

**INTERNATIONAL JOURNAL OF LAW**  
**MANAGEMENT & HUMANITIES**

**[ISSN 2581-5369]**

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**Volume 5 | Issue 1**

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**2022**

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# Constitutionality of Delegated Legislation: A Comparative Study of U.S.A., U.K., and India

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## ABSTRACT

*The delegation of legislative power is a device by means of which the legislature confers its law-making power to other agencies. The delegated legislation is generally expressed as rules and regulations created by external bodies other than the legislature. The concept of delegated legislation is not of recent origin; its spirit can be traced back to many centuries. However, in the current phase, the phenomena of delegated legislation have introduced a new trend, whereby a gradual shift has been witnessed from the rigid concept of separation of powers. The present article attempts to undergo a comparative analysis on the position of delegated legislation in three countries- the U.S.A., the U.K., and India. The paper addresses the cardinal legal question as to whether a legislative body can delegate its law-making power to other agencies; and, if the legislature is competent to do so, up to what extent such authority can be delegated? In the absence of proper guidelines concerning delegation of legislation, ambiguity arises in the scope and ambit of such delegation of power. The researcher has taken up the present research to analyze the above legal problem that leaves an area for the executive to acquire all the power of law-making, leaving room for an undemocratic danger of persons' civil and personal liberties. The researcher attempts to address the constitutionality and scope of delegated legislation in three countries that are structured on different notions and rigidity of separation of powers.*

**Keywords:** *Delegation; Separation of powers; Parliament; Legislation; Constitution; Supreme*

## I. INTRODUCTION

Delegation of legislative power is a mechanism by which the legislature delegates its legislative authority to other agencies. Delegated legislations are generally defined as rules and regulations enacted by the administrative or non-legislative authorities. The proper analysis of the expression “delegated legislation” can be seen in the report of the Committee on Minister’s

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power of the United Kingdom.<sup>2</sup> In its reports, the committee has expressly highlighted the genuine concept of the expression by providing it with two meanings. In one sense, delegated legislation refers to the legislature's delegation of rule-making authority to the executive; in another sense, it relates to the outcomes of such delegation, such as rules, regulations, orders, and ordinances.<sup>3</sup> The occurrence of delegated legislation puts a question mark on the doctrine of separation of powers. The principle of Separation of Powers makes an undoubted watertight division of powers between the organs of the government, i.e., Legislature, Executive, and Judiciary. The doctrine evolved from a French philosopher, Montesquieu, who in his work titled "*The Spirit of the Laws*" observed that the principle seeks to preserve human liberty by creating limitations in the exercise of powers and avoiding the congregation of powers in one hand of the government. The phenomenon of delegated legislation has paved the way for a new trend, resulting in a progressive shift away from the rigid principles of separation of powers.

The nature of delegation of legislation has been seen as a mark of uncertainty and confusion. On the one hand, delegated legislation is considered as a mechanism for reducing the workload of the legislature, whereas, on the other hand, it has been seen portrayed as an excuse to escape from the powers conferred to the legislature in a democratic country. The present paper discusses the central legal question of whether or not a legislative body can transfer its law-making authority to other agencies. If so, to what degree such power can be assigned? To properly analyze the question, a careful study of the constitutional mechanism concerning the position of delegated legislation in three countries, i.e., the United States, the United Kingdom, and India, should be made. The legality of delegated legislation has witnessed its validity in a country where there is no written Constitution and Parliament is supreme. In the United Kingdom, Parliament has unlimited power, and delegation of such authority has been observed as valid with less interference of the Judiciary. Such legal validity of delegating legislative power has been observed even in those countries where the legislature exercised its authority in accordance with the constitutional provisions. The legal question that awaits to be answered in the present context revolves around the purview of delegated legislation. Therefore, the researcher examines the constitutionality and scope of the legislature in delegating its law-making power in three nations with varying notions and rigidities of separation of powers.

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<sup>2</sup> The committee was appointed in England in the year 1929 to examine the constitutional validity of the delegated legislation. It submitted its report in 1932.

<sup>3</sup> Dr. U.P.D. Kesari, Administrative Law 51 (Central Law Publication 2014).

## II. CONSTITUTIONALITY OF DELEGATED LEGISLATION IN THE UNITED STATES OF AMERICA

The rule against delegation of legislative power revolves around the rigid principle of separation of power that paved its way from Locke and Montesquieu's ideas on modern governance. In the United States of America (U.S.A), two cardinal principles structured the political governance of the country.<sup>4</sup> Firstly, the principle of separation of powers; its importance in the present context has been upheld by the Hon'ble Supreme Court in *Field v. Clarke*<sup>5</sup>. The court stated that "*Congress cannot delegate legislative power to the President* " is "*universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.*" However, strict adherence to the principle of non-delegation became impossible due to the dynamic legislative system. In the name of public interest standards, Congress has been delegating limitless legislative powers to the executive. Examining the current stage of the non-delegated doctrine, it has been commented as "*moribund*" by the Chief Justice Marshall.<sup>6</sup> It is definite that powers of the governmental bodies have been vested differently, but these powers were not expressly separated by virtue of any provisions.<sup>7</sup> Therefore, the American law does not make it a mandate on the part of the executive to exclusively exercise the delegated powers, as it is in the case of the United Kingdom, where the executive is answerable to the Parliament. Congress often delegates its legislative authority to the independent commissions, unlike the executive branch that is accountable to the Congress or Parliament. While examining the importance of this practice, the Supreme Court observed that vesting legislative activity to the independent commissions rather than executive agencies lowers the chance of arbitrariness. The former's legislative action brings reasonableness as it remains outside the purview of administrative control.

## III. CONSTITUTIONALITY OF DELEGATED LEGISLATION IN THE UNITED KINGDOM

Delegated Legislation in the United Kingdom cannot be considered as controversial as in the United States of America. The main reason for such an outcome is Parliament's Supremacy and less judicial intervention in the delegation of legislative power. Unlike the United States, the judicial interpretation to justify the validity of delegations has no or limited function in the United Kingdom. To carefully outline the nature of delegated legislation in the United

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<sup>4</sup> *Id* at 58.

<sup>5</sup> *Field v. Clarke*, 143 US 656, 692.

<sup>6</sup> *Federal Power Commission v. New England Power Co.* (1974) 415 US, 352.

<sup>7</sup> Cecil T. Carr, *Delegated Legislation in the United States*, 25, *Journal of Comparative Legislation and International Law*, 47, 47-48 (1943).

Kingdom, references must be traced from the regulation-making procedure of the United Kingdom. In this regard, the law does not make it a mandate of pre-adoption public notice and comments.<sup>8</sup> However, there are specific statutes that require consultation of the regulations before enacting them.<sup>9</sup> For instance, the *Rules Publication Act, 1893* put the delegated power outside the purview of adoption and consultation by allowing regulation publication before such adoption. However, the provision was repealed in 1946 by introducing a new condition that makes the adoption process a requirement before publishing. In the United Kingdom, the state's procedure on delegated legislation seems to have certain similarities with America. In the absence of written constitution, the country (United Kingdom) lacks the constitutional safeguards that protect and keep the government of America in power.<sup>10</sup> Therefore, the United Kingdom hasn't witnessed any constitutional limitation while exercising the delegated powers. The principle of skeleton law is equally recognized in the United Kingdom as it is in America. The executive is conferred with the vast power of enacting delegated legislation. The scope of delegated legislation in the United Kingdom is not restricted to filling technical details by the executives but also on broad policies, resulting in the gradual shift in power stabilization between law-making and administrative bodies.<sup>11</sup>

#### IV. CONSTITUTIONAL VALIDITY OF DELEGATED LEGISLATION IN INDIA.

The issue concerning delegation of legislation in India received a harsh response during British rule when the Indian Constitution adopted the principles of separation of powers in its rigid nature. A careful analysis of Indian attitude towards the delegation of powers highlights that the framers of the Indian Constitution left the concept of delegation of legislative power with the upcoming regulations and judicial interpretation.<sup>12</sup> The Constitution of India has not provided any guidelines under its provisions for the successful functioning of delegated legislation. In this regard, it can be argued that there is no such provision in the Constitution that restricts the legislature from delegating its legislative power.<sup>13</sup> Under the case of *Jatindra Nath Gupta v. the Province of Bihar*,<sup>14</sup> the Supreme Court was referred by the President to advise on the legality and scope of delegated legislation. The court held the impugned

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<sup>8</sup> Bates v. Lord Hailsham [1972] 1 WLR 1373.

<sup>9</sup> Control of Pollution Act, 1974, S.75, Act of Parliament, 1974 (U.K.).

<sup>10</sup> Hermann Pünder, *Democratic Legitimation of Delegated Legislation: A Comparative View on the American, British and German Law*, 58, The International and Comparative Law Quarterly, 353, 360-361 (2009).

<sup>11</sup> Ganz, *Delegated Legislation: A Necessary Evil or a Constitutional Outrage?*, Leyland and Woods (eds) Administrative Law Facing the Future: Old Constraints and New Horizons, 63-64 (1997).

<sup>12</sup> C. H. Alexandrowicz-Alexander, *Delegation of Legislative Power in India*, 3, The American Journal of Comparative Law, 72, 72-73 (1954).

<sup>13</sup> Dr. U.P.D. Kesari, *supra* note 3, at 61.

<sup>14</sup> 3 1949 FLJ 225.

regulation as ultra-vires due to the delegation of legislative power to an external authority. The decision of *Jatindra Nath's case* put a question mark on the legality of delegated legislation in India. However, on analyzing the Constitutional provisions in the light of delegation of legislation, it can be argued that despite Articles 245 and 246, several provisions give power to the President and the governor to make laws in certain conditions.<sup>15</sup> Additionally, Article 13 includes ordinances, orders, bye-laws, rules, and regulations under the purview of "law." It is definite that rules, regulations, bye-laws, etc., are the creation of external bodies other than the legislature. Therefore, it can be interpreted in the light of these provisions that the Constitution of India neither intends to make a watertight division of powers between the organs of the government nor does prevent the delegation of legislative power under any provisions. In India, the delegation of legislative power to the executive is constitutionally valid with the limited scope on the part of the executive to exercise it.

## V. CONCLUSION

Delegated legislation is carried out in different ways in the U.S.A., U.K., and India. The proper analysis of the delegated legislation in the U.S.A. points out the crux that neither the U.S. Constitution nor the judicial interpretation by the American Supreme Court has wholly followed the strict adherence of non-delegation of legislative power. The delegation of the authority must be guided by reasonableness by conferring a limited discretionary role to the executive. The legality of delegated legislation depends on its ambit concerning the enabling Act. Thus, the judicial mechanism of wearing out the ultra vires regulation is being carried out in the same manner as in the United Kingdom. Three cases define the position and the scope of delegated legislation in the country.<sup>16</sup> The Hon'ble court in these cases analyzed the legality of delegated legislation under the standard prescribed by the legislature. In the absence of any standard and skeleton legislation, the delegation of legislative power was invalid in the American Courts. The differences in the state practice and attitude towards delegated legislation in the U.S.A. and U.K. has played an important role in concluding that the United Kingdom is more inclined towards the discretionary bureaucratic rule than the United States of America. In India, the principles of delegated legislation are impliedly incorporated in the Constitution of India. In the presence of a written constitution, the functioning of delegated legislation is often confined to constitutional limitations and safeguards. The comparison of the position of delegated legislation in three countries suggests that the democratic framework

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<sup>15</sup> India Const. Art.123, 213, 356.

<sup>16</sup> *Panama Refinery Co. v. Ryan* (1935: 293 U.S. 38); *Schechter Corporation v. U. S* (295 U.S. 495); *Carter v. Carter Coal Co.* (298 U.S. 238).

and participation of the public play an essential role in the functioning of delegated legislation. It can be concluded that the legality of the delegated legislation depends on the discretion or interpretation of the Judiciary and the people's participation in the regulation-making process.

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