instance, S. 295(4) of the Income Tax Act, 1961 reads as under:—
"The power to make rules conferred by this section shall include the power to give retrospective effect, from a date not earlier than the date of commencement of this Act, to the rules or any of them and, unless the contrary is permitted (whether expressly or by necessary implication); no retrospective effect shall be given to any rule so as to prejudicially affect the interest of assessees)".
See also S. 46, Gift Tax Act, 1958; S. 85, Estate Duty Act, 1963; S. 184-A, Navy Act, 1957; S. 36-A, Administrative Tribunals Act, 1985.
82. (1951) AC 837: (1951) 2 All ER 278.
83. *Id.* at p. 847 (AC).
84. (1975) 2 SCC 100(103): AIR 1975 SC 1429(1431).
85. *Id.*, at p. 103 (SCC): 1431 (AIR).
86. (1976) 3 SCC 37: AIR 1976 SC 1471.

retrospectivity may be inferred, a notification takes effect from the date on which it is issued and not from any prior date.

Similarly, in *Gurcharan Singh* v. *State*[87], delegated legislation was held invalid. A fresh order was passed and a clause has been added that anything done or action taken under the old order should be deemed to have been taken under the new order. The court declared the said clause invalid since it was retrospective.

It is well-settled that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with retrospective effect. But in the leading case of *B. S. Yadav* v. *State of Haryana*[88], the Supreme Court rightly observed:

> "It should also be realised that giving retrospective effect to the rules creates frustration and discontentment since the just expectations of the officers are falsified. Settled seniority is thereby unsettled, giving rise to long drawn-out litigation between the promotees and direct appointees. That breeds indiscipline and draws the High Court into the arena, which is to be deprecated."[89]

Again, no retrospective effect can be given to a delegated legislation which deprives a person of an accrued right vested in him.

In *Nachane* v. *Union of India*[90], the Supreme Court held that retrospective amendment in Life Insurance Corporation of India Class III and IV Employees (Bonus and Dearness Allowance) Rules, 1981 cannot nullify the effect of the writ issued by the court in an earlier case.

In State of *Gujarat* v. *Raman Lal*[91], the High Court held that panchayat employees were government servants. The State carried the matter to the Supreme Court. During the pendency of the appeal, the Act was amended with retrospective effect nullifying the decision of the High Court.

Holding the Act *ultra vires*, the Court stated: "A legislature cannot legislate today with reference to a situation that obtained twenty years ago and ignore the march of events and the constitutional rights accrued in the course of the twenty years. That would be most arbitrary, unreasonable and a negation of history.... *Past virtue (constitutional) cannot*

87. AIR 1974 P&H 223.
88. 1980 Supp SCC 524: (1981) 1 SCR 1024.
89. *Id.* at p. 558 (SCC): 1070 (SCR).
90. (1982) 1 SCC 205: AIR 1982 SC 1126.
91. (1983) 2 SCC 33: AIR 1984 SC 161.

be made to wipe out present vice (constitutional) by making retrospective laws.''[92] (emphasis supplied)

It is submitted that the following observations of Grover, J. in the case of *ITO* v. *Ponnoose*[93] lay down correct law on the point:

> ''The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But *where no such language is to be found* it has been held by the courts that *the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect.*''[94] (emphasis supplied)

(d) Ultra vires act: Effect

An action which is *ultra vires* is without jurisdiction, null and void, and of no legal effect whatsoever. It has no legal leg to stand on.[95] Once the court has declared that some administrative act is legally a nullity, the situation is as if nothing had happened. There is no question of estoppel against an *ultra vires* act. A plea of *ultra vires* cannot be defeated by a rule of estoppel. It has been rightly said: ''It would entirely destroy the whole doctrine of *ultra vires* if it were possible for the donee of a statutory power to extend his power by creating an estoppel.[96] The question of approbate and reprobate also does not apply in such a case. No question of acquiescence or waiver can be raised against an *ultra vires* act. In *Lohia Machines Ltd.* v. *Union of India*[97], the Supreme Court has observed: ''If a rule made by a rule-making authority is outside the scope of its power, it is void and it is not at all relevant that its validity has

92. (1983) 2 SCC 33 at 62: 177 (AIR): see also *T.R. Kapur* v. *State of Haryana*, 1986 Supp SCC 584: AIR 1987 SC 516; *Haribans* v. *Rly. Board*, (1989) 2 SCC 84: AIR 1989 SC 696; *Raj Soni* v. *Air Officer Incharge Admn.*, (1990) 3 SCC 261: AIR 1990 SC 1305.
93. (1969) 2 SCC 351: AIR 1970 SC 385.
94. *Id.* at p. 354 (SCC): 387 (AIR). For other cases, see C.K. Thakker: *Administrative Law*, 1996, pp. 134-37.
95. Lord Greene in *Minister of Agriculture* v. *Mathews*, (1950) 1 KB 148 (153): (1949) 2 All ER 724.
96. (1985) 2 SCC 197 (223): AIR 1985 SC 421.
97. (1985) 2 SCC 197: AIR 1985 SC 421.

not been questioned for a long period of time; *if a rule is void it remains void whether it has been acquiesced or not.*" (emphasis supplied)

But in *Sahni Silk Mills* v. *ESI Corpn.*[98], the parent Act enabled the Corporation to delegate its power to the Director General who in turn sub-delegated that power to Regional Directors. Regional Directors in exercise of the power recovered damages, which action was challenged. Though sub-delegation was held invalid, the Supreme Court did not direct refund of amounts already realised as damages from the employers. Thus, the Court virtually applied *de facto* doctrine observing that it was not in public interest to do so.

It is submitted that the following observations of Lord Denning, M.R. lay down correct law on the point:

> "Next, it was suggested that, even if the board could not delegate their functions, at any rate they could ratify the actions of the port manager, but, if the board have no power to delegate their functions to the port manager, they can have no power to ratify what he has already done. *The effect of ratification is to make it equal to a prior command, but as a prior command, in the shape of delegation, would be useless, so also is a ratification.*"[99] (emphasis supplied)

(B) Procedural ultra vires

(a) Definition

When a subordinate legislation fails to comply with certain procedural requirements prescribed by the parent Act or by the general law, it is known as procedural *ultra vires*.

(b) Principle explained

While framing rules, bye-laws, regulations, etc., the parent Act or enabling statute may require the delegate to observe a prescribed procedure, such as holding of consultations with particular bodies or interests, publication of draft rules or bye-laws, laying them before Parliament, etc. It is incumbent on the delegate to comply with these procedural requirements and to exercise the power in the manner indicated by the legislature. Failure to comply with the same *may* invalidate the rules so framed. But at the same time, it is also to be noted that failure to observe the procedural requirements does not *necessarily* and *always* invalidate the rules. This arises out of a distinction between *mandatory* requirements

98. (1994) 5 SCC 346.
99. *Barnard* v. *National Dock Labour Board*, (1953) 1 All ER 1113 (1119): (1953) 2 QB 18; see also *Bar Council of India* v. *Surjeet Singh*, (1980) 4 SCC 211: AIR 1980 SC 1612.

and *directory* requirements. In this book, though we are not concerned with the distinction between the two, we may say that *generally*, non-compliance with a directory provision does not invalidate subordinate legislation, but failure to observe a mandatory and imperative requirement does. "It is a well-settled rule that an absolute enactment must be obeyed or fulfilled *exactly*, but it is sufficient if a directory enactment be obeyed or fulfilled *substantially*."[1]

(c) *Requirements*

The following two procedural requirements may now be discussed:

(1) Publication.

(2) Consultation.

(1) *Publication*

(i) *Object*

It is a fundamental principle of law that 'ignorance of law is no excuse' (*ignorantia juris non excusat*), but there is also another equally established principle of law that the public must have access to the law and they should be given an opportunity to know the law. According to Wade[2], "the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public—in the sense, of course, at any rate, its legal advisers have access to it, at any moment, as of right." As observed by Domat[3], "all laws ought either to be known or at least laid open to the knowledge of all the world in such a manner, that no one may with impunity offend against them, under pretence of ignorance". In the case of an Act made by Parliament this poses little difficulty as it receives sufficient publicity during the introduction of a Bill, printing, reference to a Select Committee and its report thereon, reading before the House or Houses, discussion, voting, final approval of the Bill, radio and newspaper reports thereon, etc. But this is not true in the case of delegated legislation. As Roscoe Pound[4] observes, "the first knowledge that those affected have of a rule, is usually after it has gone into effect. The first opportunity they have to challenge it, is usually, after it is enforced against them". M.P. Jain[5] rightly stated: "It is essential, therefore, that adequate means are adopted to publicize delegated

1. *Raza Buland Sugar Co.* v. *Rampur Municipal Council*, AIR 1965 SC 895: (1965) 1 SCR 970; *Pratap Singh* v. *Shri Krishna Gupta*, AIR 1956 SC 140: (1955) 2 SCR 1029.
2. *Administrative Law*, 1994, p. 890.
3. Quoted by Ganguly: *Administrative Legislation*, 1968, p. 74.
4. Quoted by S. Rajgopalan: *Administrative Law*, 1970, p. 107.
5. *Treatise on Administrative Law*, 1996, Vol. 1, p. 150.

legislation so that people are not caught on the wrong foot in ignorance of the rules applicable to them in a given situation. The system of publication ought to be such that delegated legislation is not only made known to the people, but it is also easy to locate as and when necessary."

(*ii*) *England*

In England, by the Rules Publication Act, 1893, certain provisions were made for the giving of notice and inviting representations from interested public bodies. Under the Statutory Instruments Act, 1946, certain provisions were made with a view to ensure that the public would be aware of the delegated legislation.

In *Johnson* v. *Sargant*[6], the impugned order was passed on May 16, but was published on May 17. The court held that the order could come into operation only on May 17, i.e. when it was made known.

Though Prof. C.K. Allen[7] criticises this decision and describes it as 'a bold example of a judge-made law, soundness of which is very doubtful', in subsequent cases also, the same principle has been followed.

(*iii*) *U.S.A.*

Before 1935, there was no machinery for publication of delegated legislation in the U.S. and there was hardly any opportunity for affected persons to get information about it. But after the decision in the *Panama case*[8] (wherein, the court found that there was no adequate publication of delegated legislation), the Federal Register Act was passed in 1935, requiring publication of all regulations. The provisions for publicity of delegated legislation were further strengthened by enacting the Administrative Procedure Act, 1946.

Thus, in *Hotch* v. *U.S.*[9], a Circular Court held that if a regulation was not published in accordance with the Act of 1935, it was invalid, irrespective of whether the person charged with its contravention had actual knowledge of its contents or not.

On the other hand, in *Federal Crop Insurance Corpn.* v. *Merill*[10], a regulation was published in the *Federal Register* in accordance with the Act of 1935 and 'in spite of the conceded fact' that the farmer knew nothing about the regulation, the U.S. Supreme Court by majority held the regulation valid and binding on him. Justice Jackson (dissenting) observed:

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6. (1918) 1 KB 101.
7. *Law and Orders*, 1965, p. 112.
8. *Panama Refining Co.* v. *Ryan*, (1934) 293 US 388.
9. (1954) 212 F 2d 280.
10. (1947) 332 US 380.

"To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the *Federal Register* contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops."[11]

It is submitted that though factually what Justice Jackson says is true, the court was required to decide the question in accordance with law and the majority view was, therefore, correct. In India, the same principle is followed.

(*iv*) *India*

The above principles apply in India also. Unlike England and America, there is no statutory provision requiring publication of delegated legislation. Yet the courts have treated some sort of publication of delegated legislation as an essential requirement for its validity.

(*v*) *Directory or mandatory*

Is the requirement of prior publication of delegated legislation mandatory? What will be the effect of non-compliance with this requirement? What is the effect in defect of publication of delegated legislation? These are some of the problems which are not free from doubt. Let us consider them in the light of decided cases.

In *Harla* v. *State of Rajasthan*[12], the legislation in question passed by the Council was neither published nor was it made known to the general public through any other means. Holding its publication necessary and applying the principles of natural justice, the Supreme Court observed:

"The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives, liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilised man. It shocks his conscience. *Promulgation or publication of some reasonable sort is essential.*"[13]

(emphasis supplied)

11. *Id.* at p. 387.
12. AIR 1951 SC 467: 1952 SCR 110.
13. *Id.* at p. 468 (AIR).

Again, in *Narendra Kumar* v. *Union of India*[14], Section 3 of the Essential Commodities Act, 1955 required all the rules to be made under the Act to be notified in the Official Gazette. The principles applied by the licensing authority for issuing permits for the acquisition of non-ferrous metals were not notified. The Supreme Court held the rules ineffective.

However, in *State of Maharashtra* v. *M.H. George*[15], a notification, dated November 8, 1962 was published in the Gazette of India on November 24, 1962, prohibiting import of gold in India except on certain conditions. The respondent left Zurich on November 27, carrying gold with him and was arrested at the Bombay airport on November 28. He pleaded his ignorance of the notification. Negativing the contention the Supreme Court held that the notification had been published and made known in India and the ignorance pleaded by the respondent-accused was wholly irrelevant.

The majority observed: "[P]ublication in the Official Gazette, viz. the Gazette of India is the ordinary method of bringing a rule or subordinate legislation to the notice of the persons concerned.... [T]he notification by the Reserve Bank was published in the Gazette of India on November 24, 1962 and hence ... the notification must be deemed to have been published and brought to the notice of the concerned individuals on the 25th of November, 1962."[16]

(vi) Mode of publication

A question may also arise about the mode, manner and method of publication. As a rule, a distinction must be drawn between publication of delegated legislation and the *mode*, *manner* or *method* of publication. Even if a requirement of publication is held to be mandatory, the mode or manner of publication may be held to be directory and strict compliance thereof may not be insisted upon. In the oft-quoted passage from the judgment in *Raza Buland Sugar Co.* v. *Rampur Municipal Council*[17], speaking for the Supreme Court, Wanchoo, J. (as he then was) observed:

> "The question whether a particular provision of a statute which on the face of it appears mandatory — inasmuch as it uses the word 'shall' as in the present case — or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the

14. AIR 1960 SC 430: (1960) 2 SCR 375.
15. AIR 1965 SC 722: (1965) 1 SCR 123.
16. *Id.* 743 (AIR).
17. AIR 1965 SC 895: (1965) 1 SCR 970.

provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory."[18]

In *Raza Buland Sugar Co.*, the Supreme Court held that the statutory provision requiring publication of rules before imposition of tax was *mandatory*, but the *manner* in which the rules were required to be published was *directory*, and as there was *substantial compliance* with the requirement of publication, the rules were valid. On the other hand, in *Govindlal Chhaganlal Patel* v. *Agricultural Produce Market Committee*[19], the notification was issued under the parent Act (Gujarat Agricultural Produce Markets Act, 1964) and was required to be published in Gujarati in a newspaper being circulated in that area. The Supreme Court held that the requirement of publication in Gujarati was mandatory and as the same was not complied with, the notification was invalid.

(*vii*) *Effect of publication*

Once the delegated legislation is promulgated or published, it takes effect from the date of such promulgation or publication. In *M.H. George*[20] the Supreme Court held that the notification became effective from November 24, 1962 when it was published in the Government Gazette. In *Pankaj Jain Agencies* v. *Union of India*[21], the notification was published in the Government Gazette on February 13, 1986 prescribing the rates of custom duty which were to come in force from February 19, 1986. The notification was held valid.

(*viii*) *Defect in publication*

In some statutes, a provision is made that no act done or proceeding taken under the Act shall be called in question merely on the ground of any defect or irregularity in such act or proceeding, not affecting the merits of the case. Relying on such provisions, the Supreme Court has

18. *Id.* at p. 899 (AIR).
19. (1975) 2 SCC 482: AIR 1976 SC 273.
20. AIR 1965 SC 722: (1965) 1 SCR 123.
21. (1994) 5 SCC 198: AIR 1995 SC 360; see also *Sonik Ind.* v. *Rajkot Municipal Council*, (1986) 2 SCC 608: AIR 1986 SC 1518; *Srinivasan* v. *State of Karnataka, (infra)*.

held that failure of proper publication does not invalidate the act.[22] In *Srinivasan* v. *State of Karnataka*[23], such 'Omnibus Curative Clause' has been described as the *Ganga*[24] clause.

(ix) Conclusions

The necessity and need of the publication of subordinate or delegated legislation cannot, however, be underestimated. Whether law is viewed from the standpoint of the 'conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's 'Unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known. Delegated or subordinate legislation is all-pervasive and there is hardly any field of activity where governance by delegated or subordinate legislative powers is not as important, if not more important, than governance by Parliamentary legislation. But unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a Minister, a Secretary to the Government or other official dignitary. It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation.[25]

It is submitted that the following observations of Chinnappa Reddy, J. in *Srinivasan* v. *State of Karnataka*[26], lay down correct law on the point, and are, therefore, worth quoting:

> "Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel,

22. *Berar Swadeshi Vanaspathi* v. *Municipal Committee, Shegaon*, AIR 1962 SC 420: (1962) 1 SCR 596; *Bangalore Woollen, Cotton and Silk Mills* v. *Corpn. of Bangalore*, AIR 1962 SC 562: (1961) 3 SCR 707; *Municipal Board, Hapur* v. *Raghuvendra*, AIR 1966 SC 693: (1966) 1 SCR 950; *Municipal Board, Sitapur* v. *Prayag Narayan*, (1969) 1 SCC 399: AIR 1970 SC 58.
23. (1987) 1 SCC 658: AIR 1987 SC 1059.
24. According to the belief of Hindu religion, the holy water of river Ganga purifies and cleanses all sins of a person who takes a bath in it.
25. *Srinivasan* v. *State of Karnataka* (*infra*).
26. (1987) 1 SCC 658: AIR 1987 SC 1059.

namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient."[27]

(2) *Consultation*

(*i*) *Meaning*

The term 'consult' implies a conference of two or more persons or an impact of two or more minds in respect of a topic in order to enable them to evolve a correct or, at least satisfactory solution of a problem. It is a process which requires meeting of minds between the parties to consultation on material facts to come to a right conclusion.[28]

(*ii*) *Object*

An important measure to check and control the exercise of legislative power by the executive is the technique of consultation through which affected interests may participate in the rule-making process. This *modus operandi* is regarded as a valuable safeguard against misuse of legislative power by the executive authorities. As Wade and Philips[29] remark: "One way of avoiding a clash between department exercising legislative powers and the interest most likely to be affected is to provide for some form of consultation." This process of exchange of ideas is beneficial to both: to the affected interests itself insofar as they have an opportunity to impress on the authority their point of view; and to the rule-making authority insofar as it can gather necessary information regarding the issues involved and thus be in a better position to appreciate a particular situation. The Administration is not always the repository of ultimate wisdom; it learns from the suggestions made by outsiders and often benefits from that advice.[30]

(*iii*) *Nature and scope*

Consultation does not mean consent or concurrence. At the same time, however, it postulates full and effective deliberation, exchange of mutual viewpoints, meeting of minds and examination of relative merits of the other point of view. Consultation is not complete unless

27. *Id.* at pp. 672-73 (SCC): 1067-68 (AIR).

28. *Union of India* v. *S.H. Sheth*, (1977) 4 SCC 193: AIR 1977 SC 2328; *S.P. Gupta* v. *Union of India*, 1981 Supp SCC 87: AIR 1982 SC 149; *Supreme Court Advocates on Record Assn.* v. *Union of India*, (1993) 4 SCC 441: AIR 1994 SC 268.

29. *Constitutional Law*, 1960, p. 584.

30. M.P. Jain: *Treatise on Administrative Law*, (1996), Vol. 1, p. 164.

the parties thereto make their respective viewpoints known to others and examine relative merits of their views. Even when consultation is not a legal requirement, such a step generates greater confidence of the persons who may be affected by an action that may be taken by the authority.[31]

(iv) England

In England, though there is no statutory provision requiring consultation of affected interests before the making of subordinate legislation, it is considered mandatory. This practice is so well-established that "no Minister in his senses, with the fear of Parliament before his eyes would ever think of making regulations without (where practicable) giving the persons who will be affected thereby or their representatives an opportunity of saying what they think about the proposal".[32] Sir Cecil Carr[33] enunciates:

> "It is unthinkable that any important rules would be made about solicitors in England without consulting the Law Society or about doctors, without consulting the British Medical Association, or about local Government without consulting the County Council Association and the Association of Municipal Corporations."

With regard to the absence of statutory provisions requiring consultation, the Lord Chancellor says: "We no longer promulgate the regulations or rules in the Gazette and wait for representations to be made. We go to the trade or interest concerned and deal with it by getting them round the table, hearing what they have to say, and then drafting the rules after obtaining their views."

According to Griffith[34], such consultations are of two types:

(1) Ordinary types of consultation, and

(2) Extraordinary types of consultation.

(1) Ordinary types of consultation.—These can be further subdivided into two categories:

(A) Individual Objections.—Generally, consultations of this kind are by statutory provisions, e.g., factory laws. The proposed regulations

31. *Prakash Chand* v. *Zila Parishad*, (1971) 2 SCC 489 (499): AIR 1971 SC 1696; *Lakshmi Khandsari* v. *State of U.P.*, (1981) 2 SCC 600 (633): AIR 1981 SC 873; *State of J&K* v. *Zakki*, 1992 Supp (1) SCC 584: AIR 1992 SC 1546.
32. Sir W. Graham cited by Griffith: *Delegated Legislation, Some Recent Developments*, (1949) 12 Mod LR 297.
33. Cited by Griffith: *Concerning English Administrative Law*, p. 54.
34. *Concerning English Administrative Law*, p. 54.

are required to be published, objections are invited and opportunity of hearing is given to the affected persons.

(*B*) *Consultation with specified interests.*—Here the Minister is required to consult specified interests before he makes the regulations. Normally, these interests are statutory advisory bodies or local authorities, e.g. Traffic Advisory Committee, Merchant Shipping Advisory Committee, etc.

(2) **Extraordinary types of consultation.**—These can also be subdivided into two categories:

(*A*) *Preparation by affected interests.*—Here the power to draft the regulations is delegated to the individual or group and the Minister becomes a confirming or approving authority. Under certain factory laws, the power of making rules to compel the observance of requirements of the laws regarding cleanliness, ventilation and general health matters is delegated to the occupier of the factory.

(*B*) *Approval by Statutory Body.*—Some statutes provide for submission of the draft of the regulations to a statutory body by the Minister and the report of that body is to be laid before Parliament. The effect is that either the Minister must accept the report with its proposed amendments or defend his action of refusal in Parliament.

(v) *U.S.A.*

The technique of prior consultation is very much common in the United States. The Administrative Procedure Act, 1946 makes detailed provisions for consultation requiring that interested parties should be given an opportunity to participate in the rule-making process. In some cases Congress has prescribed even a formal hearing. Persons likely to be affected are afforded an opportunity by the rule-making authority to participate in the rule-making process. The agency will consider the written data, views, arguments, etc. of those persons and finalise the rules. Hearings preliminary to rule-making have thus become an important part of the administrative process in the United States. When formal hearings are held, they are almost like judicial proceedings.[35]

(vi) *India*

In India, there is no general statutory provision requiring consultation with the affected interests in the making of delegated legislation. But

35 Wade, *Administrative Law*, 1994, pp. 895-96.

some statutes specifically provide for consultation which fall under the following heads.[36]

(1) Official consultation.—The rule-making power is delegated subject to a stipulation that it is to be exercised in consultation with a named official authority or agency, e.g. the Central Government is required to make rules under Section 52 of the Banking Companies Act, 1949 after consulting the Reserve Bank of India.

(2) Consultation with Statutory Bodies.—In certain statutes, the rule-making power is conferred on the Central Government which can be exercised after consulting the Boards concerned, e.g. the Central Government is empowered to make rules under Sections 6 and 12 of the Drugs Act, 1940 after consulting the Drugs Technical Advisory Board.

(3) Consultation with Advisory Bodies.—Under some statutes, advisory bodies are constituted to assist the Central Government or other subordinate authorities in framing rules. Thus, Mining Boards are constituted under the Indian Mines Act, 1901 to assist and advise the Government in making rules.

(4) Draft Rules by Affected Interests.—In some cases, the power to frame rules is directly conferred on the affected interests, e.g. under Section 61 of the Indian Mines Act, 1961, the power is conferred on the owner of a mine to frame and submit to the Inspector of Mines a draft of bye-laws for the prevention of accidents and for the safety, convenience and discipline of those employed in the mine. Ultimately, the draft rules may be approved by the Central Government after hearing affected interests.

(*vii*) *Failure to consult: Effect*

As discussed above, in England, the position requiring consultation has generally been regarded as mandatory. In *Rollo* v. *Minister of Town and Country Planning*[37], holding the consultation as 'an important statutory obligation', Bucknill, L.J. observed:

> "On the one side the Minister must supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient opportunity must be given to the local authority to tender that advice."

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36. *Delegated Legislation in India*, ILI, 1964, pp. 42-49.
37. (1948) 1 All ER 13 (17).

In India, provisions regarding consultation were held to be directory in some cases. Thus, in *Ibrahim* v. *Regional Transport Authority*[38], consultation with the Municipality was required to be made by the Transport Authority before certain routes for public buses were fixed. The Supreme Court held it to be merely directory.

Similarly, in *Hindustan Zinc Ltd.* v. *Andhra Pradesh State Electricity Board*[39], the Apex Court held that failure on the part of the Board to consult the Electricity Council before revising electricity tariffs was not bad. One of the factors considered by the Court was that the consequence of non-compliance was not provided by the Act and, hence, at the most such consultation could be said to be persuasive.

On the other hand, in *Banwarilal* v. *State of Bihar*[40], the Supreme Court held that the provision under Section 59 of the Mines Act requiring consultation with the Mining Boards by the Central Government before framing regulations was mandatory.

In *Union of India* v. *S.H. Sheth*[41], in a different context, however, while considering the legality of an order of transfer of a High Court Judge under Article 222 of the Constitution of India, the Supreme Court has elaborately discussed the requirement of consultation.

(viii) Concluding remarks

In *New India Industrial Corpn.* v. *Union of India*[42], Wad, J. states: "Consultation of interest infuses law-making process with democratic forms, particularly in what is called Bureaucratic legislation. Apart from this, it is an administrative necessity. Effective and meaningful administration is impossible without imaginative administrative process. If the citizens are to receive the advantage of any beneficent measures of the administration, the administrative process should be such that the benefit reaches the citizen in full measure and with expedition." M.P. Jain[43] rightly observes: "A consultative technique is useful in balancing individual interests and administrative exigency.... *The consultative process can be a salutory safeguard against improper use of power of delegated legislation as it infuses democratic norms in bureaucratic legislation.*" (emphasis supplied)

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38. AIR 1953 SC 79: 1953 SCR 290.
39. (1991) 3 SCC 299: AIR 1991 SC 1473.
40. AIR 1961 SC 849: (1962) 1 SCR 33.
41. (1977) 4 SCC 193: AIR 1977 SC 2328; see also *State of U.P.* v. *Manbodhan*, AIR 1957 SC 912: 1958 SCR 533; *Laxmi Khandsari* v. *State of U.P.*, (1981) 2 SCC 600: AIR 1981 SC 873 (para 86).
42. AIR 1980 Del 277 (282).
43. *Treatise on Administrative Law*, 1996, pp. 163-64.

3. LEGISLATIVE CONTROL

(a) General

It is of course open to Parliament to confer legislative power upon anyone it likes, including the captain of an English cricket team, or to the author of administrative law.[44] But if Parliament delegates legislative powers to any other authority, e.g. to the executive, it must also see those powers are properly exercised by the administration.

With regard to the control of the legislature over delegated legislation, M.P. Jain[45] states: "In a parliamentary democracy it is the function of the Legislature to legislate. If it seeks to delegate its legislative power to the Executive because of some reasons, it is not only the right of the Legislature, but also its obligation, as principal, to see how its agent i.e. the Executive carries out the agency entrusted to it. Since it is the legislature which grants legislative power to the Administration, it is primarily its responsibility to ensure the proper exercise of delegated legislative power, to supervise and control the actual exercise of this power, and ensure against the danger of its objectionable, abusive and unwarranted use by the administration."

(b) Object

Thus, the underlying object of parliamentary control is to keep watch over the rule-making authorities and also to provide an opportunity to criticise them if there is abuse of power on their part.[46]

(c) Modes

Legislative control can be effectively exercised by:

(*i*) Laying on Table; and

(*ii*) Scrutiny Committees.

(*i*) *Laying on Table*

(*A*) *Object*

In almost all the Commonwealth countries, the procedure of 'Laying on the Table' of the legislature is followed. It serves two purposes; *firstly*, it informs the legislature as to what rules have been made by the executive authorities in exercise of delegated legislative power; and *secondly*,

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44. *Id.* p. 100.
45. *Treatise on Administrative Law*, 1996, Vol. 1, p. 136. *See also* Wade: *Administrative Law*, 1994, pp. 898-99; *Atlas Cycle Industries Ltd.* v. *State of Haryana*, (1979) 2 SCC 196 (203): AIR 1979 SC 1149.
46. *Lohia Machines Ltd.* v. *Union of India*, (1985) 2 SCC 197 (para 26): AIR 1985 SC 421.

it provides an opportunity to the legislators to question or challenge the rules already made or proposed to be made. Through this 'safety-valve' the legislature exercises supervision, check and control over executive rule-making power. 'Laying technique' brings legislature into close and constant contact with the administration.[47]

(B) Types

There are several types of 'laying'. The extent of legislative control necessarily differs in these cases. The Select Committee on Delegated Legislation summarised the procedure under seven heads.[48]

(1) *Laying without further provision for control.*—Here the parent Act merely provides that the rules shall be laid before Parliament. They become operative from the date they are laid before the Houses and in exceptional cases, even before they are so laid. This procedure is only to inform Parliament as to what rules were made by the executive authorities.

(2) *Laying with deferred operation.*—The requirement of laying is linked with postponement of operation of the rules and thus Parliament gets more control.

(3) *Laying with immediate effect but subject to annulment.*—Here the rules come into force when laid before Parliament, but cease to be in operation if disapproved by it within a specified period. As May[49] comments, 'this is the most common form of Parliamentary control' and is known as the 'negative resolution' procedure.

(4) *Laying in draft but subject to resolution that no further proceedings be taken.*—This is also a 'negative resolution' procedure. Here draft of statutory rules are required to be laid before Parliament but the parent Act provides that the rules should not be made effective until a particular period has expired.

(5) *Laying in draft and requiring affirmative resolution.*—This belongs to the realm of 'positive resolution' and provides a stringent parliamentary supervision over delegated legislation unlike the 'negative resolution' procedure. The draft rules do not become effective until an affirmative resolution approving the same has been passed by Parliament. An opportunity is provided to the members to discuss and

47. *N.K. Papiah* v. *Excise Commr.*, (1975) 1 SCC 492: AIR 1975 SC 1007; *State of M.P.* v. *Mahalaxmi Fabric Mills*, 1995 Supp (1) SCC 692: AIR 1995 SC 2213.
48. *Delegated Legislation in India*, ILI, 1964, pp. 166-69.
49. *Parliamentary Practice*, 15th Edn., p. 287.

eact to the rules before they can finally be given effect to by the executive.

(6) *Laying with operation deferred until approval given by affirmative resolution.*—Here the rules are actually made but they do not come nto operation until approved by Parliament. There is virtually no difference between this procedure and a 'positive resolution' procedure, iscussed under head (5).

(7) *Laying with immediate effect but requiring affirmative resolution as a condition for continuance.*—This form of laying is used where rompt operation of delegated legislation is essential but strict parliamentary supervision is also necessary. The confirmatory resolution keeps the elegated legislation alive, which would otherwise die. It is often applied n cases of taxation or to rules made during Emergency.

In India, there is no statutory provision requiring 'laying' of all delegated legislation.[50] According to the Committee on Delegated Legislation, he statutes contain four methods of laying:

(*i*) Requirement of mere publication of rules in the Official Gazette;

(*ii*) Requirement of such publication and laying on the Table;

(*iii*) Over and above the aforesaid two conditions, some statutes allowed modification by Parliament; and

(*iv*) Requirement of laying of rules for a specified period before they are published in the Official Gazette.

C) *Suggestions*

As there was no uniform practice in the laying procedure, the Scrutny Committee made the following suggestions:

(*i*) All Acts of Parliament should uniformly require that the rules shall be laid on the Table of the House 'as soon as possible';

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50. Generally, a provision of laying is found in a number of statutes, in the following words:

"Every rule made under this section shall be laid, as soon as may be, after it is made, before each House of Parliament while it is in session, for a total period of thirty days which may be comprised in one session or in two successive sessions and if before the expiry of the session both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or to be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

(*ii*) This period should be uniform and should be a total period of thirty days from the date of their final publication; and

(*iii*) The rules will be subject to such modification as the Houses may like to make.

(*D*) *Effect of laying*

When the Act merely requires laying of rules before Parliament, they come into force as soon as they are made. If the parent Act provides 'affirmative procedure', they will be effective from the date they are approved by the House. The 'laying procedure', however, does not confer on rules, status equal to the Act in absence of specific provision in the parent statute.[51]

(*E*) *Failure to lay*

In England, the position is not clear. In *Bailey* v. *Williamson*[52], the condition of laying was held to be directory. However, the position has changed after passing of the Statutory Instruments Act, 1946, and in *R.* v. *Sheer Metal Craft*[53], the court held that delegated legislation became valid only after it was laid before Parliament.

In India also, the position is not categorical. In *Express Newspaper (P) Ltd.* v. *Union of India*[54], the Supreme Court observed by way of *obiter dicta* that the provision regarding laying was mandatory. But in *Kerala Education Bill, 1957, Re*[55], the Supreme Court most emphatically and lucidly observed:

> "After the rules are laid before the Legislative Assembly, they may be altered or amended and *it is then that the rules as amended become effective.*" (emphasis supplied)

But in *Jan Mohd.* v. *State of Gujarat*[56], the court held that the rules made under the parent Act were valid, and observed that though the rules were not laid before the legislature, they became valid from the date on which they were made as the Act did not provide that they could in case be invalidated by failure to place them before the legislature.

In *N.K. Papiah* v. *Excise Commissioner*[57], the court held that the rules under the parent Act came into force as soon as they were framed. Negativing the contention that the power of the legislature to annul or

51. *Bharat Hari* v. *CWT*, 1994 Supp (3) SCC 46: AIR 1994 SC 1355.
52. (1873) QB 118.
53. (1954) 1 All ER 542: (1954) 1 QB 586.
54. AIR 1958 SC 578: 1959 SCR 12.
55. AIR 1958 SC 956 (975): 1959 SCR 995.
56. AIR 1966 SC 385 (1012): (1966) 1 SCR 505.
57. (1975) 1 SCC 492 (498): AIR 1975 SC 1007 (1012).

repeal rules subsequently could not be regarded as a sufficient control over the delegated legislation, Mathew, J. observed:

> "The dilution of parliamentary watch-dogging of delegated legislation may be deplored but, in the compulsions and complexities of modern life, cannot be helped."

(*F*) *Conclusions*

What are the consequences of failure to lay? It is submitted that the correct answer to this question depends on the terms relating to a particular laying clause. If the provision relating to laying is a condition precedent, the requirement of laying must be held to be mandatory and the rules do not come into force until they are laid. In case of 'negative clause', however, the rules come into operation immediately and the provision of laying is generally construed as directory.

(ii) Scrutiny Committees

(*A*) *Object*

As discussed above, laying on the table has not always been held to be mandatory. Even if that requirement is complied with, mere laying of rules before Parliament would not be of much use, unless the rules were properly studied and scrutinized. And, therefore, with a view to strengthening Parliamentary control over delegated legislation, Scrutiny Committees are established. In England, the Select Committee on Statutory Instruments was established by the House of Commons in 1944. In India also, there are two Scrutiny Committees: (1) the Lok Sabha Committee on Subordinate Legislation; and (2) the Rajya Sabha Committee on Subordinate Legislation.

(*B*) *Functions*

The function of these Committees is 'to scrutinise and report to the respective Houses whether the powers to make regulations, rules, sub-rules, bye-laws, etc., conferred by the Constitution or delegated by Parliament are being properly exercised within such delegation'. "They act as watch-dogs which bark and arouse their master from slumber when they find that an invasion on the premises has taken place."[58]

(*C*) *Suggestions*

The Indian Committee on Subordinate Legislation has made *inter alia* the following recommendations and suggestions:

(*a*) Power of judicial review should not be taken away or curtailed by rules.

58. *Delegated Legislation in India*, ILI, 1964, p. 201.

(*b*) A financial levy or tax should not be imposed by rules.

(*c*) Language of rules should be simple and clear and not complicated or ambiguous.

(*d*) Rules should not be given retrospective operation, unless such a power has been expressly conferred by the parent Act, as they may prejudicially affect the vested rights of a person.

(*e*) Legislative policy must be formulated by the legislature and laid down in the statute and the power to supply details may be left to the executive, and can be worked out through the rules made by the administration.

(*f*) Sub-delegation in very wide language is improper and some safeguards must be provided before a delegate is allowed to sub-delegate his authority to another functionary.

(*g*) Discriminatory rules should not be framed by administration.

(*h*) Rules should not travel beyond the rule-making power conferred by the parent Act.

(*i*) There should not be inordinate delay in making of rules by the administration.

(*j*) The defects in rules pointed out to the administration should be cured as soon as possible.

(*k*) The rules framed by the administration and required to be laid before the House by the parent Act should be laid before Parliament as soon as possible, and whenever there is inordinate delay, an explanatory note giving the reasons for such delay should be appended to the rules so laid.

(*l*) The final authority of interpretation of rules should not be with the administration.

(*m*) Rules should contain short titles, explanatory notes, reference to earlier amendments for convenience of location, ready reference and proper understanding.

(*n*) Sufficient publicity must be given to the statutory rules and orders.

The working of the Committee is on the whole satisfactory and it has proved to be a fairly effective body in properly examining and effectively improving upon delegated legislation in India. Sir Cecil Carr[59] aptly remarks: "It is evidently a vigorous and independent body."

59. *Parliamentary Control of Delegated Legislation*, Public Law, 1956, p. 200 (215).

(d) Conclusions

Parliamentary control is, however, not effective. Wade[60] says: "One of the features of the twentieth century has been a shift of the constitutional centre of gravity, away from Parliament and towards the executive. Mr Lloyd George once said: 'Parliament has really no control over the Executive; it is a pure fiction'." The accusation against the House of Commons at the present time is that it allows government departments to do things, without knowing what is being done.[61]

Prof. Ramsay Muir states: "There is no country in North-Western Europe in which the control exercised by Parliament over the Government over legislation, taxation and administration — is more shadowy and unreal than it is in Britain. *Parliament is no longer, in any real sense, the sovereign power.*"[62] (emphasis supplied)

4. OTHER CONTROLS

Over and above judicial and parliamentary controls, sometimes other controls and safeguards are also provided. One of such safeguards against the abuse of delegated power is to properly and precisely limit the power of the delegate. If the extent of power is not properly defined in the parent Act, the executive authority may usurp some powers of the legislature and may be tempted into unjustified interference with the rights of the individuals. The courts also should interpret the provisions of rules and regulations in such a manner as not to give blanket powers to the executive authority.

It is also argued that the delegation of power should be conferred only on trustworthy authorities, e.g. Central Government, State Governments, etc., as these authorities will exercise the power conferred on them in a reasonable manner. In *Maneka Gandhi* v. *Union of India*[63], the Supreme Court has observed:

> "It is true that when the order impounding a passport is made by the Central Government, there is no appeal against it, but it must be remembered that in such a case the power is exercised by the Central Government itself and it can safely be assumed that the Central Government will exercise the power in a reasonable and responsible manner. *When power is vested in a high authority like the Central Government, abuse of power cannot be lightly assumed.*"[64] (emphasis supplied)

60. *Administrative Law*, 1994, p. 897.
61. Lord Hemingford cited by Jois: *Delegated Legislation*, 1982, p. 150.
62. *Cited by* Jois (*ibid.*), p. 146.
63. (1978) 1 SCC 248: AIR 1978 SC 597: (1978) 2 SCR 621.
64. *Id.* at p. 294 (SCC): 632 (AIR) (Per Bhagwati, J.), *see also* C.K. Thakker: *Administrative Law*, 1996, pp. 156-57.

In *S.R. Bommai* v. *Union of India*[65], dealing with the power of the President to proclaim Emergency, Jeevan Reddy, J. stated:

> "It is necessary to reiterate that the court must be conscious while examining the validity of the Proclamation that it is a power vested in the highest constitutional functionary of the Nation. *The court will not lightly presume abuse or misuse.*" (emphasis supplied)

In collective exercise of power also, there is no likelihood of abuse of power. In *K. Ashok Reddy* v. *Govt. of India*[66], an action of transfer of a Judge of a High Court was challenged. The decision was based on collective exercise of power by high constitutional functionaries on objective criterion. Treating it as inbuilt safeguard on arbitrariness and bias, the Supreme Court observed: "*We have no doubt that the Chief Justice of India acting on the institutional advice available to him is the surest and the safest bet for preservation of the independence of judiciary.*" (emphasis supplied)

Certain Central Acts provide some additional safeguards also. They empower the State Governments to frame rules, but prior approval of the Central Government is necessary, e.g. Section 17 of the Probation of Offenders Act, 1958. Some statutes empower the Government to frame rules subject to previous publication in the Official Gazette, e.g. Section 29 of the Minimum Wages Act, 1948. Sometimes, powers are conferred on the Government to frame rules or regulations only after consultation with the affected interests, e.g. Section 59 of the Mines Act, 1952.

5. CONCLUSIONS

Plenary powers of law-making are entrusted to elected representatives. But in reality, the political Government, instructed by the bureaucracy, gets bills passed through either by the aid of whip or by other methods. Thus, law making has remained, more or less, exclusive prerogative of a small cross-section of elites. It affects not only the quality of the law made but reinforces centralised system of power. There must, therefore, be social auditing by public at large. Constitutional legitimation of unlimited power of delegation to the executive by the Legislature may, on critical occasions, be subversive of responsible Government and erosive of democratic order.[67]

The system of law-making, therefore, needs careful and radical restructuring, if participative, pluralist Government by the People is not to be jettisoned. As Krishna Iyer, J. stated: "That peril prompts us to hint

65. (1994) 3 SCC 1 (268).
66. (1994) 2 SCC 303 (314): AIR 1994 SC 1207 (1214) (Per Verma, J.).
67. *Avinder Singh* v. *State of Punjab*, (1979) 1 SCC 137 (160): AIR 1979 SC 321 (336); *see also* observations of Prof. Upendra Baxi cited in that case.

at certain portents to our parliamentary system, not because they are likely now but because society may have to pay the price some day.[68]

It is submitted that the following observations of Shah, J. (as he then was) in *Municipal Corpn. of Delhi* v. *Birla Cotton Mills*[69] are worth remembering:

> "(T)he guidance which saves delegation from the vice of excessiveness may be express or may be implied: and the extent of the guidance must be determined by the subject-matter of legislation and the power entrusted. But in our judgment, the delegation cannot be upheld, merely because of the special status, character, competence or capacity of the delegate or by reference to the provisions made in the statute to prevent abuse by the delegate of its authority. The question is one of the restriction upon the power of the legislative body to delegate the power of legislation and that restriction is not removed because the delegate is a high dignitary of the State or is especially versed in a particular branch of administration or has special information or is in a position to collect that information, or is not likely to abuse its authority. The Constitution entrusts the legislative functions to the legislative branch of the State, and directs that the functions shall be performed by that body to which the Constitution has entrusted and not by some one else to whom the Legislature at a given time thinks it proper to delegate the function entrusted to it. A body of experts in a particular branch of undoubted integrity or special competence may probably be in a better position to exercise the power of legislation in that branch, but the Constitution has chosen to invest the elected representatives of the people to exercise the power of legislation, and not to such bodies of experts. Any attempt on the part of the experts to usurp, or of the representatives of the people to abdicate the functions vested in the legislative branch is inconsistent with the constitutional scheme. Power to make subordinate or ancillary legislation may undoubtedly be conferred upon a delegate, but the Legislature must in conferring that power disclose the policy, principles or standards which are to govern the delegate in the exercise of that power so as to set out a guidance. *Any delegation which transgresses this limit infringes the constitutional scheme.*"[70] (emphasis supplied)

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68. *Avinder Singh* v. *State of Punjab, ibid.*
69. AIR 1968 SC 1232: (1968) 3 SCR 251.
70. *Id.* at p. 1262 (AIR). *See also* observations of US Supreme Court in *Industrial Deptt.* v. *American Petroleum Institution*, (1980), 448 US 607; "We ought not to shy away from our judicial duty to invalidate unconstitutional delegations of legislative authority."