CHAPTER IV

JUDICIAL REVIEW OF DELEGATED LEGISLATION

In chapter III we examined the constitutional limits within which legislatures can validly delegate their legislative function. On the assumption that a law-making power is validly delegated, we proceed to consider in this chapter how far the courts can control the exercise of that power by the delegate. In all the countries under examination, the courts can question the validity of subordinate legislation on the following two principal bases:

(a) the subordinate law is substantively ultra vires because the delegate has exceeded the scope of the power authorising the making of the law.

(b) the subordinate law is procedurally ultra vires because the delegate did not follow the prescribed procedure in making the law.

Before taking up the discussion of the doctrine of ultra vires reference may be made to a formula which is at times used to exclude the jurisdiction of the courts, viz; the rules made under the Act shall not be called in question in any court. The legal implications of this clause are not yet clear. In India, however, courts have held that the formula, "No order made in exercise of any power conferred by or under this Act shall be called in question in any court"1, does not preclude judicial review of the delegated legislation,2 because the formula assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred.

A. Substantive Ultra Vires

In all the countries under examination, the courts have uniformly taken the view that delegated legislation made in excess of powers conferred

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1. S. 16(1) of the Defence of India Act, 1935.
on the delegate is invalid. But, as the following discussion will show, the grounds on which delegated legislation may be held to be unauthorised are not the same in all countries. The difference arises because the limitations on the exercise of the delegated power are not confined only to the enabling Acts, but may spring from other sources as well, the scope of which varies from country to country. If the constitution of a country imposes any general restriction on law-making, the delegated legislative power also must be exercised subject to those restrictions. For example, in India, statutory rules cannot abridge the fundamental rights guaranteed by the Constitution. Again the courts may and, sometimes do, read certain implied limitations on the delegate's authority to make laws. Thus unreasonableness is a ground for invalidating departmental legislation in South Africa but not so in the U.K. At times, in the same country while the courts read an implied limitation on the power to make one type of subordinate legislation, they may decline to import the same in respect of other types. To take an illustration from the U.K., Chester v. Bateson laid down that a regulation could not take away the right of access to the courts without an authorisation in that behalf from the empowering Act in clear language but according to Liversidge v. Anderson no such restriction applies in respect of departmental legislation affecting the right to personal liberty during the days of war. Judicial decisions regarding substantive ultra vires may be discussed under the following heads:

1. Delegated legislation not authorised by the enabling Act.

In all countries under study, excess of authority is a common ground for invalidating subordinate legislation. If a rule-making power is conferred on the executive in very wide terms it will, of course, be difficult to ascertain the precise limits of the power intended by the legislature. But once such limits are determined by the courts they unhesitatingly strike down the instruments which fall outside those limits. We may take a case or two from each country.

1. Article 13 of the Constitution of India.
2. See this Chapter, below, under the heading of "Unreasonableness of Delegated Legislation."
3. (1920) 1 K.B. 829 at p. 836.
4. (1942) A.C. 206.
In the U.K. it was held in *R. v. Minister of Health, Ex parte Davis*\(^1\) that an improvement scheme not within the purpose of the empowering Act was *ultra vires*. The Housing Act, 1925, authorised a scheme 'for the rearrangement and reconstruction of the streets and houses in the area or some of such streets or houses'. But the scheme in question was, as described by Lord Hewart, C.J., not for the above purpose but 'for the purpose, if and when the local authority thinks fit, of resale, and, of course, of resale at the highest obtainable price'. The court granted prohibition to restrain the Minister from confirming the scheme.

Lord Herschell observed in *Institute of Patents Agents v. Lockwood*\(^2\) that if an enabling Act provided that instruments made thereunder "should have effect as if enacted in this Act", the jurisdiction of the courts to inquire whether or not the instruments conformed to the statute was taken away. The object of this clause, according to his Lordship, was to make the courts as powerless to pass judgment on subordinate legislation as they were helpless against an Act of Parliament. This view has been disapproved by the House of Lords in *Minister of Health v. The King*\(^3\) (on the prosecution of Yaffe) where it was said that the above clause would not save the instruments which were inconsistent with the empowering Act, because:

The Act of Parliament in which it is contained is the Act which provides for the framing of the scheme, not a subsequent Act. If therefore the scheme, as made, conflicts with the Act, it will have to give way to the Act.... It would be otherwise if the scheme had been, per se, embodied in a subsequent Act, for then the maxim to be applied would have been "*Posteriora derogant prioribus*".\(^4\)

The Committee on Minister's Powers took the view that the controversy regarding the effect of "as if enacted" clause "had been laid to rest" by the *Yaffe* case, though according to Allen the precise effect of the clause "is still doubtful" and "remains undetermined."\(^5\)

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1. (1929) 1 K.B. 618. Odgers stated the position as follows: "Rules must be read together with their relevant Act; they cannot repeal or contradict express provisions in the Act from which they derive their authority. If the Act is plain the rule must be interpreted so as to be reconciled with it or if it cannot be reconciled the rule must give way to the plain terms of the Act." Odgers, *The Construction of Deeds and Statutes* (1952), 3rd ed., p. 303, see also, _Halbury’s Laws of England_, Vol. 31.

2. (1894) A.C. 347.

3. (1931) A.C. 494.


For an Australian illustration holding subordinate legislation void on the ground that it exceeded the enabling power, reference may be made to Morton v. Union U.S. Co. of New Zealand Ltd. S. 164 of the Excise Act 1901-49 provided *inter alia*: "The Governor-General may make regulations not inconsistent with this Act prescribing all matters... as may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the excise. The High Court held that the provision authorised only such regulations which were, for the more effective administration of the provisions, actually contained in the Act and not those which departed from the positive provisions made by the Act, or which were outside the field marked out by the Act itself. Consequently, a regulation which in the opinion of the court imposed a distinctive and independent liability in addition to the liabilities imposed by the Act, was invalid.

As to the effect of the "as if enacted clause", a State Supreme Court refused in Foster v. Aloni to hold that every regulation purporting to be made under a provision governed by such clause, was automatically validated. The court observed that the conditions laid down by the enabling Act as precedent to the exercise of delegated power, must genuinely purport to be made under the power delegated by the enabling statute. If there was inconsistency between the sections of the empowering Act and the regulations, "(normally) the inconsistent section would be treated as the leading provision and the regulation as the subordinate."

As early as 1916, the Canadian Supreme Court had taken the view similar to that taken by the House of Lords in 1931 in the *Yaffe case*. The relevant decision was of Belanger v. the King in which a certain rule, professedly made under certain provisions of the Government Railways Act, directed the doing of an act which was inconsistent with the explicit requirements of a section of the statute. Another section of the statute provided, "All such regulations made under this Act shall be taken and read as part of this Act." The court held that the said rule could not override the inconsistent section of the Act. Despite the provision that regulations made under the Act were to be taken as part of the Act, Duff, J. observed:

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1. (1951) 83 C.L.R. 402 at pp. 409, 410.
2. (1952) A.L.R. 18 (F.C.)
4. 34 DLR (1917) p. 221.
5. Ibid, at 229.
I see no difficulty in holding that in this case the regulation, in so far as it is inconsistent with section 16, must give way; or as it is perhaps better to put it, the regulation must be read as subject to an implied proviso that nothing in it shall be considered to sanction a departure from section 16.

In *Rex v. Ngubane*, the South African Supreme Court held a statutory regulation invalid on the ground that it exceeded the authority conferred by the Act. In this case S.23 of the Diseases of Stock Act empowered the Governor-General to make regulations for a variety of purposes and ended with the words "generally for protecting the introduction or spread of any disease within the Union . . . and for securing co-operation between officers and owners." A regulation claimed to have been made under this general clause provided for a census of cattle and required an owner of cattle to take an active part in the compilation of a census return of his cattle. The Supreme Court held that the regulation was not authorised by the Act and was therefore *ultra vires*.

In the U.S.A., the judicial authority for invalidating subordinate legislation made in excess of the enabling power, is to be found in *Morill v. Jones*. The relevant statute provided that, "Animals, alive, specially imported for breeding purposes from beyond the seas, shall be admitted free (of duty), upon proof thereof satisfactory to the Secretary of the Treasury." But a regulation made under this provision required that before a collector admitted such animals free, he must "be satisfied that the animals are of superior stock, adapted to improving the breed in the United States." The Supreme Court held that the regulation was unauthorised as it exceeded the delegated power. The statute clearly included animals of all classes, while the regulation sought to confine its operation to animals of 'superior stock'. This was manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe.

In India, courts have clearly taken up the position that rules falling outside the purview of the powers delegated are invalid. In *Chandra Bali v. R.*, the validity of certain rules made under S. 19 of the Northern India Ferries Act was questioned. The section authorised the making of rules for the purpose of maintaining order and safety of passengers and property. The commission, however, made *inter alia* certain rules for the propose of

1. 1952 S.A.L.R. 21 (A.D.)
2. 106 U.S. 207 (1882).
forbidding the establishment of private ferries within a distance of two miles from the limits of another ferry. The court held the rules *ultra vires* as they were outside the scope of the rule-making power conferred by the Act.

In *Munsha Singh Dhaman Singh v. State of Punjab*¹, Rule 16 (ii) of the East Punjab Consolidation Rules was struck down as being in excess of the rule-making powers conferred by S. 46 of the E.P. Holdings Act, 1948, because the consolidation officer in pursuance of that rule exercised and enjoyed vast powers whose unfettered exercise resulted in virtual liquidation of the areas of the individual proprietors which was outside the scope and purpose of the Act. Another instance of the same type is *Shahabuddin Khan v. The State of U.P.*,² where a government notification curtailing the powers of the Chief Inspector of Factories was held to be in excess of the delegated authority conferred by S. 105 of the Factories Act.

The Supreme Court considered this question in *Chief Commissioner of Ajmer v. R. S. Dani.*³ The Ajmer Merwara Municipalities Regulation, 1925, laid down certain qualifications for enrolment as an elector of the Ajmer Municipality. The Chief Commissioner was empowered to make rules consistent with the regulation, among other things, for 'the preparation and revision of electoral rolls, and the adjudication of claims to be enrolled and objections to enrolment.' The Chief Commissioner made the election rules, prepared the electoral rolls accordingly and published them in the gazette as final. He however omitted to provide for giving opportunity to parties concerned to scrutinize the qualifications of the electors and for revision of the rolls and adjudication of claims and objections to enrolment. The court held that because of the said omission the rules did not serve the purpose of the regulation and were therefore defective. It was further held that for the same reason the electoral rolls were not in conformity with S. 30(2) of the regulation which prescribed the qualifications of electors and could not, therefore, form a basis for any valid election. The court took this view notwithstanding the fact that S. 248(4) of the Regulation provided, "On publication in the Official Gazette of any rules made under this Regulation such rules shall have effect as if enacted in this Regulation." This decision indicates that in India also 'as if enacted' clause cannot save subordinate legislation from being held invalid on the

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¹ A.I.R. 1960 Punjab 3217.
² A.I.R. 1960 All. 373.
ground that it does not conform to the enabling Statute. The court, of course, said that it was unnecessary to consider whether in the event of an inconsistency between the section of the regulation and the rules made thereunder, the section would prevail or the rules. But when the court had expressed the opinion that because of the omission to make provision in the rules for the revision of electoral rolls etc., the rules were defective, there remained, it is submitted, little to be said about the inconsistency between the regulation and the rules. Again, if the electoral rolls could not stand because of the said omission and the resulting non-conformity with the regulation, how could the rules?

Some of the Indian High Courts have already held that the ‘as if enacted’ clause does not preclude the courts from enquiring whether or not statutory rules conform to their enabling Act.

It seems that the courts will not import any implied doctrine to enlarge the ambit of delegated powers. Thus in Agarwal Ayengar and Co. v. State, it was contended that the power conferred on the rule-making authority to control the price of textiles impliedly carried with it the power to regulate the price of “likerin wire”—an article necessary for use in the machinery for carding cotton. The principle relied upon in support of the contention was that whenever power was conferred upon the legislature to pass laws in a given field, that power carried with it the power to regulate all the matters which might be called subsidiary or ancillary. The court held that this principle was inapplicable in interpreting the subordinate power of legislation conferred upon the executive government.

Nor do the courts permit the rule-making authority to give retrospective operation to its rules unless and until that power was expressly conferred by the parent Act.

It may be observed here, however, that the effective application of the rule that the delegated powers must not go beyond the scope of the enabling authority is conditioned by the delegatory Act defining the precise limits of the law-making power. As pointed out earlier, if the power to make rules is delegated in very wide terms there would be little scope left to apply

2. A.I.R. 1951 Bom. 397.
the rule of *ultra vires*. The language used, for example, in S. 2, sub-sec. (1) of the Defence of India Act, 1939, is so comprehensive that it is difficult to conceive how any of the rules could be beyond its scope. S. 2(2) of the Act gave certain powers which were, however, declared to be "without prejudice to the generality of the powers conferred by sub-section (1)." In *King Emperor v. Sibnath Banerji*,¹ the Privy Council held that a rule which was covered by the more general language used in sub-sec. (1) would not become *ultra vires* although it did not fall within the terms of the legislative provisions of sub-sec. (2).

Subordinate legislation, to be valid, must not be in conflict with or repugnant to the delegating Act.

In *Ram Prasad v. State*,² S. 49 of the U.P. Panchayat Raj Act, 1949, laid down that every case or proceeding cognizable by Panchayat Adalat (village court) must be tried by a bench constituted in the manner provided in the Act. Rule 87 made under the Act laid down that three members of a Panchayat Adalat should constitute the quorum of meeting of any bench. This number was less than what was prescribed in the Act, and so the rule was held invalid as being inconsistent with the provisions of the delegating Act.

Similarly, in *Manepalli Venkatanarayana v. The State of Andhra Pradesh*,³ Rule 31(5) of A.P. General Sales Tax Rules, 1957, was declared to be in conflict with the delegating statute i.e., the Sales Tax Act. The Act in this case did not prescribe the assessing authority but left it to the State Government to make the appointment. It gave the power of reassessment only to the assessing authority and to none else, whereas the rule-making authority extended it, under the impugned rule, to include other authorities also. The rule was held *ultra vires* and void.

Sometimes the conflict between the parent Act and the subordinate legislation may not be apparent, yet the rule may be found to be repugnant to the scheme of the Act. In *Mohammad Hussain Gulam Mohammad v. The State of Bombay*,⁴ the validity of Rules 53, 65, 66 and 67 made under the Bombay Agricultural Produce Market Act, 1939, was questioned

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² A.I.R. 1952 All. 843.
before the Supreme Court on the ground that they were in conflict with the enabling Act. Rule 53 provided that the market committee should levy and collect fees on agricultural produce brought and sold in the market area at such rates as might be specified in the bye-laws. The rule, however, failed to prescribe the maxima to which the bye-laws should conform. S. 11 of the Act clearly stipulated that the maxima should be prescribed by the Rules. On this ground, the Supreme Court held rule 53 *ultra vires* S. 11.

S. 5A, read with the proviso to S. 4(2), contemplated the Commissioner to be the licence issuing authority, but not the market committee. Rule 65, however, conferred this power on the market committee. On the ground of the rule being in conflict with the Act, the Supreme Court struck down rule 65. Rules 66 and 67 being of the same description, were also declared ultra vires.

For the same reason referred to above, a notification was quashed in *Ram Sewak v. State of U.P.* The U.P. Government issued a notification under S. 6(1) of the Land Acquisition Act, 1894, empowering the collector to take possession of about thirty-one acres of unspecified lands in a specified village. The language used in the section is, “any particular land is needed for a public purpose.” The Allahabad High Court held the notification invalid as it was not in conformity with S. 6. The court observed that “the law requires the land to be particularised in the notification under S. 6. It requires definiteness in the matter and it is clear that in the present case definiteness is wanting. . . . In my judgment the impugned notification in the instant case suffers from the defect of want of particularity and is not in accordance with law.”

In *Haji H. Ibrahim v. Emperor,* the power to make rules under the Factories Act for precautions to be taken against fire was held not to include the power to make rules for the consequences of the fire since the Act intended that the provisions regarding that matter should be made by each factory (as far as could reasonably be required in the circumstances of each factory), and then left to the inspectors to see if the necessary precautions had been taken. Rule 37 of the Factories Rules was therefore declared *ultra vires.*

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2. Ibid, at 26 (Per Jagdish Sahai, J.).
3. A.I.R. 1943 Bom. 5.
The principle of implied conflict has been invoked in *Adarsh Industrial Corporation v. Market Committee, Karnal.* S. 31 of the Punjab Agricultural Produce Markets Act of 1939 provides that dues from the market committee to the government shall be recovered as arrears of land revenue. Rule 51 of the rules made under the above Act provides for the same mode of recovery of fees payable to the market committee by others. The Punjab High Court held the rule *ultra vires* S. 31. It said that the recovery of sums as arrears of land revenue was a matter of legislative policy clearly provided in S. 31, but its scope was restricted to sums payable to the government by the market committee. S. 31 excluded, by implication, the recovery of fees payable to the market committee as arrears of land revenue. Consequently, it was not for the rule-making authority to extend the scope of S. 31 and include matters following outside its purview. The rule was, therefore, inconsistent with the legislative intention gathered from S. 31.

Occasionally a question arises whether a subordinate law becomes invalid, though otherwise within the scope of the delegating Act, if it is in conflict with some other statutory or non-statutory provision of law. The position is that if the statute itself declares that the rules formed thereunder shall have the same effect as if enacted in the Act, then the rules would be valid even though they come in conflict with some other existing law. For example, in *Subbarao v. Income Tax Commissioner,* two the validity of Rules 2 & 6 framed under the Income-Tax Act, 1922, which provided that an authorised agent could not file the application for the removal of registration of a firm, was questioned. These rules though within the purview of the authority delegated under the Act, were in conflict with the Attorney Act of 1822 which permitted the agent to sign on behalf of the principal. Relying on the principle that a special enactment over rode more general laws on the same subject, the court held the rules valid.

If instead of the 'as if enacted' formula, the parent statute says that the rules made under it shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the enabling Act, then also the result would be the same. This has been so held by the Supreme Court in *Hari Shanker Bagla v. State of M.P.* where it declared S. 6 of the Essential Supplies Act, which provided that any order made under S. 3 shall have effect even if it was inconsistent with any

2. A.I.R. 1952 Mad. 127.
other existing law, a valid piece of legislation.

Another situation may arise where no such provision exists in the statute but a rule framed under the rule-making power conferred by an Act may be found to be inconsistent with the provisions of an existing Act. A similar question arose in *T.B. Ibrahim v. R. T. Authority.* S. 68 of the Motor Vehicles Act sets out that a Provincial Government may make rules for the purpose of prohibiting the picking up or setting down of passengers by stage or contract carriages at specified places or in specified areas or at places other than duly notified stands or halting places. Rule 268 made under the power conferred by the above provision provided that in case of public service vehicles the transport authority might fix or alter the starting places and termini between which such vehicles shall be permitted to be used within its jurisdiction. On the other hand, S. 270 of the Madras District Municipalities Act of 1920 empowers the Municipal Council to construct or provide halting places and motor vehicle stands. Where a Municipal Council has provided a public landing place, halting place or cart stand, the executive authority may prohibit the use for the same purpose of any public place or the sides of any public street. It was contended that the authority which was clothed with a power to fix a stand was the municipality under the Madras District Municipalities Act and not the Regional Transport Authority who derived its power from rule 268 of the Madras Vehicles Rules framed under the Motor Vehicles Act, 1939. Hence rule 268 was bad as being inconsistent with S. 270 of the District Municipalities Act.

The Supreme Court did not hold that there was any inconsistency between the rule and the State Act, nevertheless, it did observe that if rule 268 was within the power of the rule-making authority 'it follows that it cannot be challenged as being void because it is not consistent with some general law.'

It is doubtful if the courts in England, in the absence of an express authorisation by Parliament, would be willing to give such an operation to subordinate legislation.¹

¹. A.I.R. 1953 S.C. 79.

². Thus in *Perry v. London General Omnibus Co.,* (1961) 2 K.B. 335 at p. 348, the court doubted if in the absence of an express provision a statutory instrument could repeal or amend on Act of Parliament.
2. Delegated legislation violating fundamental law

In the United Kingdom there is no fundamental law or a written constitution to which Acts of the legislature should conform. Consequently a legislative grant made by the U.K.'s Parliament cannot be read subject to any limitation save those contained in the grant itself. Provided the Parliament so authorises, subordinate legislation can amend or repeal an Act of Parliament itself. Thus, in Miller v. Boothman\(^1\) the Court of Appeal held Regulation 10(c) of the Wood Working Machinery Regulations, 1922 to have modified the provisions of S. 14 of the Factories Act of 1937. The power to modify was expressly given by the Act. It therefore follows that whenever the question of \textit{vires} of a piece of subordinate legislation arises in the U.K., what the courts have to determine is whether the necessary authority has been conferred by the empowering Act. If the language of the enabling statute is not clear, the problem is one of interpretation and then the intention of Parliament is to be ascertained. The following decisions will show the approach of the courts in cases where subordinate legislation affects what may be called the fundamental rights of the subjects.

In Chester v. Bateson\(^2\) a statute authorised the making of regulations for the public safety and successful prosecution of the war. One of the regulations made under the statute prohibited, in certain cases, proceedings, to recover possession of the dwellings of the workmen employed in the manufacturing of war materials, and imposed penalty for taking any such proceedings. It was held that the regulation forbade the owner of the property access to all legal tribunals in regard to this matter for which there was no authority in the statute. Avory, J. observed:\(^3\)

\begin{quote}
Nothing less than express words in the statute taking away the right of the King's subjects of access to the courts of justice would authorise or justify it.
\end{quote}

In \textit{R. W. Paul Ltd. v. Wheat Commission},\(^4\) a bye-law, which looked like more a departmental regulation than a rule of a local authority,\(^5\)

\begin{itemize}
\item \textbf{1.} (1944) 1 K.B. 337.
\item \textbf{2.} (1920) 1 K.B. 829.
\item \textbf{3.} \textit{Ibid}, at 837.
\item \textbf{4.} (1937) A.C. 139.
\item \textbf{5.} See Griffith & Street, op. cit., 116.
\end{itemize}
was held to be *ultra vires* because it purported to dispense with an Act of Parliament for which no express authority could be found in the enabling statute.

On the other hand, in *R. v. Halliday*¹ the contention that departmental legislation could not affect personal liberty without parliamentary authority in clear language, was rejected. The regulation involved in this case was a war-time regulation made under the Defence of the Realm Act, 1914, and allowed the government to detain without trial a person of alleged 'hostile origin or association'. There were no express words in the enabling statute granting such a wide power and this, in the opinion of the dissenting judge, Lord Shaw, made the regulation *ultra vires*. But the majority upheld the regulation as a necessary security measure and within the authority of the Act.

It shows that subordinate legislation in the U.K. has not received a uniform interpretation from the courts. In *Institute of Patent Agents v. Lockwood*,² the Board of Trade was authorised by Parliament to make such general rules as were, in the opinion of the board, necessary to give effect to the provisions of the relevant statute with regard to the registration of patent agents. One of the rules made by the board required every patent agent to pay an annual fee for being registered. It was claimed that the rule was *ultra vires* as the parent Act did not expressly authorise imposition of a tax. The House of Lords, however, held that the general words used in the statute conferred the necessary power. In *Attorney-General v. Wilts United Dairies*³ however, the same court had held that to charge a licensing fee under a regulation amounted to taxation and was illegal in absence of express authority from Parliament.

The only conclusion possible from the above interpretation appears to be that in the U.K. subordinate legislation encroaching on basic rights of the subjects will not be deemed to be valid without express authorisation from Parliament; whereas in some cases, however, a general and broadly phrased power may be regarded as impliedly granting the required authority.

In countries where powers of the legislature are limited and defined by a written constitution, the position of subordinate legislation as to its

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¹ (1917) A.C. 260.
² (1894) A.C. 347.
³ (1922) 38 T.L.R. 781.
vires is different from what we find in the U.K. In the U.K. there is only one test to determine the validity of subordinate legislation, viz. whether or not it is authorised by the enabling statute. There is no further test except that of 'good faith' which we shall discuss below. The tests, which have been applied to subordinate legislation by the courts in Australia, Canada, South Africa, U.S.A. and India, each of which has a written constitution, are mainly two, The first is, whether or not the enabling Act, or the enabling provision, is itself valid. If a legislature purports to delegate a power which it does not itself possess under the constitution, or otherwise violates a constitutional provision, the Act will be invalid, and subordinate legislation based on such Act will consequently fall to the ground. “Every Act which confers power to make subordinate laws”, declared the Supreme Court of India in Narendra Kumar v. Union of India,¹ “does so with an implied condition that such legislation shall be in accordance with the provisions of the Constitution.” The second test which compliments the first, is whether or not subordinate legislation violates any provision of the Constitution. If it does, it is unauthorised, because the legislature should not be deemed to have authorised what it could not itself do. However, if the legislature did, in express terms, authorise its delegate to make laws which would be inconsistent with the constitution, the matter should fall under the first test and the laws would, again, be invalid.

In Australia, in the Jehovah’s witnesses case,² the court considered the validity of the National Security (Subversive Associations) Regulations 1940-41 and of the National Security Act 1939-40, under which these Regulations were framed. The regulations made unlawful all bodies, which in the opinion of the Governor-General, were subversive to the war effort. Consequently the association of the Jehovah’s witnesses, a religious organisation believing in neutrality in matters relating to war, was declared to be an unlawful body. The regulations and the Act were challenged as void being inconsistent with S. 116 of the Constitution which provided that the Commonwealth shall not make any laws prohibiting the free exercise of any religion. The court found that the constitutional provision was not infringed by the regulations or the Act. It was, however, of the view that a contravention of the provision would have rendered the offending legislation ultra vires.

In Canada, where the Constitution distributes legislative powers between the Dominion Parliament and Provincial Legislatures, the Saskatchewan Court of Appeal described the above two tests as follows:\(^1\)

It is only axiomatic to say that a provincial legislature cannot delegate power which it does not possess, nor can it enlarge or extend its constitutional powers by a process of a delegation. The test of the validity of a Proclamation made under the legislation (Act) is simply this—would the Proclamation, if enacted as legislation by the provincial legislature, be within the competence of that body.\(^2\)

In South Africa, the legislative powers of the Union Parliament are limited to the extent to which the South Africa Act contains ‘entrenched’ provisions. Therefore, the courts can control delegated legislation on the same grounds that the enabling legislation must not be inconsistent with the constitution and that subordinate legislation must not violate a constitutional provision. This is clear from the judicial statement in *Rex v. Ngobane*\(^3\), which we noted earlier.

In the U.S.A. also rules made under delegated authority have been invalidated on the above two grounds. Thus in *Panama Refining Co. v Ryan*,\(^3\) certain laws made by the President were struck down by the Supreme Court because the enabling statute was itself unconstitutional. In *Chicago R.I. & P. Ry. Co. v. U.S.*,\(^4\) a regulation was declared *ultra vires* being in contravention of provisions of the Federal Constitution. The regulation required compensation to be paid by one rail road common carrier to another for the use of cars belonging to another carrier, but exempted short line roads from paying the compensation in certain cases. The Supreme Court held that the regulation was so arbitrary and unreasonable as to become an infringement upon the rights of ownership and was in violation of the due process of law.

In India the first of the above two tests was applied in *Chintaman Rao v. State of Madhya Pradesh*,\(^5\) where a State Act which authorised the Deputy Commissioner to impose a total prohibition of bidi-making in some areas during certain periods was declared *ultra vires* since it violated the right to carry on any occupation, trade or business guaranteed by Art. 1.

\(^1\) *Re. Sask, Moratorium Legislation*, (1954) 4 D.L.R. 599. at 652-53.
\(^2\) (1952) SALR 21 (A.D.).
\(^3\) (1934) 293 U.S. 388-448.
\(^4\) 284 U.S. 80.
\(^5\) 1950 S.C.J. 571; AIR 1951 S.C. 118.
19 (1) (g) of the Constitution. Consequently, the order issued under the Act was also held invalid. Again, in Tan Bug Taim v. Collector of Bombay, the Central Legislature authorised the government to make rules for requisition of immovable property—a subject which was not within the legislative field of the legislature. It was held that the rules made under the provision were void.

As to the second test namely, that subordinate legislation must not be inconsistent with the Constitution, it was argued before the Supreme Court in Narendra Kumar v. Union of India that if the enabling provisions of a statute were accepted as valid, rules made thereunder could not be challenged as being unconstitutional. The court rejected the argument and referring to the words 'in accordance with the provisions of the Articles of the Constitution' said:

Such words have to be read by necessary implication in every provision and every law made by the Parliament on any day after the Constitution came into force.

The principle underlying the above observation had already been applied by the Supreme Court in earlier decisions. Thus, Art. 286(2) of the Constitution, as it stood before its amendment in 1956, granted certain exemptions in respect of taxes on the sale or purchase of goods. But rule 5(2)(1) made under the Bombay Sales Tax Act, 1952, imposed certain conditions on such exemptions. The offending provision was held invalid. We have already noted above that in Raj Narain v. Chairman, P.A. Committee, Patna, the notification in question was held ultra vires because it effected a change in the policy of an Act of Parliament which, according to In re Delhi Laws Act case, was prohibited by the Constitution. The same question arose again in Messers Dwarka Prasad Laxmi Narain v. State of U.P., where Cl. 3(1) of the U.P. Coal Control Order, 1953, issued under S. 3 of the Essential Supplies (Temporary Powers) Act, 1946, provided that no person shall “stock, sell, store for sale or utilise coal for burning bricks or shall otherwise dispose of coal in this State except under a licence in Form ‘A’ or ‘B’ granted under this Order or in accordance with the provisions of this Order.” Cl. 3(2)(b) laid down that nothing contained in

1. A.I.R. 1946 Bom. 216; see, V. N. Shukla, Judicial Control of Delegated Legislation in India, I J.I.L.I. p. 361
sub-cl.(i) "shall apply to any person or class of persons exempted from any provision of the above sub-clause by the State Coal Controller to the extent of their exception." The Supreme Court held that cl. 3(2)(b) was *ultra vires* because it gave unrestricted power to the State Controller to make exemptions, and even if he acted arbitrarily from improper motives there was no check over him and no way of obtaining redress. Such a power was violative of the freedom of trade and business guaranteed under Art. 19(1)(g) and could not be justified as a reasonable restriction under cl. (6) of the same Article.¹

In *Sheo Shanker v. M.P. State*², the court had to consider whether the enabling Act also became invalid if a rule made under it would be found to be *ultra vires* on the ground of its violating some provisions of the Constitution. The majority held that only the offending rule, and not the Act was to be rejected. In the *State of Bombay v. United Motors*³ while the Bombay Sales Tax Act was held wholly *intra vires*, rule 5 (2) made under the Act was held invalid being in conflict with Art. 286 of the Constitution. The same principle was affirmed in *Madhubhai Amathalal Gandhi v. Union of India*⁴ and *Narendra Kumar v. Union of India*⁵.

3. Unreasonableness

Subordinate legislation emanating from local authorities (e.g., a municipal bye-law) must be reasonable in order to be held valid by the courts. The rule is based on a presumed intention of the legislature that while conferring on such bodies power to make laws, it did not authorise them to make unreasonable provisions. In a leading English case on the subject *Kruse v. Johnson*, Lord Russell said:⁶

¹ In this case cl. 4(3) of the Control Order was also held void as imposing an unreasonable restriction upon the freedom of trade and business guaranteed under Art. 19(1)(g) of the Constitution and not coming within the protection afforded by cl. 6 of the Art. For other instances of subordinate legislation held *ultra vires* on constitutional grounds, see *R. M. Seshadri v. Dist. Magistrate, Tanjore*, A.I.R. 1954 S.C. 747; *R. M. D. Chamarbaughwala v. Union of India*, A.I.R. 1957 S.C. 28; *R. J. Singh v. Electric Inspector*, A.I.R. 1960 All. 28; *U. P. S. M. Sangh v. U. P.*, A.I.R. 1960 All. 46; *Bidya Bhushan Mahapatra v. State*, A.I.R. 1960 Orissa 68.
² A.I.R. 1951 Nag. 38.
⁵ A.I.R. 1960 S.C. 430.
⁶ (1898) 2 Q.B. 91 at pp. 99-100.
If, for instance, they 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.'

No implied restriction is, however read, by the courts when legislative power is conferred on a government department and, consequently, executive legislation is not subject to the requirement of reasonableness. In such a type of legislation, the arbiter is the minister himself who is responsible to Parliament. In *Sparks v. Edward Ash Ltd.* and *Taylor v. Brighton Borough Council*, the court refused to examine the validity of the departmental regulations on the ground of unreasonableness.

In Australia, the courts do not recognise ‘unreasonableness’ as a ground for challenging the validity of statutory regulations.

The courts in South Africa require all subordinate legislation to be reasonable irrespective of whether it is made by a government department or a municipality or any other local authority. The basis for holding unreasonable statutory regulations invalid in that country is the presumed intention of the Parliament that it does not authorise the making of unreasonable laws. The authority for such presumed intention has been found in the passage from the English case *Kruse v. Johnson*. Though in its parent country this decision has been held to be inapplicable to departmental legislation, in South Africa it has been used by the courts to control all types of subordinate legislation. According to *Kruse v. Johnson*, unreasonableness covers partiality between classes, manifest injustice, bad faith, and oppressive or gratuitous interference with rights. All these

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1. (1943) K.B. 223 at 229-30. It may, however, be pointed out that all subordinate legislation is not made by Minister, nor all subordinate legislation is laid before Parliament. This explanation is, therefore, not applicable to rules made by authorities other than ministries and to rules that are not laid before Parliament.

2. (1943) K.B. 223.


5. (1898) 2 Q.B. 91.
grounds have been approved by the South African courts for testing the reasonableness of executive regulations.¹

Regulation 179 of the Mines and Works Regulations provided that in Transval and Orange Free Provinces certain specified jobs of shiftmen should be held only by white men. In Rex v. Hildwick-Smith,² the court held that the regulation discriminated against coloured persons by excluding them from certain forms of employment on the ground of their colour, and as no power was conferred either in express terms or by necessary implication to make such a discrimination, the regulation was *ultra vires* the enabling Act.

This was approved by the South African Supreme Court in *Minister of Posts and Telegraphs v. Rasool*, where Stratford, A. C. J., observed³ that an enabling Act might not be construed to confer the power to do unreasonable things, unless such power was specifically given.

In *Rex v. Abdurahman*,⁴ the court has reiterated the view that an unreasonable regulation will be *ultra vires*.

In the U.K., the justification for excluding departmental legislation from the test of reasonableness has been based, as we have seen above,⁵ on the Minister's responsibility to Parliament. In that country the Parliament is representative of all the inhabitants in general and may well therefore be depended upon for preventing any departmental legislation in case it is unreasonable. But in South Africa, as is well known, the Parliament represents only a small section of the inhabitants of the country, namely, the Whites, and the vast majority of the population consisting of the coloured people have no representation there. The idea of ministerial responsibility, therefore, could afford little justification in South Africa for relieving the departmental legislation from the test of reasonableness. The courts of that country seemed to have realised this and deliberately extended the principle of *Kruse v. Johnson* to statutory regulations in the

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² 1924 T. P. D. 69.
³ 1934 A.D. 167 at 173.
⁴ 1950(3) S.A.L.R. 136 (A.D.) at 143 and 147-8.
⁵ In *Sparks v Edward Ash Ltd.*, (1943) K.B. 223 at 229-30.
interests of justice. The judicial approach on this subject can be seen from the following remarks of a retired judge of the Natal Provincial Division of the South African Supreme Court, L. R. Caney. Referring to the said decision, he says:

In our country, however, where racial conflicts and colour consciousness abound and where by far the majority of the population is not only illiterate but also has the most meagre, and often no part in the process of government (national, provincial and local), the courts should be ready to bear the full measure of the burden of deciding upon the reasonableness... of subordinate legislation, for the protection of minorities and also of the politically inarticulate, and in the interests of justice.

In the U.S.A. unreasonableness of a statutory regulation would render it invalid as it will be hit by the 'due process of law' clause of the 5th or 14th Amendment of the Constitution. No distinction is made in this respect between executive legislation and bye-laws. "Just as the Ordinances of a municipal corporation must be reasonable to stand up under the delegations of the municipal charter", writes Hart, "so must administrative regulations be reasonable to be valid."

In Pacific States Box and Basket Co., v. White and, Manhattan General Equipment Co., v. Commissioner certain regulations were attacked as being unreasonable. In both the cases the Supreme Court found that the regulations were not unreasonable, but had they been so the court was prepared to declare them ultra vires.

In India, unreasonable piece of delegated legislation may be hit by the Constitution, as for example, under Art. 19 which guarantees seven freedoms and allows the State to impose only reasonable restrictions upon those freedoms on certain grounds specified in the article, any bye-law or a statutory regulation shall be ultra vires the Constitution if it unreasonably restricts those freedoms.

2. In Sinovich v. Hercules Municipal Council (1946) A.D. 783 it was held by a majority that where an enabling Act confers a specific power and the subordinate legislation does the same what was authorised, the question of reasonableness is ruled out. See also Rex v. Canestra, (1951), 2 S.A.L.R. 317, (A.D.)
3. See also, Schwartz, Introduction to American Administrative Law, 1958, pp. 73-74.
5. 296 U.S. 176 (1935).
The more important question is whether the courts in India can question the reasonableness of subordinate legislation outside the provisions of the Constitution. So far as the reasonableness of local bye-laws is concerned, the rule laid down by *Kruse v. Johnson* is followed. But the position of departmental regulations does not appear to have been settled in this respect.

The Allahabad High Court has in some cases taken the view that rules made under statutory authority would be invalid if unreasonable. The statements were *obiter dicta* and were made simply to refer the position of delegated legislation. No reason was assigned, nor any authority cited, for the view taken. The High Courts of Bombay, Madras and Madhya Pradesh have however held that the validity of statutory rules cannot be questioned on the ground of reasonableness, because the rules made under statutory authority become part and parcel of the statute and therefore stand on a different footing from bye-laws, with the result that though the latter can be challenged on the ground of unreasonableness, the former cannot.

It is, however, not clear as to why the statutory rules should be regarded as ‘part and parcel of the statute itself’ so as to put them on a different footing from that of municipal bye-laws in respect of reasonableness. English law makes this distinction because in view of English courts a minister responsible to Parliament is more trustworthy than a local authority, and a departmental legislation is normally laid before Parliament subject to annulment by the Houses. Of course, these two conditions exist in India also and on that basis the distinction between bye-laws and statutory rules would appear to be justifiable. But it is interesting to note that the Indian courts have adopted the English distinction between these two types of subordinate legislation without committing themselves to the reasons on which such distinction is made.

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1. (1898) 2 Q.B. 91
4. *Mulchand v. Mukund*, A.I.R. 1952 Bom. 298. The court observed at p. 297 that “once the rules are framed, they are incorporated in the statute itself and become part of the statute, and the rules must be governed by the same principles as the statute itself. And, therefore, although a bye-law may be challenged on the ground that it is unreasonable, a statutory rule cannot be so challenged.”
4. Bad Faith

It is the settled law in all countries under study that legislative Acts cannot be questioned by the courts on the ground that they have been obtained by improper motives. Once a law passed by a legislature is found to be within its legislative field, its validity does not depend on whether good or bad motives induced its enactment.

There is another rule that when a statutory authority is conferred on the administration or any other body, it must be exercised in good faith; otherwise on the proof of bad faith the courts can set aside the administrative action even though it does not transgress the express limits of the power. Now, can the courts examine, on the ground of bad faith, the validity of laws that are passed not by a legislature but by its delegate? The answer is not the same for all the countries.

In the U.K., Canada, South Africa and India delegated legislation made by administrative authorities including the executive head, stands subject to the test of good faith. There are judicial statements to the effect that on satisfactory evidence regarding malafides of the delegate being adduced, his laws can be held invalid. Thus in the U.K., Clauson, L.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.

In a Canadian appeal before the Privy Council an Order in Council was attacked as being made with the ulterior motive of confiscating profits of a class of merchants. On the facts of the case the court could not decide whether the allegation was true, but it said that if there was ‘a cause in which powers entrusted for one purpose are deliberately used with design of achieving another, itself unauthorised or actually forbidden’, it was bad faith and a court of law might intervene.

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The same view was held in South Africa and India. In *Narendra Kumar v. Union of India* the validity of Non-ferrous Metal Control Order, 1958 was in question. Supposing that the order would have been invalid if it were made malafide, the Supreme Court stated:

Malafides have not been suggested and we are proceeding on the assumption that the Central Government was honestly of opinion that it was necessary and expedient to make an order providing for regulation and prohibition of the supply and distribution of imported copper and trade and commerce therein.

But in Australia the rule against enquiry into motives behind Acts of a legislature has been extended to apply partly to delegated legislation also. By a unanimous opinion in *Dignan's* case, the Australian High Court applied this rule to regulations made by the Governor-General (on advice of a Minister) and refused to take into consideration the motives behind such regulations for examining their validity. Gavan Duff, C.J. and Stark J., stated:

If Parliament, however, placed in the hands of the Executive the power of making the Regulations the subject of attack in these proceedings, and that power has been abused or misused, the only remedy is by political action, and not by appeal to the courts of law.

The justification for excluding motives from judicial examination was based on the legislative character of the function performed by the Governor-General in making the provisions. In the words of Rich, J.

. . . . .the power given by the delegation is so akin to that of legislation that the reasons and motives of the donee, whether appearing ex facie the Regulations or aliunde, cannot affect their validity.

But in *Arthur Yates & Co. Pty. Ltd. v. Vegetable Seeds Committee,* a distinction was made between delegated legislation issued by King or his

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3. *Ibid,* at p. 217. In *King Emperor v. Benorilal Sarma,* (1945) A.C. 14, Viscount Simon, L.C., observed at p. 21: "Assuming that he (the Governor-General) acts bona fide and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that the emergency exists." An inference may be drawn from this observation that courts may question the malafide exercise of power.
5. *Ibid,* at 84.
7. (1945) 72 C.L.R. 37.
representative acting on the advice of a responsible minister and that issued by ‘a domestic, executive or administrative body.’ The former could not, the court affirmed, be questioned on the ground of bad faith but the latter could be so questioned since it was not, in the opinion of the court, an act of a pure legislative body. Notwithstanding any legislative element that might be contained in delegated legislation made by an ‘administrative’ body, the provisions were not, according to the decision, a real act of legislation and were, therefore, not protected by the rule against enquiry into motives. In the present case it was alleged that the Vegetable Seeds Committee, constituted under defence powers, had issued a direction under delegated authority prohibiting sales of certain seeds by merchants in order to compel them to purchase the committee’s own inferior stock of seeds which it could not otherwise dispose of. The court held that this was a relevant ground for examining the validity of the direction.

In America, the rule excluding enquiry into good faith of a legislature is applied to all subordinate legislative bodies also. Whatever be the status of the law making authority, whether a legislature or a municipal body, it is to be conclusively presumed that its legislative act has been induced by proper motives.¹

But the above rule protects from enquiry into good faith not all acts of a legislative body but only such of its acts which are of a legislative character. In a case, the court disallowed a municipal resolution which was obtained by corrupt means, as the resolution constituted part of the administrative duties of the council and was not an exercise of powers of “sovereignty.”

The Australian and American views depart from the general principle, followed in the U.K., Canada, South Africa and India, that every exercise of delegated legislative power by an executive authority is, for the purpose of enquiry into motives, an administrative action (as against that of a legislature) and so is subject to the test of good faith. In Australia, statutory regulations framed by Governor-General on the

¹ “And the same presumption that legislative action has been advised and adopted on adequate information and under the influence of correct motives will be applied”, writes Cooley, “to the discretionary action of municipal bodies, and of the state legislature, and will preclude, in the one case as in the other, all collateral attack.” The author cites numerous decisions of state courts where this proposition was upheld. Cooley, Constitutional Limitations, (1927) pp. 451-55.
advice of a responsible minister, are regarded as legislative for this pur-
pose but those made by subordinate authorities are not so. In the U.S.A.,
though every legislative act of a delegate is protected by the rule against
enquiry into motives, some of his proceedings can be held as administrative.
It is clear that a distinction between 'legislative' and 'administrative' actions has been deemed necessary in all these countries for the purpose of
enquiry into the bonafides of law-making authorities. Such distinction is
rather fine in the field of delegated legislation where almost every act of the
delegate is, in a sense, legislative and, in another sense, administrative. It
is legislative because the act is an exercise of legislative power and it is
administrative because the action is taken by an administrative machinery.
Where the line of this division should be drawn remains, therefore, a matter
of opinion.

5. Sub-delegation

A general rule drawn from the law of agency that a delegate cannot
re-delegate, is expressed in the maxim delegatus non protest delegare. The
maxim does not apply to the legislature under a written constitution¹. Does, then, this maxim apply to the delegate on whom the legislature has
corrofered a legislative power? Where the legislature itself authorises its
delegate to sub-delegate his power there arises little difficulty, but it has to
be seen what the courts have said in situations where there is no such
express authorisation.

In the U.K. there seems to be no decision on the question whether
sub-delegation of a legislative power without express provision for it is
permissible.² The above maxim was, of course, applied in Allingham v.
Minister of Agriculture³, where a County War Agricultural Committee
delegated to its executive officer its power to give discretion with respect to
the use of land for agricultural purposes. This power was conferred on the
committee by the Minister of Agriculture under the Defence Regulations,
1939. A direction issued by the committee's executive officer was held
invalid on the ground that the regulations were to be construed as requiring the committee itself to issue the direction and that the committee
had no power to delegate its own delegated authority. But since the sub-

1. Except perhaps in the U.S.A.
3. (1948) 1 All E.R. 780.
delegated power was not for issuing general directions but to issue specific ones to individual farmers, it was a delegation of taking, what should normally be called, an administrative action, and not of making laws. Professor de Smith\(^1\) regards this decision as 'settled law' that the maxim *delegatus non potest delegare* applies to regulations made by Ministers of the Crown. But Allen\(^2\) disagrees with him saying that the instrument involved in the case was not a regulation but a 'specific direction'. However, if a sub-delegated power to take an administrative action is governed by the rule of non-sub-delegation, there is greater justification, it is suggested, for applying the rule to sub-delegation of a legislative power since 'of all powers that can be put in commission, none can possibly be more important than the legislative because it has the largest range and can produce the most far-reaching consequences'.\(^3\)

There is, in fact, a judicial dictum which suggests that sub-delegation of a legislative power without express authority from the empowering statute or instrument to do so, would be invalid. In *Jackson, Stansfield & Sons v. Butterworth*\(^4\), it was held by the Court of Appeal that the plaintiff could not recover from the defendant payment for work done in repairing certain garages, because at the time when the work was done, there was no written licence to do the same within the meaning of Regulation 56A(2) of the Defence (General) Regulations, 1939. The power to grant the licence was conferred by the Regulation on the Minister of Works who delegated it to clerks or other duly appointed officers of local authorities in circulars issued by the Ministry of Health. Referring to such sub-delegation, Scott L.J., made the following statement,\(^5\)

> The circulars are, in character, mainly administrative, but I think that in some respects they go beyond administration and become legislative.... The delegation to another Minister or to local authorities of powers of administration and discretion was not within the authority of the Minister of Works. *Delegatus non potest, delegare* but the intention to delegate power and discretion to the local authorities is clear. The method chosen was convenient and desirable, but the power so to legislate was, unfortunately not there.

But it is also realised in the U.K. that if a power to make laws is given to a minister in general terms, it will be impossible for him to personally

\(^1\) *Sub delegation and Circulars*, 1948 (12) M.L.R. 37.
\(^3\) *Ibid*, at 209.
\(^4\) (1948) 2 All E.R. 558.
\(^5\) *Ibid*, at 563, 565.
enact all the laws required under the power. Professor Griffith, therefore, suggests that in such cases, if no express authority to sub-delegate is given to the minister, an implied one should be read in the empowering provisions:¹

If the Minister is empowered to make subordinate legislation, it is suggested that his power to authorise himself or others....to make sub-delegated legislation depends on the generality of the statute and the extent to which the powers to legislate are there defined. If the statute is so widely phrased that two or more “tiers” of subordinate legislation 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 a significant decision, In the matter of a Reference as to the Chemical Regulations,² the Canadian Supreme Court adopted a view similar to that expressed by Professor Griffith. One of the questions the court had to consider in this case was whether the regulations in relation to chemicals, framed under the War Measures Act, 1927, were ultra vires the Governor-General-in-Council since by these regulations he sub-delegated to certain agencies power to make orders, rules and bye-laws of which no express authority was given by the Act. The Governor-General-in-Council was authorised to make ‘Such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada.’³ The sub-delegation was unanimously upheld by the court in view of the very wide power conferred on the Governor-General-in-Council from which the judges inferred that the authority to sub-delegate was impliedly given by the Act. Some of the judges also discussed the rule of non-subdelegation but excluded the case from its application.⁴ What appears to have weighed with the

¹ Griffith and Street, Principles of Administrative Law, 2nd ed., p. 60.
² (1943) S.C.R. 1.
³ S. 3.
⁴ Duff, C.J., thought that there was nothing in the words of the empowering provision which precluded sub-delegation and that ex facie it was within the language there employed. The legislative power conferred by the Act was, according to him, ‘nothing less than a plenary discretion’ and the statute was ‘of the highest political nature.’ To Rinfret J., the authority delegated to Governor-General-in-Council was of ‘plenary powers of legislation as large and of the same nature as those of Parliament itself’ and regarding the maxim ‘delegatus non potest delegare’ his Lordship said that it had no reference to delegated legislation. Nor was the Governor-General-in-Council, within the ambit of the Act, a delegate of Parliament, according to the learned judge. Kerwin and Hudson, JJ. seemed to be of the opinion that the above maxim would apply to delegated legislation, but because of the wide power conferred on the Governor-General-in-Council and of the fact that the statute was a wartime legislation the maxim was not applicable to the present case.
judges was not only the generality of the power conferred on the Governor-General-in-Council but also the special character of the Act which was intended to meet war exigencies.

Recently, in *A. G. of Canada v. Brent,* the Supreme Court invalidated a sub-delegation of legislative power by the Governor-General-in-Council, under regulations which prohibited admissions where, in the opinion of a Special Enquiry Officer, such person should not be admitted by reason of the enumerated list of matters which were contained in S.61 of the relevant Act. In a brief judgment the court declared the provision *ultra vires* saying:

Parliament had in contemplation the enactment of such regulations relevant to the named subject matters or some of them, as in His Excellency in Council’s own opinion were advisable and not a wide divergence of rules and opinions ever changing according to the individual notions of Immigration Officers and Special Inquiry Officers. There is no power in Governor-General-in-Council to delegate his authority to such officers.

These two decisions show that in Canada sub-delegation of a legislative power is not precluded from the application of the maxim *delegatus non potest delegare*, but if the delegate has been given what the courts may regard as ‘plenary’ power of legislation, an implied authority to sub-delegate may be inferred.

Two Australian cases relating to sub-delegation of legislative powers are also relevant in this connection. The matter involved in both of them was what may be described as ‘conditional sub-delegated-legislation’, i.e. laws made by the delegate to come into operation on a condition which is left to be determined by a sub-delegate. In *Welsbach Light Co. v. Commonwealth,* the Governor-General was authorised by the Trading with the Enemy Act, 1914, to prohibit by proclamation any act or transaction in relation to trade with the enemy. The Governor-General prohibited all transactions with a company which the Attorney-General declared to be, in his opinion, of a nature described in the proclamation. The proclamation was attacked as delegating to the Attorney-General the power of finally determining whether

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a particular company was within the prohibition or not. The High Court of Australia upholding the proclamation said that no delegation of legislative power was involved. Griffith, C. J. thought that this type of delegation was 'very common' and Isaac, J. expressed the view that what was given was not a legislative but 'a declaratory power'. Higgins, J. applied to the case the argument which was employed by the Privy Council in Russell v. The Queen and said, "the Attorney-General does not legislate; Parliament legislates conditionally on the declaration of the Attorney-General."

In Croft v. Rose, the Governor-in-Council was authorised to make regulations fixing the maximum speed for driving in any specified locality. The regulation made for this purpose fixed the speed limit as 30 m.p.h. for the areas in which there was provision for the lighting 'by means of street lighting' or which were defined 'by means of a restriction sign and a de-restriction sign'. The provision of lighting and signs was to be made by authorities other than the government. It was contended that the Governor-in-Council in leaving to other persons to determine the areas in which the speed limit was to operate, sub-delegated his legislative power for which there was no express authority in the enabling Act. The court held that there was no delegation of legislative power since the Governor-in-Council had himself chosen some criteria and descriptions specified in the regulation. It was observed:

The most that could be said in favour of delegation was that the Governor-in-Council had placed in the hands of other persons than himself the power to determine when and where the provisions of the regulations should operate. But this does not amount to delegation that has, as we understand the matter, ever been considered objectionable.

Thus in Australia, if a legislative delegate authorises others to bring into operation the provisions of law made by the delegate himself, the courts will not regard it as sub-delegation of a legislative power although on the permissibility of sub-delegation as such, authoritative judicial pronouncement is still awaited.

1. Ibid, at 275.
2. Ibid, at 283-84.
4. (1882) 7 A.C. 829 at 835.
6. Ibid, at 151...
Regarding South Africa, writes Caney, "unless the enabling legislation authorises, expressly or by necessary implication, a power of delegation on the part of the subordinate legislature, the latter cannot delegate to an official or other persons the power conferred upon it." But the decisions cited by him in support of this proposition relate to conferring upon a sub-delegate the authority to take what may be regarded as administrative action pursuant to a legislative power. In this respect, the South African courts have held that a subordinate legislative body, whether it be a government department or a local authority, cannot so make its laws as to give to an official an unfettered authority to decide what may, and what may not, be done under those laws. If it does so, the provisions may be interpreted to be oppressive and gratuitous interference with the rights of the persons affected thereby and will be hit by the rule laid down in Kruse v. Johnson. Thus, on this ground a government regulation was held invalid in Natal Organic Industries (Pty.) Ltd. v. Union Government, because it conferred an unlimited discretion on an official by providing that no person should use certain material in the manufacture of yeast unless he was authorised by the said official to do so. But, as already pointed out, such decisions relating to taking of administrative action do not throw light on the problem whether or not a legislative delegate can, without an express authority from the empowering body in that behalf, sub-delegate his power to make laws.

Most of the American judicial decisions as well as juristic writings relating to sub-delegation deal with re-delegation of executive or administrative power and not with that of legislative power delegated by Congress to the President or to administrative agencies. An explanation for this may be found in the following observation of Davis:

Rules and regulations are almost always issued in the names of agency heads, who customarily know at least something of the final product and approve it. The result is that sub-delegation concerning rulemaking seldom comes to court.

3. Ibid.
4. (1898) 2 Q.B. 91. All the tests of validity of byelaws laid down by Lord Russell in this decision are also applied to departmental legislation. See p. 330, supra.
In 1937 Hart expressed the view that with the exception of "such concertizing ordinances and sub-legislative powers which directly affect major personal and property interests. . . . the President may (sub) delegate his ordinance making powers to the heads of the appropriate departments, whose acts in such cases are in law his own." But he did not support the exception pointed out by him with any judicial decision. Referring to this statement, Schubert commented in 1956 that "the exception is probably not warranted", though he too did not quote any judicial authority for his own opinion.

In the following two decisions of lower courts, however, sub-delegation of legislative powers was held permissible.

In States v. Barenco the relevant statute conferred the power to make regulations concerning exports on the President and provided that unless he otherwise directed his functions under the Act they 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. The sub-delegation went still further and passed through a few more officials the last of whom made the regulation for the violation of which the defendant was indicated in the present case. The various sub-delegations were upheld by the court which stated:

We believe there is nothing invalid about the delegation and re-delegation of authority to act. Heads of Government Departments and Boards must act, and presumably have been acting, time out of mind, vicariously in the performance of their routine business. It is impossible for them to do otherwise and dispose of the large amount of work. But they still remain, as did the Vice-President in the present case, responsible for the acts of their subordinates.

In Shreveport Engraving Co. v. U.S. the Shreveport Engraving Company was convicted for violations of conservation orders and directions issued under the War Powers Act because it used copper in excess of its allowable quota. It was contended that the orders and directives in question were issued neither by the President nor by the Chairman of the War Pro-

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1. The exercise of Rule Making Power, President's Committee on Administrative Management, Report with Special Studies, (1937), p. 188.
3. 50 F. Suppl. 520 (D.C. Mad. 1913).
5. 143 F. 2d. 222 (1944).
duction Board, but by a subordinate official to whom the Chairman purported to delegate the powers conferred by the Act upon the President, and by the President upon him and they were, therefore completely void for want of authority. The contention was rejected as the court found that the Acts had expressly authorised the President to sub-delegate and the President had also expressly authorised the Chairman of the War Production Board to sub-delegate the powers in question. But even if there were no express provision for the sub-delegation, the court was prepared to read an implied authority. The court said:¹

"These express provisions aside, we think it is too clear for debate that Congress, in conferring the powers in question, did not expect or intend that the President should execute all of the tremendous powers and in person discharge all the vast duties imposed upon him and that if there had been no express authority to act by deputies that authority would have been implied.

From these two decisions it appears that the necessity, referred to by Professor Griffith, for reading an implied authority to sub-delegate legislative power, has already been recognised by the American courts.

The Supreme Court of India, in *Ganpati Singh v. State of Ajmer*,² invalidated certain statutory rules because they amounted to sub-delegation of a legislative power for which there was no express authority in the enabling provisions. The Ajmer Laws Regulation (III of 1877) empowered the Chief Commissioner to make rules about the maintenance of Watch and Ward and about the establishment of a proper system of conservancy and sanitation at fairs and other large public assemblies. The rules made under this power prohibited the holding of a fair except under a permit issued by the District Magistrate and before issuing such permit the District Magistrate was enjoined to satisfy that the applicant was in a position to establish a proper system of sanitation and watch and ward at the fair. In a brief judgment the court observed:³

"The rules empower District Magistrate to make his own system and see that it was observed. But the Regulation confers this power on the Chief Commissioner and not on the District Magistrate, therefore the action of the Chief Commissioner in delegating this authority to the District Magistrate is *ultra vires*.

¹ *Ibid*, at 226.
² *1955 S.C.J.* 119
³ *Ibid*, at 121.
The facts of this case are a little peculiar because the object of the regulation of maintaining a proper system of sanitation etc. was attempted to be achieved through the requirement of personal satisfaction of the District Magistrate in individual cases and not by asking him to prescribe a proper system to which the fair-holders might conform. This point was touched by the Supreme Court but was not elucidated. Some High Court decisions have dealt with the problem of sub-delegation at a greater length.

In *State v. Ameer Chand,*¹ the Central Government having been authorised by the relevant statute, delegated to the Punjab Provincial Government, its authority to make order⁵ relating to essential commodities which again authorised the District Magistrates and certain other officers to make orders directing certain persons to declare their stocks of food grains in the prescribed manner. It was held that the Provincial Government had no authority to subdelegate the power which was itself delegated to it. The maxim *delegatus non potest delegare* and the English case *Allingham v. Minister of Agriculture*² were relied upon. The court was also of the view that the order issued in this case by an officer requiring certain persons to submit certain returns and declaring that legal action would be taken against them who would fail to comply with the provisions thereof, was clearly an order of legislative character and could not be issued under the sub-delegated authority.

Referring to the above decision, the Bombay High Court disputed, in a similar case³ brought before it, whether the order issued by the officer was legislative in nature. The view adopted by the court was that since the order was issued to each individual merchant concerned, it was an executive order and would not, therefore, be hit by the rule of non-delegation of delegated authority, but it never denied that sub-delegation of a legislative power without an express authority from the empowering body in that behalf would be bad.

Again, in *Pritam Bus Ltd. v. State of Punjab,*⁴ the Provincial Government redelegated its delegated authority to prescribe uniforms for bus drivers and conductors to the Regional Transport Authority. The court took the view that the power delegated to the Regional Transport Authority

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¹ I.L.R. 1953 (Punjab) 80.
² (1948) 1 All. L.R. 780.
was not legislative but executive, and therefore the sub-delegation was not void. However, the court seemed to be agreeable to the proposition that if it were a legislative sub-delegation, it would have been invalid.

Thus in India the trend of the judicial opinion seems to be that the maxim *delegatus non potest delegare* would apply to sub-delegation of legislative power.

B. *Procedural Ultra Vires*

If before making any subordinate laws the executive is required to comply with certain procedural preliminary requirements prescribed by the enabling Act or by a general statute such as holding consultation with particular bodies, or to publish the laws whether in the draft or final forms, or to lay them before Parliament, failure to comply with the same may invalidate the laws. But non-compliance with a procedural requirement, may not always invalidate such laws, because there is a well established judicial distinction between a mandatory and directory provision, and non-compliance with a directory provision does not invalidate legislation but failure to observe an imperative provision does. If the relevant statute is silent about the effect of non-compliance with a provision, it is not easy to say how one should determine whether the provision is mandatory or merely directory.¹

¹ One reasonable test suggested in *Howard v. Bodington* (1877) P.D. 203 is:

You must take to the subject matter; consider the importance of the provision that has been disregarded and the relation of that provision to the general object imperative to be secured by the Act; and decide whether the matter is what is called imperative or only directory.

A more definite test is to be found in a Privy Council decision given in *Montreal Sheet Railway Co. v. Normandin* (1917) A.C. 170. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the act done.

More elaborate rules for this purpose were laid down by the Appellate Division of the South African Supreme Court in *Sutter v. Sheepera* 1932 A.D. 165.

(1) If a provision is couched in a negative form it is to be regarded as a peremptory rather than a directory mandate. To say that no power of attorney shall be accepted by the Deeds office unless it complies with certain conditions rather discloses an intention to make the condition peremptory than directory; though even such language is not conclusive.

(2) If a provision is couched in positive language, and there is no sanction added
1. Effect of failure to consult

In the U.K. a provision requiring 'consultation' before the making of subordinate laws has, according to Professor Griffith, generally been regarded as mandatory.\(^1\) In *May v. Beattie,*\(^2\) the Minister of Transport was authorised by S. 1, sub-sec. 1 and 2, of the London Traffic Act, 1924, to declare a street a 'restricted street' for the purpose of omnibuses and to make regulations. But S. 5 of the Act stipulated that before doing so he "shall refer the matter to the Advisory Committee for their advice and report." It was argued that the committee to which a reference was made in that case by the Minister was not constituted as required by the Act and therefore regulations made in pursuance of the reference were invalid and *ultra vires.* The court without saying that the validity of the regulations could be challenged on that ground did not agree that the committee was improperly constituted. Again, in *Rollo and Another v. Minister of Town and Country Planning,*\(^3\) the question was whether the Minister, who was required by S.1(1) of the New Towns Act, 1946 to consult with the local authorities before making an order designating an area as the site for the proposed new town, did or did not hold the required consultation. It was contended that what was done by the Minister in the case was not 'consultation' within the meaning of the Act and therefore the order involved in the case was liable to be quashed. The court took great pains to show that what the Minister did was consultation as required by S. 1(1). Presumably, the court was of the view that the requirement of consultation was mandatory; otherwise the court could have disposed of the case by saying that even if there was no consultation the validity of the order was not affected. The following lines quoted with approval by Bucknill, L.J.,\(^4\) from the judgment of Morris J. in the court below, affirm this view:

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\[^{1} Griffith and Street, *Principles of Administrative Law*, 2nd ed., p. 107.\]
\[^{2} (1927) 2 K.B. 353.\]
\[^{3} (1945) 1 All E.R. 43.\]
\[^{4} Ibid, at 17.\]
The holding of consultation with such local authorities as appear to the Minister to be concerned is, in my judgment, an important statutory obligation. The Minister with receptive mind must by such consultation seek and welcome the aid and advice which those with local knowledge may be in a position to offer in regard to a plan which the Minister has tentatively evolved.

Decisions of the Canadian and Australian courts regarding the effect of a failure to hold 'consultation' are not known. But Driedger thinks that the position in Canada would be the same in this respect as in the U.K.

In South Africa, a provision requiring consultation with advisory bodies before making statutory regulations is regarded as mandatory. It has been so held in *R. v. Mzimukulu.*[^1] S. 21(3) of the Natives (Urban Areas) Consolidation Act, 1945, required that the Native Advisory Board or Boards established under the Act should be consulted before certain regulations were approved by the competent authority. The question before the court was whether the impugned regulations, which were validly promulgated after consultation with the existing native advisory board, became invalid because subsequently in the same municipal area another native advisory board was established for a separate location and the new advisory board was not consulted in respect of those regulations.

The court held that the regulations in question did not become invalid but expressed the view that if any such regulations were originally made without consultation with the existing advisory board, they would have been invalid.

In the U.S.A., there is a general provision in S. 4 of the Administrative Procedure Act, 1946, requiring that opportunity must be given to interested persons in the process of enacting delegated legislation. Subject to certain exceptions, general notice[^3] of proposed rule-making is to be published in the Federal register; thereafter, the rule-making agency is required to afford to interested persons an opportunity to participate in the rule-making through submission of written data, views or arguments, or in any other manner, with or without the opportunity being given to present the same orally. Where "rules are regarded

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2. 1956 (3) S.A.L.R. 429 A.D.
3. This notice must include (1) a statement of the time, place and nature of public rule-making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subject and issues involved.
by statute to be made on the record after opportunity for an agency hearing," a much more detailed procedure has been prescribed. The rules must be adopted by the agency concerned after considering all relevant matter presented to it and if the rules are substantive, they must be published not less than 30 days before the date of their coming into effect. But this period of 30 days can be reduced by the agency concerned on good cause which should be published with the rules.

The above provision requiring notice of proposed rule making has been regarded as mandatory. In American Air Transport Inc., et al. v. Civil Aeronautic Board et al., a District Court enjoined enforcement of a regulation which was issued 'without such a hearing as is necessary under the Administrative Procedure Act' and also under the parent Act. There seems to be no pronouncement of the Supreme Court of the United States on the effect of failure to give opportunity to interested persons to present evidence or written data during the rule-making process.

In India, the Federal Court in Biswanath Khemka v. The King Emperor, considered the effect of non-compliance with the provisions of S. 256 of the Government of India Act, 1935, requiring consultation between public authorities before the conferment of magisterial or enhanced magisterial powers on a person. When an appointment of a magistrate as Additional Presidency Magistrate without the required consultation was questioned, it was held that the requirement to consult was directory and that the non-compliance thereof would not render ineffective or inoperative an appointment otherwise regularly and validly made. The same view had been followed by the Supreme Court in T. B. Ibrahim v. Regional Transport Authority and State of U.P. v. M. L. Srivastava. In the former case consultation was required before certain routes for public buses were fixed by Transport Authority and in the latter case, the Public Service Commission was required to be consulted on all disciplinary matters affecting a civil servant. In both the cases, the requirement was held to be directory only.

1. Vide, Ss. 7 and 8 of the Administrative Procedure Act, 1940.
3. 1945 F.L.J. 103.
5. 1958 S.C.J. 150.
The requirement of 'concurrence' in contra-distinction to 'consultation', however, has been held to be mandatory by the Nagpur High Court in *Radha Krishna v. The State.* In this case, the Central Government, under authority of S. 4 of the Essential Supplies (Temporary) Powers Act, 1946, sub-delegated its power to provide for certain matters in relation to food stuffs to the Provincial Government, subject to the condition that before making an order, concurrence of the Central Government would have to be obtained. The Provincial Government made an order after obtaining the required concurrence, but later amended it without such concurrence. It was held that because the condition of obtaining the concurrence was not fulfilled the amendment of the order was *ultra vires.*

2. Effect of failure to publish.

In the U.K. it was decided in *Jones v. Robson* that statutory provision which required a notice to be given of making certain orders in such manner as the rule-making authority may direct, was directory only and not a condition precedent for the orders to be effective. In this case, no satisfactory evidence was adduced of the required notice in respect of the order in question, nor of any manner in which the notice was directed to be issued, but the order was published in accordance with the Rules Publication Act, 1893. Though the court did not accept this as the required notice, it held that the order was valid and binding.

But later in *Johnson v. Sargent and Sons,* it was held that an order could come into operation only when it became known. The order questioned here was made on the 16th May, 1917 and in effect published on May 17. There was no reason to suppose that any one in the trade knew about it. His Lordship agreed with the rule that a statute would come into effect from the earliest moment on the date of its coming into force. But he argued:

> There is about statutes a publicity even before they come into operation which is absent in the case of many orders such as that with which we are now dealing.

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2. * (1901) 1 K.B. 673.*
3. * (1918) 1 K.B. 101.*
He decided therefore that the order did not become effective until the morning of May 17 when it was known.

The Johnson's case has been described as 'a bald example of Judge made law,' and its soundness 'very doubtful'. However, the view expressed there gets support from Lyskey, J., who stated in Simms Motors Units v. Minister of Labour that a statutory rule or order 'must be published in the proper way for the information of the public and those who are bound to comply with the regulations.'

The Statute Instruments Act, 1946, provides that unless otherwise provided by law, copies of statutory instruments shall be printed and sold as soon as may be after their making. The Act also affords a protection whereby in criminal proceedings for contravention of any statutory instrument it can be pleaded as defence that the instrument in question has not been 'issued' by the stationery office or that no reasonable steps are taken to make it known. It was held in R. v. Sheet Metalcraft Ltd., that an instrument, which was required to be printed as above, was not precluded from coming into effect because of its non-printing. The court pointed out that by providing the aforesaid statutory defence in criminal proceedings, the Act postulated that the instrument was validly made and was operative before it was printed; otherwise there would have been no infringement of the instrument and in that case there was no necessity for providing the defence. This decision was given by a lower court but in view of the language used in the provision, it does not seem likely that the higher courts will treat the requirement of printing mandatory.

In Australia the requirement to notify regulations was regarded as imperative by a State Supreme Court in Shepparton Water Trust v. Jeffrey. In this decision an objection that the regulation was not validly made because it was not notified in the gazette as required, was upheld. As regards publication of delegated legislation made by the Commonwealth authorities, it is required that all regulations must, unless a contrary in-

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2. Ibid, at 133.
3. (1946) 2 All E.R. 201.
4. S. 2(1).
5. S. 3(2).
7. 1890 A.L.R. 42.
tention appears, be notified in the gazette. There does not seem to be any High Court decision on the point whether such a provision was directory or mandatory. But in *Dignan v. Australian Steamships Pty. Ltd*, Evatt, J., observed,¹ “Notification in the Gazette is essential to the regulations taking effect at all.” According to this view, the requirement to notify should be regarded as mandatory.²

In Canada it was held in a British Columbia case of *Rex v. Rose*,³ that there could be no conviction for the contravention of an order which was not published and was not in the knowledge of the accused. Though there was, in the Province of British Columbia, no provision which required publication of legislative orders at all, but the court relied for its decision on the authority of the English case of *Johnson v. Sargent and Sons*.⁴ The view taken in these cases that since delegated legislation does not receive the publication which a statute gets, the former does not come into effect until published (though no such restriction operates in case statutes), has been widely criticised in Canada. The discussion however is only of an academic interest now after the enactment of the Rules Publication Act, 1950. S. 6(1) of the Act requires every regulation save those specially exempted under S. 9 of the Act, to be published in the Canada Gazette within a specified time of its making. The Act, however, adds a rider in sub-sec. (3) of the said section to the effect that no regulation will be invalid by reason only because it is not published. The requirement evidently seems to be only directory. It may, however, be noted that the view expressed in *Rex v. Ross* still continues to be a good law in Canada.

The Orange Provincial Division of the South African Supreme Court held certain rules to be invalid in *Van Rooy v. Law Society*,⁵ because

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¹ (1931) 45 C.L.R. 188 at p. 201.
² But it seems that if once a regulation becomes effective, it can in certain cases (i.e. where the existing rights of a person, other than the Commonwealth or an authority of the Commonwealth, are not prejudicially affected), be made to operate from a date before the date of its notification. See, S. 48(2) of Acts Interpretation Act and the interpretation put on it by the High Court in *Australia Coal and Shale Employees Federation v. Aberfield Coal Mining Co. Ltd. v. Commonwealth* (1945) 71 C.L.R. 245. The effect of these decisions is discussed by C.K. Comans. See, *Retrospective Commonwealth Regulation*, 27 A.L.J.231.
³ (1945) 3 D.L.R. 574.
⁴ Supra.
⁵ 1953 S.A.L.R. 580 O.P.D.
they were never promulgated as required by a general statutory provision. It was contended in this case that since the provision requiring publication was couched in the positive and not negative language and since there was no sanction added in case of non-compliance with the requirement, the provision was directory. The court rejected the contention on the ground that there was nothing in the authorising statute which could be taken as expressly or by necessary implication dispensing with the general requirement of publication. It was therefore held that the provision was peremptory.

In South Africa, even at common law, the position is that regulations or bye-laws to have the force of law must be duly published.

In America, S. 5(1) of the Federal Register Act requires the publication in the Federal Register of such documents as may be required to be published by an Act of Congress. The Administrative Procedure Act directs, as mentioned earlier that, “agency shall separately state and currently publish in the Federal Register... substantive rules adopted as authorised by law.” S. 4(c) of the same Act requires that “publication or service of any substantive rules shall be made not less than 30 days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.”

What will be the effect of non-publication of a rule made under delegated authority has not been expressly mentioned in the above two statutes. But S. 7 of the Federal Register Act says that no document required to be published under the Act “shall be valid as against any person who has not had actual knowledge thereof” until it has been actually fixed for publication. A circuit court has held in Hatch v. U.S. that the effect of the above provisions is that a regulation which had not been published is not valid regardless of whether the person charged with its contravention had actual knowledge of its contents. It observed:

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5. 212 F. 2nd 280 (1954).
The Acts set up the procedure which must be followed in order for agency rulings to be given the force of law. Unless the procedures are complied with, the agency (or administrative) rule has not been legally issued and consequently it is ineffective.

Davis has criticised this decision as wrong in view of the aforesaid express provision of the Federal Register Act that an unpublished regulation is not valid "as against any person who has not had actual knowledge." The matter does not seem to have been considered by the Supreme Court so far.

The Supreme Court of India considered the effect of non-publication of delegated legislation in Harla v. State of Rajasthan and Narendra Kumar v. Union of India. The facts of the first case were that during the minority of the then Maharajah of Jaipur State, a Council of Ministers was appointed in 1923 by the Crown Representative to look after the government and administration of the State. The powers of the council were defined and limited. This council by a resolution purported to enact the Jaipur Opium Act which was never published and nor was it made known to the public through any other means. The court did not know what law or custom regarding the coming into effect of an enactment was prevalent in Jaipur State. It therefore applied the principle of natural justice that before a law could be operative, it must be promulgated or published. The Supreme Court expressed itself rather strongly:

The thought that 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........Promulgation or publication of some reasonable sort is essential.

The statutory requirement for publication of rules is thus reinforced by the dictates of natural justice and therefore leaves no room for doubt about its mandatory character.

2. 1951 S.C.J. 735.
In the other case of *Narendra Kumar v. Union of India*¹ the Supreme Court was concerned with the Non-Ferrous Metals (Control) Order 1958. The order was made by the Central Government under S. 5 of the Essential Commodities Act, 1955, and was made applicable to copper. Cl. 4 of the order prohibited acquisition of non-ferrous metal except under a permit issued by the controller 'in accordance with such principles as the Central Government may from time to time specify.' The enabling section required all rules made thereunder to be notified and laid before both Houses of Parliament. The petitioners, who were dealers in copper, applied permits to purchase the metal from importers but none was issued. Four days after the petitioners' application, the Central Government communicated to the Chief Industrial Adviser in a letter certain principles on the basis of which the permits were to be issued and the effect of the principles was that the permits were to be issued only to the manufacturers. The Non-Ferrous Metals Order was itself published in the gazette but the principles were not notified. A question for the court to decide was whether these principles had any legal force. The court held that since they were not notified and laid before Parliament as required by the enabling statute, they were ineffective. Thus, the provisions regarding notification and laying were treated as imperative. What would have been the effect if the principles were laid out but not notified, is not clear from the decision. The issue regarding non-publication of the principles was decided rather summarily without giving any reason why the requirement of notification was regarded as mandatory and not directory. In *State of U.P. v. M. L. Srivastava*² the court had cited with approval a rule from Crawford on *Statutory Construction* that for holding a provision to be mandatory or directory the consequences which would follow from construing it in one way or the other, should also be taken into consideration. The fact that the court has not laid down any positive rule on the point only indicates that a requirement for notification of delegated legislation must be regarded as imperative without doubt.

It is interesting that in *In re Pesala Subrahmanyam*,³ the Madras High Court has gone still further. S. 3(2) (c) of the Essential Supplies (Temporary Powers) Act, 1946, required the publication of the notification in the "Official Gazette". The relevant notification was however published in

¹ 1958 S.C.J. 150 at p. 158.
² A.I.R. 1950 Mad. 308.
the District Gazette. Relying on the General Clauses Act, 1863, the court construed the expression, ‘Official Gazette’ meaning the Gazette of India or Fort Saint Gazette of Madras Province and invalidated the notification on the ground that publication of the notification in the District Gazette was not a sufficient compliance with the requirement of the Act.¹

3. Effect of failure to lay

In all the countries under study, except the U.S.A., the normal practice is to require statutory rules to be laid before the respective legislatures. Even in the U.S.A., the requirement for laying has not been completely unknown.² What actually is the legal effect of failure to comply with this requirement, is discussed below.

In the U.K., the effect of a failure to comply with the requirement of laying is not clear,³ as there is no direct judicial authority on the point. In Bailey v. Williamson,⁴ the court considered certain rules which were required to be laid before the House of Parliament within specified time after being made and were not to be enforced to the extent to which they were disapproved by either House within that period after being laid. It was held that the disapproved rules were not to be enforced after the disapproval, but were valid until then. Thus the rules were regarded as valid before they were laid, but the decision did not say anything about the effect of nonlaying. By the time the case arose the rules were not laid but period prescribed for their laying did not expire.

In Storey v. Graham,⁵ a doubt arose whether the laying requirement was more than directory.⁶

¹ The High Court of Punjab held in Sunderlal v. State of Punjab, (A.I.R. 1957 Punjab 140) that a decision of the government to amend an existing rule, though communicated to the heads of the departments did not amount to an amendment because it was not published in the Gazette for the information of the people concerned. In this case there was no provision requiring publication even of the original rules.
² See, Chap. V.
³ But the position is clear in situations where a statute specifically stipulates that unless they are laid before legislature the rules do not come into force. In such cases failure to comply with the requirement renders the rules invalid, See. Metalfie v. Cox (1895) A.C. 328.
⁴ (1873) 8 Q.B. 118.
⁵ (1894) A.C. 347.
⁶ (1899) 1 Q.B. 406. In Institute of Patent Agents Lockwood (1894) A.C. 347, Lord Herschell observed that ‘laying’ was compulsory but he did not explain what would be the effect if the rules were not laid.
Allen thinks\(^1\) that it is better to regard the requirement for laying as directory where the statutory instruments to which it is annexed are subject to a negative resolution, because the annulment of such instruments usually is without prejudice to the acts done earlier. This he argues, assumes that the instrument is valid from the beginning but is subject to a condition subsequent. This assumption cannot however apply to statutory instruments which are required to be laid before they become operative as required in S. 4 of the Statutory Instruments Act, 1946.

Where rules are to be laid and are subject to affirmative resolution, laying the rules do not become effective, or continue to be effective, without an affirmative resolution, and so laying becomes mandatory. However, when the laying requirement is in respect of a draft—whether subject to an affirmative or a negative resolution—it has been suggested\(^2\) that the requirement is imperative because here the laying precede the making.

The departmental view in the U.K. seems to be that a requirement to lay delegated legislation before Parliament is directory.\(^3\) Yet the government, it is interesting to note, got Indemnity Acts\(^4\) passed by Parliament on two occasions when it found that certain instruments had not been laid in accordance with their authorising Acts. These statutes not only indemnified the officials concerned against all the consequences whatever of the failure to lay but also provided that the instruments in question ‘shall be deemed to have been duly laid before Parliament’. If that was so and if the laying requirement was considered to be merely directory, then the necessity of such statutes did not arise.

In Australia a State Supreme Court has held laying requirement to be mandatory in \(Bain v. Thorne.\)^\(^5\) The parent Act provided that regulations made under it should have the force of law on their publication and should be laid before Parliament within a specified period after their approval by the Governor-General-in-Council. The regulation in question was never so laid. The court held that even if the regulation had come into force on its notification in the gazette, it became inoperative because

\(^{1}\) Allen, \textit{Law and Orders} (2nd ed.) p. 166.
\(^{2}\) Griffith and Street, \textit{Principles of Administrative Law} (2nd ed.) p. 110.
\(^{4}\) National Fire Service Regulations (Indemnity) Act, 1944; Price Control and other Orders (Indemnity) Act, 1955.
\(^{5}\) (1916) 12 Tas. L.R. 57.
subsequently it was not laid as required. The laying, said the court, “cannot be looked upon as merely directory.” The requirement was regarded as a matter of real substance since, by this, the Parliament had, in the opinion of the court, retained control over the regulation. Though the Houses had no power to rescind the regulation, it was, in the court’s view, possible for any member of Parliament to move a resolution which, if carried would practically compel the government to have them rescinded.

But later in Dignan v. Australian Steamships Pty. Ltd., two High Court Judges expressed the view that a provision requiring laying of regulations was not mandatory. S. 10(c) of the Acts Interpretation Act 1904-30, directed all regulations made under an Act to be laid before each House of the Commonwealth Parliament within a specified time after their making. The Act was silent about the effect of non-laying, and that was why their Lordships held that the non-tabling of regulations did not make them void. The Acts Interpretation Act has since then been amended so as to provide that failure to lay would make the regulations void.

In Commonwealth v. Grunseit, the High Court considered the effect of ‘non-tabling’ of a direction which was not laid under S. 48 (1) (c). It was contended that the direction was legislative and so was void being not laid. The court held that the direction was administrative and not legislative and so laying was not necessary. It was not however disputed that had the direction been legislative, its non-tabling would have made it void.

So in Australia, we see that the regulations which are not laid before Parliament within the specified time, have to be remade and then laid before the Houses. Remaking in these cases is deemed necessary because the regulations are considered to have become void for failure to lay.

What the courts in Canada feel regarding the effect of non-laying is not known though in that country, S. 7 of the Regulations Act makes it compulsory to lay all regulations except those specially exempted in this behalf.

1. (1931) C.L.R. 188.
2. Discon & Starke, JJ.
3. Ibid, at 202, 205.
4. (1943) C.L.R. 58.
5. See, Seventh Report of the Committee on Regulations and Ordinance.
The question does not appear to have come up before the South African Supreme Court but the Cape of Good Hope Division of that court considered it in *R. v. Daniels & Another.* A certain Provincial Regulation required to be laid upon the table of the Provincial Council within a specified time after its making was not so laid, yet the court held it valid treating the laying provision as directory. The court gave three reasons for this view: first, if the provisions were regarded as mandatory the consequence would be uncertainty in law. Secondly, there was no explicit legislative statement that the regulation was to be void if it was not laid. Thirdly, the direction for laying was couched in positive and not in negative language and the legislature had imposed or suggested no penalty which was to follow in case the regulation was not laid. The West Indian Court of Appeal in *Springer v. Doorly* also held the laying requirement as directory on the ground of avoiding uncertainty in law.

In the U.S.A. only a few statutes require rules made thereunder to be so laid or to be reported to Congress. In such cases invariably the authorising Acts direct that the rules would take effect after a specified period from the date of their transmission to Congress. Even where a rule is subject to a negative resolution, it cannot under its enabling terms, take effect until the prescribed period has expired. If such resolution is passed within the said period, the rule never becomes operative. The reporting of rules to Congress in such cases is clearly a condition precedent for their coming into force and must be taken to be a mandatory requirement. There seems to be no judicial authority on the point but Pfiffner thinks that the 'reporting' is mandatory.

In India until recently the requirement to lay subordinate legislation before Parliament was made in the following words:

All rules made under this section shall be laid for not less than 30 days before both Houses of Parliament as soon as possible after they are made and shall be subject to such modifications as Parliament may make during the session in which they are so laid or the session immediately following.

Regarding the effect of non-laying two questions seem to arise;

1. Are the rules prevented from taking effect until they are laid before

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1. (1936) C.P.D. 331.
3. For details see Chap. V.
5. See, First Report, Lok Sabha Committee on Subordinate Legislation (1954).
Parliament? (2) If the rules can come into effect before they are so laid, do they cease to be effective subsequently because they are not laid within the specified period?

As to the first question, the following observation of the Supreme Court, though made by way of obiter dicta, in *Express Newspapers v. Union of India,*¹ may be relevant:

The rule was framed by the Central Government... and was a piece of delegated legislation which, if the rules were laid before both the Houses of Parliament.... acquired the force of law. After the publication of the rules, they became a part of the Act itself.

The earlier part of this passage suggests that for bringing the rules into force their laying is essential, but the latter part indicates, perhaps a little inconsistently, that their publication is enough to give them the force of law. It is difficult to draw an inference whether the court said so because in its opinion both laying and publication were essential. We may recall here that in *Narendra Kumar v. Union of India,*² certain principles regarded as part of certain statutory rules were declared ineffective because they were neither published nor laid. There is, however, nothing in *Narendra Kumar’s* case to suggest that the result would have been the same if the principles were published but not laid.

In *In re Kerala Education Bill,* the Supreme Court observed:³

‘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. If no amendments are made the Rules come into operation after a period of 14 days (the period for which they were required to remain before legislature) expired.’

Here the court seemed to be of the definite view that the rules could not come into effect until they were laid and after the laying period had elapsed. If this was the correct view, it would follow that the rules would not be effective at all in case they were not laid.

This matter was considered in detail by the Calcutta High Court in *Munnalal v. H. R. Scott,*⁴ where the court examined whether a laying

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¹ 1958 S.C.J. 113 at p. 118.
² Supra.
³ 1959 S.C.J. 321 at p. 344
requirement, contained in Art. 320(5) of the Constitution of India, was mandatory or directory. This provision was materially the same as given above with the addition, however, of a few words to the effect that the modifications which the Houses of Parliament might make could be 'whether by way of repeal or amendment'. Chakravarti, C.J., pointed out that the word 'repeal' implied and connoted that what had to be repealed was already law. It was not said in the provision that till the regulations had been laid or after they had been laid for a particular period, they should not come into force. The court therefore held that the laying requirement was not mandatory and the regulations involved in the case were intended by the Constitution to be valid even before they were laid.

The Calcutta High Court's opinion that the statutory rules required to be laid before Parliament are valid even before they are laid, seems rather convincing. Prior to the regular practice of providing for laying of statutory rules before Parliament grew up, the enabling Acts used to state, that rules might be made by government by notification in the Gazette and to come into force on the date of such notification or on a later date specified therein. Now what the laying provision requires is that the rules shall be laid... as soon as possible after they are made....' Obviously the old position that rules may come into effect on their notification seems to remain unchanged. No doubt rules are directed to be subject to such modifications as Parliament may make within the prescribed period after their laying, but this direction does not affect the validity of the rules prior to passing of such modifications if any.1

It is interesting to note that to get over the difficulties implicit in the observation of the Supreme Court in In re Kerala Education Bill,2 the Central Government, after consulting the Committee on Subordinate Legislation, changed the laying clause in such a way that the rules required to be laid before Parliament would be operative ab initio.3 The following words have been added to the clause:4

So however that any such modification or annulment shall be without prejudice to the validity of any thing previously done under that rule.

1. The English Case, Bailey v. Williamson (1873)8 Q.B. 118 is a useful guide on this point.
4. For example, see S. 17 of the Haj Committee Act, 1959.
The second question, whether the rules cease to be operative if they are not laid before the Legislature within the specified time, remains to be considered. If the rules required to be laid become effective before they are laid, do they later cease to be operative if not laid within the prescribed period? The Supreme Court's observations cited above do not indicate that the court regarded the laying requirement as directory; rather they suggested the contrary. The Calcutta High Court, which held in Munnalal v. H. R. Scott\(^1\) that the laying requirement was directory, did so, it is respectfully submitted, without considering the question fully. The court examined only one aspect of the problem—whether laying was essential for the relevant regulations to come into effect. After finding that the regulations were intended to be valid even before they were laid, the court held that the laying requirement was directory. If 'laying' was directory it should mean that a failure to lay the regulations within the prescribed period would not affect the continued validity of the regulations. But this aspect was not touched by the court.

In deciding whether the requirement to lay statutory rules within the prescribed period is directory or mandatory, the consequence of holding the requirement as mandatory shall have to be taken into consideration. The period within which rules are required to be laid according to the laying clause in India is "as soon as possible after they are made" which means an indefinite period. If the laying provision is held to be mandatory, the consequence will be that the rules which are in force \(ab initio\) will cease to be operative because they are subsequently not laid before Parliament within some future and indefinite period. This will introduce uncertainty into law, causing hardship to the general public for want of proper means to know the government's failure to lay. On the other hand, if we look to the object of the laying requirement it does not seem to be more than that of providing an opportunity for parliamentary control of delegated legislation. But as was said in Springer v. Doorly, uncertainty in law is a greater evil than the ineffectiveness of parliamentary control in those few cases where there may be failure to lay. If all these factors are taken into consideration it seems likely that the Indian courts will take the stand that the requirement to lay rules before Parliament within the prescribed period is only directory.

1. Supra.
Concluding Remarks

The judicial control of delegated legislation in India is on a fairly wide scale. Of the several grounds on which the doctrine of *ultra vires* is applied to statutory rules, the ground of 'unreasonableness' is not in much use in India in determining the validity of such rules, except, of course, when validity of delegated legislation is to be judged with reference to Art. 19 of the Constitution. As regards 'failure to lay', as a ground of procedural *ultra vires*, the obiter dictum of the Supreme Court in *In re Kerala Bill*¹ (suggesting that such rules when required to be laid, do not become effective until laid) has, of course, now been watered down and the rules can now be brought into effect before laying.

The scope of judicial control of delegated legislation is much wider in India than in the U.K. Delegated Legislation in India is required to conform not only with the enabling Act but also with the written Constitution and further the enabling Act itself must conform with the Constitution; whereas in the U.K., statutory instruments have to conform only with the empowering Act, and the validity of an Act of Parliament cannot be questioned. In Australia, Canada, South Africa and the U.S.A., the position is the same as in India. Even as compared with the American courts, the Indian courts exercise a greater check on delegated legislation because they apply the doctrine of *mala fides*, like the English, Canadian and South African courts, while in the U.S.A. the *bona fides* of a legislative body, be it a legislature or a subordinate law making body, cannot be questioned in respect of its legislative acts.

The Supreme Court's attitude in respect of laying requirement, as expressed in *In re Kerala Bill*,² *Express Newspapers v. Union of India*³ and *Narendra Kumar v. Union of India*⁴ appears to be rather strict, but it is suggested that the above requirement should be regarded as merely directory. The reasoning of South African case *R. v. Baniels*⁵ and of the West Indian case *Springer v. Doorly*⁶ that the consequence of holding such requirement to be mandatory would unnecessarily bring uncertainty into

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5. (1938) C.P.D. 331.
law, sounds to be strong. If certain statutory rules, which have already come into force, cease to be effective for want of laying within an uncertain period described as "as soon as possible", there might be hardship to the general public. The object of the provision to lay is to provide for parliamentary control, and the government's failure to comply with the provision does, no doubt, defeat that object, but ineffectiveness of parliamentary control in stray cases where government may fail to lay rules may not be so great an evil as the uncertainty of law that results from holding the requirement to be mandatory.

Regarding sub-delegation, the Indian judicial opinion is that a power to make law cannot be sub-delegated without there being an express provision in that behalf by the enabling Act. It should however be realised that with the need for ever increasing State regulation, more and more quasi-legislative powers have to be conferred on the government, and that too in broad terms. Without sub-delegation, the government may not find it possible to frame the necessary rules and regulations. A strict application of the rules against sub-delegation may thus cause administrative hardships. It is now a settled law that the legislature cannot delegate law making power without laying down legislative policy for the guidance of the delegate. This policy, it is submitted, may be regarded as an adequate guide for the sub-delegate also, and implied authority be read into the enabling Act to the effect that sub-delegation can take place subject to the policy declared in the statute. This necessity is being realised in the U.K. and has already been recognised in the U.S.A.