

**SUBORDINATE LEGISLATION: SCRUTINISING THE
VALIDITY**

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I Introduction

ONE OF the practical problems which a lawyer faces in the course of his career is that of examining the validity of subordinate legislation. The task is also performed by law officers of the government, legal advisers of local authorities and universities and, to some extent, by legal counsel of public sector corporations. Certain aspects of the subject therefore deserve examination in depth.

II Requirements for validity

In order that the exercise of delegated legislative power may be valid, certain conditions have to be satisfied. The principal conditions are :

- (i) The parent Act (under which the power to make subordinate legislation is exercised) must be valid.
- (ii) The delegation clause in the parent Act must be valid.
- (iii) The statutory instrument so made, must be in conformity with the delegation clause, in point of –
 - (a) substance;
 - (b) procedure; and
 - (c) form.
- (iv) The statutory instrument must not violate certain general norms laid down by judicial decisions, *e.g.*, norms regarding ouster of court jurisdiction, imposing a penalty or tax, giving retrospective effect, *etc.*
- (v) The statutory instrument must not violate any of the fundamental rights guaranteed by the Constitution.¹

Some of these requirements need detailed discussion, which is attempted in the succeeding paragraphs.

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1. Part III. *Narendra Kumar v. Union of India*, A.I.R. 1960 S.C. 436; *Air India v. Nergesh Meerza*, A.I.R. 1981 S.C. 1829 at 1853.

(1) Validity of parent Act

It is elementary that if the parent Act is invalid, the statutory instrument (SI) made thereunder also becomes invalid. For, if the source of the power is legally defective, so also must be its exercise. The main grounds on which the parent law can be challenged are :

- (a) violating a fundamental right; and
- (b) violating any other provision of the Constitution.

The question is primarily to be decided with reference to the text of the Constitution.

(2) Validity of delegation clause

It is not only necessary that the parent Act must be valid, but also the clause delegating legislative power should be valid. This question is to be decided, not with reference to textual provisions of the Constitution, but to certain principles of constitutional law, based on judicial decisions. The most convenient way of stating the position in this regard is that, (i) legislative policy is to be laid down by the legislature and, therefore, essential legislative functions cannot be delegated; (ii) matters of detail can, however, be left to be dealt with by the delegate.

(3) Conformity with delegation clause

(a) *In point of substance*

The authority to which legislative power is delegated, must keep itself within the limits of the delegation. If the SI goes beyond the powers granted by the parent Act through the delegation clause, then it would be void by reason of "substantive *ultra vires*". This has at least two important aspects, viz., the SI, (a) should not deal with matters not enumerated in the delegation clause. The delegate (who issues subordinate legislation) cannot make a rule on a matter on which no power is given to him by the parent Act; and (b) must not be inconsistent with the general scheme and intendment of the parent Act.

A rule making power authorising the prescribing of certain particulars, was held not to authorise fixing a time limit for the form.² An English case is also useful.³ A purchase tax regulation made under the authority of the Finance (No. 2) Act 1940 was challenged on several grounds, the major one being that the regulation conferred on the commissioners, a power to claim a sum as due, without the claim being related to the Act. It was held that the regulation was *ultra vires*, since it, (i) purported to confer on the commissioners, powers of a judge; (ii) substituted a sum which the commissioners deemed to be due for the figure which fell to be assessed under the Act; and (iii) attempted to oust jurisdiction of the court.

2. *S.T.O. v. Abraham*, A.I.R. 1967 S.C. 1823.

3. *Commissioners of Customs and Excise v. Cure and Deelay Ltd.*, [1961] 3 All E.R. 641; [1962] 1 Q.B. 340 (Sachs J.). Cf. *Padfield v. Minister of Agriculture*, [1968] A.C. 997.

Even the mention of a topic in the rule-making section is not enough, if that topic (recognition of schools) is not mentioned in the substantive sections of the Act.⁴

(b) *Procedural ultra vires and defects of form*

In considering procedural *vires*, of subordinate legislation challenge is directed to the formalities required to be observed in the making of such legislation. For example, failure to consult some authority (as required by the parent statute), might well lead to the instrument being held to be *ultra vires*.

In a case which went upto the Privy Council the Governor-General of Ceylon appointed a commissioner to hold an inquiry and left it to him to decide his own terms of reference. The relevant statute required the Governor-General to decide the ambit of the inquiry. The court held that the appointment was *ultra vires*.⁵ But the context may allow a different construction.⁶

In India, draftsmen regard a requirement for previous publication as mandatory. Similarly a provision for publication on making is also mandatory.⁹

Defects of form may also raise legal questions—for example where an instrument envisaged to be issued as a “rule” is given a different label.

III “As if enacted” : meaning

Sometimes, Parliament itself has attempted to prevent challenge to a SI by stipulating in the statute, that the delegated legislation, when made “shall have effect as if enacted in this Act”. In one case,⁸ the House of Lords held that this expression meant that the delegated legislation was as unchallengeable as if it was actually incorporated in the Act itself. However, later, when examining this same phrase in relation to the minister confirming a housing scheme, it decided that the phrase could only take effect if the scheme in question conformed to the Act. If it did not conform to provisions in the Act, then the minister was not able to confirm the scheme.⁹

The “as if enacted” clause has now fallen into disuse.

Current opinion in India is, that notwithstanding such a provision, the validity of a rule can be challenged.¹⁰

IV General norms for statutory instruments

Apart from the principle that the statutory instrument must be in conformity with the parent Act (particularly with the delegation clause) in point of substance

4. *Regina v. St. A.H.E. School*, A.I.R., 1971 S.C. 1920 at 1923-4.

5. (*Rajah*) *Ratnagopal v. Attorney-General*, [1970] A.C. 974 at 981 (P.C.)

6. See, *Provident Mutual Life Ass. v. Derby City Council*, [1981] 1 W.L.R. 173 at 180-2 (H.L.).

7. *State of M.P. v. Ram Raghubir Prasad*, A.I.R. 1979 S.C. 888.

8. *Institute of Patent Agents v. Lockwood*, [1894] A.C. 347 (H.L.).

9. *Minister of Health v. Rex, ex parte Yaffe*, [1931] A.C. 494 (H.L.) See, Craig, *Administrative Law*, 435-6 (1st Indian Reprint 1992).

10. *State of Kerala v. Abdulla & Co.*, A.I.R. 1965 S.C. 1585 at 1589; *K. Rama Rao v. R.A. Mundkar*, A.I.R. 1960 Mys. 313.

and procedural formal requirements, it should also be borne in mind that every SI is subject to certain general norms which are laid down in the case law. The most important are the following limitations, which apply unless the parent Act expressly gives a wide power on the particular point. Thus an SI cannot,

- (i) make a provision ousting the jurisdiction of ordinary courts;^{10a}
- (ii) impose a penalty for violation of any provision thereof;
- (iii) impose a tax or fee.¹¹ An exemption from Land Ceiling Act cannot be made conditional on penalty;¹²
- (iv) be given retrospective effect (*i.e.*, it cannot be made to be effective from a date earlier than its making).¹³ It follows, that validating amendment of a rule *by a rule* is itself invalid.¹⁴ Nor can a retrospective amendment of rule nullify the effect of a writ issued by the court earlier;¹⁵
- (v) make a provision amending or repugnant to the parent Act;¹⁶
- (vi) purport to define a word used, but not defined, in the parent Act, *e.g.*, if a law is passed to regulate aircraft, an order issued thereunder cannot provide that "aircraft shall include hovercraft". This must be achieved by amending the parent Act.

These restrictions are, of course, subject to an express provision to the contrary, contained in the parent Act and conferring an express power to deal with any of the matters mentioned above. The theory of the law is that the legislature ordinarily does not intend to give to the delegate a wide power to deal with the matters mentioned above. That presumption can be displaced by a contrary provision in the parent Act.

V Fundamental rights and other constitutional provisions

It is also necessary to ensure that a SI instrument does not come into conflict with any of the fundamental rights guaranteed by the Constitution.¹⁷ Same principle applies to a SI violating any other constitutional provision.¹⁸

10a. This is the legal position. Rule 320, item 4 of the Lok Sabha Rules also requires the Committee on Subordinate Legislation to examine whether a rule directly or indirectly bars jurisdiction of the courts.

11. *Banerjee v. State of M.P.*, A.I.R. 1971 S.C. 517 at 520, para 18.

12. *De Lux Land Organisers v. The State*, A.I.R. 1992 Guj. 75.

13. *Hukam Chand v. Union of India*, A.I.R. 1972 S.C. 2427; *R.T.O. Chittoor v. Associated Transport*, A.I.R. 1972 S.C. 2427; *R.T.O. Chittoor v. Associated Transport*, A.I.R. 1980 S.C. 1872.

14. *Gurcharan Singh v. State*, A.I.R. 1974 P. & H. 223.

15. *A.V. Nachane v. Union of India*, A.I.R. 1982 S.C. 1126.

16. *Baban Naik v. Union of India*, A.I.R. 1967 Goa 1.

17. Part III. See, *Narendra v. Union of India*, *supra* note 1.

18. *Harnam Singh v. R.T.A.*, A.I.R. 1954 S.C. 140; *Manubhai v. Union of India*, A.I.R. 1961 S.C. 21; *D.S. Mills v. Union of India*, A.I.R. 1959 S.C. 626

VI Sub-delegated legislation

It is not uncommon for a person or body to receive delegated powers indirectly under a statute. The legislation which is then produced is known as sub-delegated legislation.

This state of affairs would appear to be in conflict with the general principle of law that a delegate is not able to delegate *delegatus non potest delegare*. This view is borne out by the general rule that where Parliament gives a power to make law for some specified purpose to a person or body, it can be exercised only by that person or body.

In an English case,¹⁹ the minister delegated to a County Agricultural Executive Committee, the power to direct farmers in the cultivation and use of their land. In the particular instance, the committee permitted one of its executive officers to give a direction. It was held that the direction was invalid. The committee, being a delegate, could not delegate.

But it is possible that Parliament may foresee the need for, and expressly approve, the sub-delegation of certain powers.

In UK, courts have held that it is possible for a Ministry circular to contain instructions which go further than being administrative guidance and are in law, delegated legislation. Consequently, the conditions set out in the circular can be binding on the local authority operating under it.²⁰

The Minister of Health, as permitted by Act of Parliament, appointed certain local authorities to be his delegates for the purpose of requisitioning property. The delegation was done by a Ministry circular which also set out the conditions under which the authorities were to operate. One of these instructions was that no furniture was to be requisitioned if the owner wanted them for his own residence. The Blackpool Corporation purported to requisition premises in contravention of these two conditions. The court decided that the requisition was invalid. The circular, with its conditions, was sub-delegated legislation.²¹

The rule against sub-delegation turns upon statutory construction. "If Parliament confers power upon A, the evident intention is that it shall be exercised by A and not by B."²² Sub-delegated legislation is also improper for several reasons.²³

In India, sub-delegation of delegated legislative power without express authority would be regarded as invalid.²⁴ In any case, the sub-delegate cannot go beyond his authority.²⁵

19. *Allingham v. Minister of Agriculture and Fisheries*, [1948] 1 All E.R. 780.

20. *Blackpool Corporation v. Locker*, [1948] 1 K.B. 349. (C.A.)

21. *Ibid.*

22. Wade, *Administrative Law* 319, 757 (1982); *Hawke's Bay Raw Milk Products Co-operative Ltd. v. N.Z. Milk Board*, [1961] N.Z.L.R. 218; *K.E. v. Benoari Lal Sarma*, [1945] A.C. 14 at 24 (P.C.);

23a. See, the trenchant criticism by Streetfield J. in *Patchett v. Ieathem*, (1949) 65 T.L.R. 69 at 70.

24. *State of Punjab v. Amir Chand*, A.I.R. 1953 Punj. 1; *Pritam Bus Ltd. v. State of Punjab*, A.I.R. 1957 Punj. 145.

25. *Radha Kishan v. State*, A.I.R. 1952 Nag. 387; *Bennett Coleman v. Union of India*, A.I.R. 1973 S.C. 106.

VII Unreasonableness and mala fides

In general, statutory powers have to be exercised in a reasonable manner.²⁶

The above doctrine is of particular importance for bye-laws of local authorities.²⁷ The theory is that Parliament could not have intended powers of delegated legislation to be exercised unreasonably. This principle is well-established in relation to bye-laws of local authorities. As regards other types of statutory instruments, the position is ill-defined. But reasonableness may be demanded by constitutional provisions as to fundamental rights.

Even where the parent Act says that the specified authority may make regulations if "he is satisfied" that they are required, the court can examine whether that authority could reasonably have been satisfied in the circumstances.²⁸ *Mala fide* subordinate legislation - particularly, bye-laws of corporations - would be void, if the power is exercised for a wrong purpose. The matter is discussed at length by Dixon J. in *Yates (Arthur) & Co. Pvt. Ltd. v. Vegetable Seeds Committee*.²⁹

In India, the test of reasonableness is applicable to delegated legislation, both on general principles and under fundamental rights such as article 14 or 19.

VIII Natural justice

Making of statutory instruments is not subject to natural justice.³⁰ The general principle is that natural justice is not a requirement of legislation or quasi-legislation.³¹

IX Procedural errors : consultation or sanction

Duty to consult a particular body or group of persons before making subordinate legislation is usually regarded as mandatory.³² So is a requirement to obtain the prior approval of the prescribed authority before making or issuing, (a) a rule or order,³³ and (b) a notice.³⁴

26. *Westminster Corporation v. L & N.W. Rly.*, [1905] A.C. 426 at 430; *Roberts v. Hopwood*, [1925] A.C. 578; Wade, *supra* note 22 at 353-354, 752-30.

27. *Kruse v. Johnson*, [1989] 2 Q.B. 91 (Lord Russell, C.J.); *Repton School Governors v. R.D.C.*, (1981) 2 K.B. 138; *A.G. v. Denby*, (1925) Ch. 596; *London Passenger Transport Board v. Sumner*, (1935) 154 L.T. 108 (bye-law penalising non-payment of fare unreasonable); *Townsend (Builders) Ltd. v. Cinema News and Property Management Ltd.*, (1959) 1 W.L.R. 1191; *Cinnamon v. British Airports Authority*, (1980) 1 W.L.R. 582. See, Alan Wharam, "Judicial Control of Delegated Legislation: The Test of Reasonableness", 36 *Mod. L. Rev.* 611 (1973).

28. Wade, *supra* note 22 at 397, 402, 754.

29. *Yates (Arthur) & Co. Pvt. Ltd. v. Vegetable Seeds Committee* [1945], 72 C.L.R. 37, 80, 81 (High Court of Australia).

30. *Bates v. Lord Hailsham*, [1972] 1 W.L.R. 1373 at 1378; [1972] 3 All E.R. 1019 (Megarry J.); cf. *R v. Liverpool Corporation*, [1972] 2 Q.B. 299.

31. *Tulsipur Sugar v. Notified Area Committee*, A.I.R. 1980 S.C. 883; *Lakshmi Khandasari v. State of U.P.*, A.I.R. 1981 S.C. 873.

32. *Agricultural etc. Training Board v. Aylesbury Mushrooms Ltd.*, [1972] 1 W.L.R. 190. See, Jergesen, "The Legal requirement of Consultation", P.L. 290 (1978).

33. *Jeo Rai v. State*, A.I.R. 1959 Raj. 73; *Bhikam Chand v. State*, A.I.R. 1966 Raj. 142.

34. *L.T. Commissioner v. Pratap Singh*, A.I.R. 1961 S.C. 1026

X Partial invalidity

In UK, it has been held that a SI may be partly bad and partly valid. Where the parent Act required the minister to consult certain representative associations before passing an industrial training order, it was held that the order was valid as regards the organisations consulted and was bad as regards others.³⁵

Similarly, an order prohibiting herring fishery, which purported to extend slightly beyond the waters covered, was held *ultra vires* as to the excess, but enforceable in respect of the remainder.³⁶

35. *Agricultural etc. Training Board*, *supra* note 32

36. *Dunkley v. Evans*, [1981] 1 W.L.R. 1522 [1981] 3 All E.R. 285 (D.C.). For further references see, (i) Halsbury, *Laws of England.*, vol. 1, para 26 (4th ed.). (ii) Wade, *supra* note 22 at 755, (iii) *Daymond v. Plymouth City Council*, [1976] A.C. 609; (iv) *R. v. North Hertfordshire District Council*, *ex parte Cobbold*, (1985) 3 All E.R. 486 at 492 (Mann. J.).