

**SUPREME AND SUB ORDINATE FORMS OF  
LEGISLATION**

**ALEESHA DOS REIS FALCAO**

**F.Y.LL.M**

# INDEX

Sr. No.	Topic	Page no.
1	Introduction	1 – 2
2	Legislations as per schools of law	3
3	Legislation as a source of law	4 – 5
4	Supreme and subordinate legislation	6 – 9
5	Delegated legislation	10 – 13
6	Unauthorized delegation	14
7	Criticisms of delegated legislation	14 – 15
8	Conclusion	16
9	Bibliography	17

# LEGISLATION

## A. Introduction

The term 'legislation' is derived from two Latin words, meaning *law* and *latum* meaning to make, put or set. Etymologically, legislation means the making or the setting of law.

According to Salmond: "Legislation is that source of law which consists in the declaration of legal rules by a competent authority." According to Gray, legislation means "the formal utterances of the legislative organs of the society".

According to Holland: "The making of general orders by our judges is as true legislation as is carried on by the Crown." Again, "in legislation, both the contents of the rule are devised, and legal force is given to it by acts of the sovereign power which produce written law.

All the other law sources produce what is called unwritten law to which the sovereign authority gives its whole legal force, but not its contents, which are derived from popular tendency, professional discussion, judicial ingenuity or otherwise, as the case may be."

According to Austin: "There can be no law without a legislative act." The term legislation is sometimes used in a wider sense to include all methods of lawmaking.

Legislation is that source of law which consists in the declaration of legal rules by a competent authority. It is such an enunciation or promulgation of principles as confers upon them the force of law. It is such a declaration of principles as constitutes, legal ground for their recognition as law: for the future by the tribunals of the state<sup>[1]</sup>.

1. Sir John Salmond; Jurisprudence; page 171

Although this is the strict and most usual application of the term legislation, there are two other occasional uses of it which require to be distinguished. It is sometimes used in a wide sense to include all methods of law-making. To legislate is to make new law in any fashion. Any act done with the intent and the effect of adding to or altering the law is, in this wider sense, an act of legislative authority. As so used, legislation includes all the sources of law, and not merely one of them<sup>[1]</sup>.

When a judge establishes a new principle by means of a judicial decision, he may be said to exercise legislative powers and not judicial powers. However, this is not legislation in the strict sense of the term. The term legislation includes every expression of the legislature whether the same is directed to the making of law or not. An Act of Parliament may amount to nothing more than establishing a uniform time throughout the realm or altering the coinage.

1. Sir John Salmond; Jurisprudence; page 172

## **B. Legislation as per the schools of law**

The view of the analytical school is that typical law is a statute and legislation is the normal process of law making. The exponents of this school do not approve of the usurpation of the legislative functions by the judiciary. They also do not admit the claim of custom to be considered as a source of law.

The view of the historical school is that legislation is the least creative of the sources of law. To quote James Carter: "It is not possible to make law by legislative action. Its utmost power is to offer a 'reward or threaten a punishment as a consequence of particular conduct and thus furnish an additional motive to influence conduct

-When such power is exerted to reinforce custom and prevent violations of it, it may be effectual and rules or commands thus enacted are properly called law; but if aimed against established custom they will be ineffectual. Law not only cannot be directly made by human action, but cannot be abrogated or changed by such action". According to this view, legislation has no independent creative role at all. Its only legitimate purpose is to give better form and make more effective the custom spontaneously developed by the people<sup>[1]</sup>.

Both the analytical school and the historical school go to extremes -the mistake made by the analytical school is that it regards legislation as the sole source of law and does not attach any importance to custom and precedent.

The mistake of the historical school is that it does not regard legislation as a source of new law.

### **C. Legislation as a source of law**

When judges establish a new principle by means of a judicial decision, they may be said to exercise legislative, and not merely judicial power. Yet this is clearly not legislation in the strict sense already defined.

The law-creative efficacy of precedent is to be found not in the mere declaration of new principles but in the actual application of them. Judges have in certain cases true legislative power-as where they issue rules of court- but in ordinary cases the judicial declaration of the law, unaccompanied by the judicial application of it, has no legal authority whatsoever. So the act of the parties to a contract, in laying down rules of special law for themselves to the exclusion of the common law, is by some regarded as an exercise of legislative power. But although they have made law, they have made it by way of mutual agreement for themselves, not by way of authoritative declaration for other persons.

The writers who make use of the term in this wide sense divide legislation into two kinds, which they distinguish as *direct* and *indirect*. The former is legislation in the narrow sense- the making of law by means of the declaration of it.

Indirect legislation, on the other hand, includes all other modes in which the law is made.

In a third sense, legislation includes every expression of the will of the legislature, whether directed to the making of law or not. In this use, every Act of Parliament is an instance of legislation, irrespective altogether of its purpose and effect. The judicature, as we have seen, does many things which do not fall within the administration of justice in its strict sense; yet in a wider use the term is extended to include all the activities of the courts. So here, the

legislature does not confine its action to the making of law, yet all its functions are included within the term legislation.

An Act of Parliament may do no more than ratify a treaty with a foreign state, or alter the calendar, or establish a uniform time throughout the realm, or make some change in the style and title of the reigning sovereign, or alter the coinage, or appropriate public money, or declare war or make peace, or grant a divorce, or annex or abandon territory. All this is legislation in a wide sense, but it is not that declaration of legal principles with which, as one of the sources of law, we are here alone concerned<sup>[1]</sup>.

Law that has its source in legislation may be most accurately termed *enacted* law, all other forms being distinguished as *unenacted*. The more familiar term, however, is *statute law* as opposed to the common *law*; but this, though sufficiently correct for most purposes, is defective, inasmuch as the word statute does not extend to all modes of legislation, but is limited to Acts of Parliament. Blackstone and other writers use the expressions *written* and *unwritten* law to indicate the distinction in question. Such law, however, is reduced to writing even in its inception, besides that which originates in legislation. The terms are derived from the Romans, who meant by *jus non scriptum* customary law, all other, whether enacted or unenacted, being *jus scriptum*

1. V.D. Mahajan; Jurisprudence and Legal Theory; page 178 - 179

## **D. Supreme and Subordinate Legislation**

According to Salmond, legislation is either supreme or subordinate.

Supreme legislation is that which proceeds from the sovereign power in the State. It cannot be repealed, annulled or controlled by any other legislative authority. On the other hand; subordinate legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. However, there are other organs which have powers of subordinate legislation.

### **What is subordinate legislation?**

Under the general law, the term 'subordinate legislation' is often used to refer to a legislative instrument made by an entity under a power delegated to the entity by the Parliament.

It can be necessary for legislative power to be delegated for any of the following reasons:

- to save pressure on parliamentary time
- the legislation is too technical or detailed to be suitable for parliamentary considerations.
- to deal with rapidly changing or uncertain situations
- to allow for swift action in the case of an emergency.

Salmond refers to five kinds of subordinate legislation<sup>[1]</sup>.

(i) **Colonial:** As regards subordinate legislation in the colonial field, the powers of self-government entrusted to the colonies and other dependencies of the Crown are subject to the control of the imperial legislature which may repeal, alter or supersede any colonial enactment.

However, it is to be noted that after the passing of the Statute of Westminster of 1931, the Dominion Legislatures have been given the power to make any law they please. No law passed by them after the Act of 1931 can be declared inoperative or void on the ground that it is repugnant to the law of England or any Act of Parliament. Every Dominion legislature has the power to repeal or amend any law.

(ii) **Judicial:** In the same way, certain delegated legislative powers are possessed by the judicature. The superior courts have the power of making rules for the regulation of their own procedure. This is judicial legislation in the true sense of the term, differing in this respect from the so-called legislative action of the courts in creating new law by way of precedent. It is a true form of legislation although it cannot create new laws by way of precedents.

(iii) **Municipal:** Municipal authorities are also allowed to make bye-laws for limited purposes within their areas. According to Allen: "By a series of enactments, notably the Public Health Acts, 1875-1976, the Municipal Corporations Act, 1882 and the' Local Government

1. Sir John Salmond; Jurisprudence; page 173 - 175

Acts, 1888-1933, local authorities-county, borough, rural and urban district councils-have powers to enact bye-laws binding upon the public generally, for public health and for 'good order and government'. Offences against these bye-laws are punishable on conviction by summary process by fines usually not exceeding £ 5. The range of subjects dealt with is immense: to take the commonest, we may note building, advertisements, care of the sick (hospitals, vaccination, infectious diseases), cleanliness of dwelling-houses, housing of the working classes, town-planning schemes, nuisances, scavenging and cleansing, police, rating, education, traffic, highways, burials, and the conduct generally of persons in public places. All these matters and their many analogs in local government; count for no less in the daily lives of ordinary citizens than the enactments of Parliament. The far off dignity of the House of Commons, though to the instructed it may symbolize the majesty of the Constitution, to the plain law abiding man is but a name compared with the immediate discipline of magistrates, policemen, and inspectors."

**(iv) *Autonomous*:** Sometimes the State allows private persons like universities, railway companies, *etc.*, to make bye-laws which are recognized and enforced by law courts. Such legislation is usually called *autonomic*. The railway company may make bye-laws for the regulation of its undertaking. Likewise a university may make statutes for the government of its members<sup>[1]</sup>.

1. Sir John Salmond; Jurisprudence; page 173 - 175

## Autonomic law and conventional law distinguished

Conventional law is the law which has its source in the agreement of those who are subject to it. Agreement is a law for those who make it, which supersedes supplements or derogates from the ordinary law of the land. Eg. Articles of association of a company, Articles of partnership. There is a close resemblance between Autonomic law and conventional law but there is also a real difference between them. The creation of each is a function entrusted by the state to private persons. But conventional law is the product of agreement and, therefore is law for none except those who have consented to its creation. Autonomic law on the contrary is the product of a true form of legislation.

**(v) *Delegated Legislation:*** Another kind of subordinate legislation is executive legislation or *delegated legislation*<sup>[1]</sup>. It is true that the main function of the executive is to enforce laws but in certain cases, the power of making rules is delegated to the various departments of the government. This is technically called subordinate or delegated legislation. Delegated legislation is becoming more and more important in modern times.

1. V.D. Mahajan; Jurisprudence and Legal Theory; page 181 - 183

## **E. Delegated legislation**

**Delegated legislation** (also referred to as **secondary legislation** or **subordinate legislation** or **subsidiary legislation**) is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority.

Often, a legislature passes statutes that set out broad outlines and principles, and delegates authority to an executive branch official to issue delegated legislation that flesh out the details (substantive regulations) and provide procedures for implementing the substantive provisions of the statute and substantive regulations (procedural regulations). Delegated legislation can also be changed faster than primary legislation so legislatures can delegate issues that may need to be fine-tuned through experience.

To quote Baldwin: "In the three years from 1925-1928, the average number of Acts was 506, the average number of pages occupied by them 539 ; while the average number of Statutory Rules and orders was 1408.6 and the average number of pages covered by them was 1, 849."

Many factors have been responsible for the growth of delegated legislation. The concept of the State has changed and instead of talking of a police State, we think in terms of a welfare State. This change in outlook has multiplied the functions of the government. This involves the passing of more laws to achieve the ideal of a welfare State. Formerly, every bill used to be a small one but civilization has become so complicated that every piece of legislation has to be detailed. The rise in the number and size of the bills to be passed by Parliament has

created a problem of time. It is realized that all this legislation cannot be enacted even if the members of Parliament are prepared to work day and night. The result is that Parliament resorts to the device of passing skeleton bills and leaving the work of filling in the details to the departments concerned<sup>[1]</sup>.

Modern legislation is becoming highly technical and it is too much to expect that the ordinary members of Parliament will appreciate all the implications of modern legislation. Except a few experts in certain lines, the other members of Parliament are bound to bungle if they attempt to do the impossible.

Under the circumstances, it is considered safe to approve of general principles of legislation and leave the details to the ministries concerned.

The time available for drafting bills to be passed into law by Parliament is not adequate. If an attempt is made to draft detailed bills within a short period, the drafting is bound to be defective.

No wonder power is delegated to the departments concerned to issue orders-in-council which can be made at leisure and which can be expected to be logical and intelligible.

It is impossible for any statesman or civil servant to foresee all contingencies that might arise in the future and provide for them in the bill when it is being passed by Parliament. It is convenient if some power is given to the department concerned to add to the details to meet any contingency in future. Moreover, full knowledge of the local conditions may not be available to the government at the time of the passing of the law and it is desirable to adjust the law by means of orders-in-council to meet the requirements of the various localities.

1. V.D. Mahajan; Jurisprudence and Legal Theory; page 181 - 184

Delegated legislation gives flexibility to law and there is ample scope for adjustment in the light of experience gained during the working of any particular legislation.

Delegated legislation is controlled in the following ways:

**(a) Parliamentary Control:** Parliament has always general control. When a bill is before it, it can modify, amend or refuse altogether the powers which the bill proposes to confer on a minister or some other subordinate authority.

**(b) Parliamentary Supervision:** A second way of controlling delegated legislation is that laws made under delegated legislation should be laid before the legislature for approval and the legislature may amend or repeal those laws if necessary.

**(c) Judicial Control:** While parliamentary control is direct, the control of courts is indirect. Courts cannot annul subordinate enactments, but they can declare them inapplicable in particular circumstances. The rule or order frowned on by the courts, though not actually abrogated, becomes a dead letter because in future no responsible authority will attempt to apply it<sup>[1]</sup>. If it is applied, nobody will submit to it. Judicial control operates through the doctrine of *ultra vires*. All delegated legislation is subject to the test whether or not it falls within the periphery of the power thus conferred. If they do not, they are of no effect. Courts also possess certain direct power over the acts and procedures of public authorities. The most important of them are called writs. The other methods are injunctions and declarations.

**(d) Trustworthy Body:** An internal control of delegated legislation can be ensured if the power is delegated only to a trustworthy person or body of persons.

1. V.D. Mahajan; Jurisprudence and Legal Theory; page 182

{e) **Publicity:** Public opinion can be a good check on the arbitrary exercise of delegated statutory powers. Public opinion can be enlightened by antecedent publicity of the delegated laws.

(f) **Expert's Opinions:** In matters of technical nature, opinions of experts should be taken. That will minimise the danger of vague legislation and "blanket" delegation.

C.T. Carr has suggested certain safeguards to avoid the evils of delegated legislation which is otherwise inevitable. Delegation of legislative powers should be made to a trustworthy authority.

The limits within which the delegated powers are to be exercised should be defined clearly and the courts should be given the power to declare any piece of delegated legislation as *ultra vires*, which is beyond the power given to the authority concerned. The particular interests involved should be consulted by the authority concerned at the time of issuing orders-in-council. There should be antecedent publicity for delegated legislation and also for amending or revoking delegated legislation. The rules and regulations made under delegated legislation should be put before the legislature before they come to have the force of law. If they are not approved by the legislature they must lapse. Expert advice should also be taken at the time of making rules and regulations<sup>[1]</sup>.

All delegated legislation must be subject to judicial control and review. It must not be repugnant to the statute under which it is made. It must not be vague or uncertain.

It must not be unreasonable. It must be allowed to be controlled by the courts by means of appropriate writs.

1. V.D. Mahajan; Jurisprudence and Legal Theory; page 183

### **E. Unauthorised subdelegation**

Related to the concept of ultra vires is the issue of unauthorised subdelegation. A subdelegation arises when legislative power is subdelegated by the person or body to whom the power has been delegated. Subordinate legislation that includes a subdelegation would be invalid if the empowering Act does not authorise the subordinate legislation to include the subdelegation<sup>[1]</sup>. For example, unauthorised subdelegation would arise if an Act authorises the Governor in Council to make a regulation to deal with an issue, but the regulation the Governor in Council makes does not substantively deal with the issue itself and instead purports to allow a chief executive to deal substantively with the issue under a public notice.

### **F. Criticisms of delegated legislation**

The criticism of use of delegated legislation is that it takes law making away from democratically elected Parliament and allows non-elected people to make the law. This is acceptable provided there is sufficient control but as seen parliaments control is limited. This criticism cannot be made of bylaws made by local authorities since these are elected by local citizens. Another problem is that of sub-delegation which basically means that the law making authority is handed down another level. This raises questions that our law is made by civil servants and it is merely stamped by the minister department. The other main problem with delegated legislation is that it is difficult to discover what the present law is as large volume of delegated legislations can be made and lack of publicity is another issue because majority of delegated

legislation is made in private in contrast of public debates of parliament. The final issue about delegated legislation and acts of parliament is that obscure wording which can lead to difficulty in understanding the law.

1. <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/subord-legislation/unauthorised-subdel.aspx>

## **CONCLUSION**

Delegated legislation is necessary for many reasons; allowing faster, more specific or technical legislation to be created, where it would not be possible with insufficient parliamentary time and relevant knowledge. However, delegated legislation needs to be controlled as it is created more privately than statutes, and with the risk of sub-delegation and abuse of power, by non-elected bodies or individuals. The present controls over delegated legislation, although reasonably effective have their disadvantages, most being limited in their controls; enabling acts can allow very wide powers, affirmative resolutions do not allow for amendments, negative resolutions do not always allow for opposition or unease to be expressed, the Scrutiny Committee's reports are not always considered, and the courts can only look into delegated legislation if an affected individual challenges it. As a result, although controls are reasonably effective, delegated legislation could be considered inadequately controlled, with no real parliamentary inspection, except for the small number of statutory instruments subject to positive resolution. Since delegated legislation is in many ways undemocratic and less public than statutes, it needs tighter controls to prevent possible abuse of power.

## **BIBLIOGRAHY**

### **Books referred:**

1. Sir John Salmond; Jurisprudence; 1967; Eastern Book Company; pages 171 – 175
2. V.D. Mahajan; Jurisprudence and Legal Theory; page 179 – 185

### **Websites referred:**

1. <http://www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/legislation-handbook/subord-legislation/unauthorised-subdel.aspx>