CHAPTER 1

INTRODUCTORY

Administrative Law, scope of.

It is usual to start textbooks with a definition. But, as in other branches of developing law, it is difficult to arrive at an agreed definition because different scholars and jurists are likely to look at the subject from the aspect arising from the particular problems before them for the time being. The purpose of the reader would, therefore, be best served by analysing the broad features of Administrative Law with reference to other branches of law, and then to discuss some leading definitions.

A branch of Public Law.

Any textbook on Jurisprudence[1] will show that both Constitutional and Administrative Law are branches of 'public law', as distinguished from 'private law' which deals with the rights and liabilities of private individuals in relation to one another. But Constitutional and Administrative Law deal with the relation of individuals with the State and other 'public' bodies.

Constitutional and Administrative Law are so interrelated that it is difficult to explain the scope and extent of Administrative Law without reference to those of Constitutional Law.

Relation with Constitutional Law.

According to *Holland*,[2] while constitutional law describes the various organs of the sovereign power as at rest, —administrative law describes them as *in motion*. *Maitland*[3] says that the above view of Holland cannot be accepted if it means that constitutional law merely deals with the *structure* while administrative law deals with the *functions* of the organs of government; for, in that case the powers and prerogatives of the Crown would be relegated to the sphere of administrative law as to which no one would agree. That is why *Keith* observed—

"It is logically impossible to distinguish administrative from constitutional law and all attempts to do so are artificial."[4]

The consensus of opinion amongst English textbook writers is that the distinction between constitutional law and administrative law is one of degree and convenience rather than of principle. While constitutional law deals with the *general principles*[5] relating to the organisation and power of the organs of the State and their relations *inter se* and towards the citizens, administrative law is that aspect of constitutional law which deals *in detail* with the powers and functions of the administrative authorities, including the civil services, public departments, local authorities and other statutory bodies exercising

1. E.g., Salmond, *Jurisprudence*, 10th Ed., 1948, p. 506; Wade & Phillips, *Constitutional Law*, 8th Ed., 1970, p. 583.
2. Holland, *Jurisprudence*, 13th Ed., p. 374.
3. Maitland, *Constitutional History* (1908), pp. 526-39.
4. Ridge's *Constitutional Law of England*, 7th Ed., revised by A.B. Keith, 1939, p. 1.
5. Jennings, *Law and the Constitution*, 5th Ed., p. 217.

public functions and wielding *quasi-governmental* powers. Thus, while constitutional law is concerned with the constitutional status of ministers and civil servants, the organisation of the services or the working of the various departments of the government belong to the sphere of administrative law. In the words of *Jennings*,[5] the subject-matter of administrative law is public administration and it determines the organisation, functions, powers and duties of 'administrative' authorities.

In countries having a written Constitution, such as the *U.S.A.* or *India*, however, the distinction between Constitutional and Administrative Law is not so much blurred inasmuch as the law relating to the Constitution is to be found in the organic instrument while Administrative Law is, in the main,[6] to be found from sources outside the written Constitution, such as statutes, statutory instruments and case-law. Nevertheless, in these countries, too, there is a close interrelation between constitutional and administrative law in so far as the latter is concerned with the functions and powers of, and control over, the administrative authorities.[7] The Constitution imposes certain limitations, such as the fundamental rights, upon all governmental powers and if an administrative authority transgresses any of these limitations or any other mandatory provision of the Constitution, the administrative act will be void and will be so declared by the Courts. The *Indian* Constitution also provides constitutional remedies, such as the writs known in England as the 'Prerogative writs' by means of which, apart from the remedies available under the general law, an individual aggrieved by some administrative action may have his remedy from the Courts.

According to *Dicey*,[8] it is one of the basic principles of English Constitutional Law that all authorities within the State, including the Executive, must be under the control of the ordinary courts. As to how this control is exercised over the administrative authorities comes within the province of Administrative Law. Broadly speaking, this control is exercised under three broad heads, in so far as the functions of the administrative authorities are threefold,— legislative, judicial and purely administrative :

(i) The legislative function of the administrative authorities is to make subordinate legislation, i.e., rules, orders and the like, in exercise of powers conferred by statutes.

It is the business of the Courts to see that in making such subordinate legislation, the administrative authorities do not exceed the powers conferred by the relevant statute, and the doctrine which is applied by the Courts is that of *ultra vires*.

(ii) There are many administrative authorities which are empowered by statute to exercise *quasi-judicial* powers, that is to say, to determine the rights of parties, without being 'courts'. Some such authorities are commonly known as administrative tribunals.

Inasmuch as such tribunals or authorities are required by the relevant statutes to proceed in a judicial manner, i.e., by hearing the parties, the courts of law can interfere with their decisions by the writs of prohibition and *certiorari* (see *post*) when they act *ultra vires* the statute by which they

6. An exception is offered by the Constitution of India in so far as it contains provisions relating to the Civil Services in Part XIV.

7. Davis, in his *Administrative Law Text* (1959, p. 1), thus defines Administrative Law as "the law concerning the powers and procedures of administrative agencies, *including specially the law governing judicial review of administrative action*".

8. Dicey, *Law of the Constitution*, 1959, pp. 47, 193.

were empowered to decide the disputes or when they are without jurisdiction for other reasons, or their decisions are contrary to the principles of natural justice or are vitiated by apparent errors of law.

(iii) The rest of the functions of the administrative authorities are purely administrative.

In this sphere, the Court's function is obviously restricted because the administrative authorities are more frequently empowered by statutes to act according to their discretion and according to their subjective satisfaction. The Courts can interfere by the writ of *mandamus* (see *post*) primarily where the authority concerned has exceeded its statutory powers or refused to discharge its statutory duty.

Another point to be noted, in this context, is that in the Anglo-American world, Administrative Law is a later development in the history of Jurisprudence, inasmuch as Administrative Law springs as an offshoot or species from the genus Constitutional Law, which first established the accountability of the State to the people. This is being treated separately, in the next chapter. That chapter will also demonstrate that whatever might be its origin, Administrative Law to-day forms a separate branch of law, and a subject for separate study, even though at points it may overlap with the scope of Constitutional Law.

Administration and Administrative Law.

As its derivation shows, 'Administrative Law' is the law relating to the 'Administration'. It is, however, not co-extensive with the scope of the term 'Administration'.

In order to appreciate the meaning of these expressions, we must refer, briefly, to certain terms of Political Science.

The 'State' may shortly be described as an independent political society, occupying a definite territory, and having for its primary object,—the defence of the territory against external aggression and the maintenance of order and justice within the community itself.

The essential elements of a State, thus, are—(i) a group of persons; (ii) the occupation of a determinate portion of the Earth's surface which constitutes the home of the population acting together for common purposes; (iii) independence of foreign control; and (iv) a common supreme authority through which the collective will is expressed and enforced. The last two elements may be shortly referred to as external and internal sovereignty.

The 'Government' is the agency or organisation through which the will of the State is formulated and expressed and the sovereign power of the State is exercised. While Governments change, the State remains permanent notwithstanding changes in the Government. The State and the Government are thus not identical. While the State is the sovereign community itself, the Government is its *organ* through which it acts. The essential functions of a Government are classsified as executive, legislative and judicial.

'Administration' is a technical term, referring to the sum total of acts by which the will of the State is effectuated. It is a function of the Government as a whole in the broader sense, but, more particularly, of the Executive branch of the Government, i.e., the residue left after the functions of the Legislature and the Judiciary are exhausted.[9]

Administration.

9. Cf. Goodnow, *Comparative Administrative Law* (1893), Vol. I, p. 4.

Administration, e.g., includes the appointment of officers of the government, levy and collection of taxes, the execution of laws, the enforcement of judgments of courts. On the other hand, the function of administration, to-day, does not exclusively belong to the Executive consisting of the head of the State, the Ministers and the Civil Service, but is shared by the local authorities[10] and a number of administrative tribunals and other statutory bodies endowed with public functions. In England, *Maitland*[11] discerned this as early as 1908 when he wrote—

"We are becoming a much governed nation, governed by all manner of councils, boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes."[11]

The word 'administration', thus, refers to the entire machinery by which the country is administered according to laws made by the Legislature as well as the policy decisions made by the Executive,—as applied to particular facts and circumstances.

Administrative Law.

Adminstrative Law is that body of *law* which concerns the function of administration and the relations of the administrative authorities with the individuals as well as the other authorities of the State. It does not, however, deal with the organisation of these administrative authorities and their internal problems, which come within the scope of 'Public Administration', and the allied subject of Political Science.

The various categories of administrative authorities whose powers, duties and liabilities are dealt with by Administrative Law are the Government Departments, public officials, statutory bodies and public corporations, administrative tribunals, local authorities.

Scope of this work.

The various authorities, referred to above, who participate in the business of administration are administrative authorities, sometimes collectively referred to as 'the Administration'. Administrative Law deals with the powers of these administrative authorities, the *legal* relationship between such authorities and the individual and the *justiciable* rights of the individual as against 'the Administration'. The citizen may have his redress from the Administration by correspondence and departmental representation in the plurality of cases. But the scope of the present work is to indicate the remedies which are available in a *court of law* and the principles by the application of which the courts would be in a position to keep the administrative authorities under the Rule of Law.[12] This emphasis on the judicial aspect of administrative law defines the scope of the present work.

Classification of Administrative Action.

Judicial control of administrative action or administrative power is one of the contents of administrative law. But administrative action is of different

10. That is, authorities who are, more or less, autonomous bodies carrying on the administration of different local areas or discharging some administrative functions in relation thereto, subject to statutory (and constitutional) limitations.

11. Maitland, *Constitutional History* (1908), p. 501.

12. Cf. Frankfurter, quoted in Vom Baur's *Administrative Law*, 1946, p. 1n.—"Administrative law deals with the field of legal control exercised by law-administrating agencies other than courts, and the field of control exercised by courts over such agencies."

kinds and no proper treatment is possible without classifying the acts of administrative authorities under several heads.

The Committee on Ministers' Powers[13] attempted to simplify matters by defining administrative action as action 'based on a decision on policy'. This definition, however, emphasises that aspect of the functions of administrative authorities which may be said to be of the 'purely administrative' type and overlooks that there is a volume of administrative function which simulates a *judicial* decision, and, in the words of *Cooper* v. *Wilson*,[14] "approaches in point of degree very near to the judicial". This definition also fails to take account of the function of subordinate legislation or the rule-making function belonging to the administrative authorities.

An administrative act, is, primarily,[15] the act of an adminstrative authority (or 'agency', as it is named in the American Administrative Procedure Act, 1946). Any agency or limb of the Government, other than the Legislature or the Judiciary, is an administrative authority. In *our* Constitution, the 'executive power' of the Union is vested in the President, by Art. 53(1) and that of a State is vested in the Governor, by Art. 154(1). It being impossible for the President or the Governor to exercise every executive function personally, the Constitution authorises either of them to exercise the executive power either directly or through officers subordinate to him. Evidently, these executive authorities, together with the host of their subordinates, who exercise the 'executive power' under the Constitution, are administrative authorities. These would also include the 'local authorities' and other authorities, referred to in Art. 12, in whom the 'executive power' of the State may be vested.

Executive power and administrative action.

This begs the question 'what is executive power'. Simple as it appears, the Supreme Court did not find it to be so when it had to analyse the executive function, in *Ram Jawaya* v. *State of Punjab*.[16] It was once thought that the function of the Executive was simply to execute the laws. But, with the advent of the 'Welfare State' and the growth of industrialisation with its concomitant problems, the State has ceased to be a mere Police State, and the function of the Executive has ceased to be merely the carrying out of the laws made by the Legislature. The Executive has to initiate policy and it is open to the Executive to undertake measures in various spheres either without legislation or in advance of legislative sanction. After an analysis of various provisions of *our* Constitution, the Supreme Court came to the conclusion that except for incurring expenditure or for affecting private rights, prior legislative sanction is not necessary to undertake every executive or administrative function. The executive function has thus come to be the residuary function of the State.[16-17]

Executive power.

In the words of *our* Supreme Court—

"It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily, the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away subject, of course, to the provisions of the Constitution or of any law."[16]

13. Otherwise known as the Donoughmore Committee, which reported in 1932.
14. *Cooper* v. *Wilson*, (1937) 2 K.B. 309.
15. 'Primarily', because even a court or judicial authority may sometimes perform an administrative function, e.g., the organisation and control of its own staff.
16. *Ram Jawaya* v. *State of Punjab*, (1955) 2 S.C.R. 225 (236).
17. *Jayantilal* v. *Rana*, A. 1964 S.C. 648 (655).

An administrative act may, accordingly, be statutory as well as non-statutory.

It is clear that a very wide area of activities is comprised within the sphere of 'administrative action' and that even though an administrative authority is an authority which is other than the Courts or the Legislatures of the country, the residuary functions of the Administration may themselves partake of the legislative or the judicial quality. The fiction of *'quasi'* has, accordingly, been invented to distinguish these acts of the administrative authorities from the acts of the Legislature and the Judiciary.

The acts of the administrative authorities, thus, may be divided into three broad categories :

(a) *Quasi-legislative :* This is the function of subordinate legislation or that of making rules, regulations and other statutory instruments to fill in the details of legislative enactments in order to make the execution of the laws possible.[17]

While the legislative function is vested in the Legislature of a country [in *India,* the Union Parliament and the State Legislatures (Art. 245)] by its Constitution, the administrative authorities may make subordinate legislation, when so empowered by the Legislature. This function of subordinate legislation is popularly known as 'rule-making' function, though there are other species of subordinate legislation than Rules, such as regulations, orders, bye-laws. This function of the Administration wil be elaborated in Ch. IV, *post.*

(b) *'Purely' Administrative :* While the instruments of subordinate legislation are general in their operation just as the laws made by the Legislature are,—applying to a class of persons or objects, coming within the scope of the statutes under which they are made,—an administrative act or order simply disposes of a particular case (e.g., referring a partcular industrial dispute to an Industrial Tribunal[18]), or merely enunciates the policy to be pursued by the administrative authority or the Government without immediately affecting the rights of any individual,[19] or makes inquiries or investigations as a preliminary[20] to judicial or legislative proceedings, or appoints a particular person to an office, or refers a matter to a statutory tribunal for adjudication,[21] or transfers a case from one area to another,[22] or makes a contract or transfers property in exercise of its statutory[23] or constitutional[24] powers.[25]

An administrative order may be made not only in exercise of a statutory power but may sometimes be made without any statutory authority, for, as explained at p. 5, *ante,* legislative sanction is not necessary for all executive acts.

Though the gulf between purely administrative acts and *quasi-judicial* acts (*below*) has been narrowed down by including within the *quasi-judicial* fold all administrative acts which inflict upon an individual civil consequences,[26]

18. *Newspapers Ltd.* v. *Industrial Tribunal,* A. 1957 S.C. 532 (539)
19. *State of U.P.* v. *Vijay,* A. 1982 S.C. 1234 (para. 3).
20. *Pearlberg* v. *Varty,* (1972) 2 All E.R. 6 (18, 21) H.L.; *Hearts of Oak Co.* v. *A.G.,* (1932) A.C. 392; *Norwest* v. *Dept. of Trade,* (1978) 3 W.L.R. 73 (89) C. A.; *Narayanlal* v. *Mistry,* A. 1961 S.C. 29 (para. 21).
21. Cf. *Musaliar* v. *Venkatachalam,* A. 1956 S.C. 246 (266).
22. *Pannalal* v. *Union of India,* A. 1957 S.C. 397 (410).
23. Cf. *Rikhy* v. *Delhi Municipality,* A. 1962 S.C. 554 (559).
24. Cf. Arts. 298-299 of *our* Constitution.
25. *Ram Jawaya* v. *State of Punjab,* (1955) 2 S.C.R. 225.
26. *Kraipak* v. *Union of India,* A. 1970 S.C. 150; *Maneka* v. *Union of India,*

there is still a strip left which may be called purely administrative, because it is not saddled with the obligation to hear anybody before taking action, e.g., matters relating to the formulation or alteration of Government *policy,*[19] or the exercise of a purely contractual power,[27] or a mere preliminary inquiry which does not finally decide the rights of the parties,[20] and the like.[18]

This category of administrative action will be elaborated in Ch. 5, *post.*

(c) *Quasi-judicial:* When an administrative act immediately affects an individual's legal rights[26] or the law requires[28] that in coming to its decision in the matter the administrative authority must follow a *procedure* simulating the judicial process, the administrative act becomes *quasi-judicial.* Under the American Administrative Procedure Act, 1946, it is termed 'administrative adjudication',—indicating the 'process for the formulation of an order'.

In short, it is only the additional requirement to follow a particular procedure to ensure a minimum of fairness or justice that distinguishes a *quasi-judicial* act from an administrative act.[29-30] Apart from this, both an administrative and a *quasi-judicial* decision are arrived at upon consideration of administrative policy and *expediency,* or upon *subjective*[31] considerations as distinguished from judicial decisions which are arrived at by applying fixed *objective* standards and the merits of the cases of the parties before the Court, uninfluenced by any consideration of a predetermined policy.[32]

In the result, the distinction between administrative and other actions rests not on the nature of the authority doing the act, but on the nature of the function in the discharge of which the act in question has been done[33] and, in fact, an administrative authority may have the obligation to act *quasi-judicially* in some matters or at some stages of the same matter, though as regards the rest,[34-35] his acts will be purely administrative.

Rule of Law and Administrative Law.

One of the basic features of the English Constitutional system, according to *Dicey,*[36] is the Rule of Law, and the ingredients[37] of this Rule of law are—

A. 1978 S.C. 597; *Kapoor* v. *Jagmohan,* A. 1981 S.C. 136; *Eurasian Equipment* v. *State of W.B.,* A. 1975 S.C. 266; *Vilangandan* v. *Executive Officer,* A. 1978 S.C. 930; *State of Punjab* v. *Ajudhia,* A. 1981 S.C. 1374; *State of Orissa* v. *Binapani,* A. 1967 S.C. 1269 (1271); *Mohinder* v. *Chief Election Commr.,* A. 1978 S.C. 851 (para. 44).

27. *Radhakrishna* v. *State of Bihar,* A. 1977 S.C. 1496 (para. 23).

28. *Nageswara* v. *A.P.S.R.T.C.,* A. 1959 S.C. 308 (321).

29. *R.* v. *Manchester Legal Aid Committee,* (1952) 1 All E.R. 480; *Pearlberg* v. *Varty,* (1972) 2 All E.R. 6 (15, 17) H.L.; *Wiseman* v. *Borneman,* (1969) 3 All E.R. 275 (277) H.L.

30. Cf. *Harinagar Sugar Mills* v. *Shyam Sundar,* A. 1961 S.C. 1669 (1675).

31. *Sadhu Singh* v. *Delhi Admn.,* A. 1966 S.C. 91.

32. *Sharp* v. *Wakefield* (1891) A.C. 173 (179); *Franklin* v. *Minister of Planning,* (1947) 2 All E.R. 289 (H.L.).

33. *Bd. of Revenue* v. *Vidyawati,* A. 1962 S.C. 1217 (1220).

34. *R.* v. *Registrar of Building Societies,* (1960) 2 All E.R. 549; *Pearlberg* v. *Varty,* (1972) 2 All E.R. 6 (20) H.L.

35. *State of Madras* v. *Sarathy,* (1953) S.C.R. 534.

36. Dicey, *Law of the Constitution,* 10th Ed., pp. 202-03.

37. See also Hewart, *New Despotism,* pp. 26-27.

Rule of Law, according to Dicey.

(a) Absence of arbitrary power on the part of the Government, which means that the Administration possesses no arbitrary powers apart from those conferred by law.

From this follows the corollary that no man is punishable or can be made to suffer in body or goods, except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.

(b) Equality of all persons in the eye of law, which involves the equal subjection of all persons to the "ordinary law of the land administered by the ordinary law courts".

Elaborating this second corollary, *Dicey* observed—

"not only that no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the *ordinary tribunals*".[36]

But since the publication of his First Edition (1885), conditions in England have changed so as to make his classical view untenable on both the above points. For,—

(a) By ordinary law, he meant the common law and statute law, i.e., law made by Parliament. But subordinate or delegated legislation by the executive Departments has since come to form the bulk of the law. So, a problem has arisen how far the rule of the ordinary law of the land can be maintained consistently with the existence and development of such departmental legislation, i.e., *legislation by other than legislative bodies.*

(b) On the other hand, by 'ordinary Courts', *Dicey* meant the judicial tribunals. But owing to the complexity of modern social conditions and the increase of functions of the State (resulting from the transition from the negative or *laissez-faire* concept to that of the 'welfare' or 'public service' concept of the State), Parliament has been compelled to entrust the power of deciding administrative or *quasi-judicial* issues arising out of the administration of an Act to the Department which is responsible for administering that Act, or to an 'administrative tribunal'.

And these administrative tribunals differ from common-law courts—

"in precisely the particulars which furnish the reasons for the common law insistence that every individual shall be entitled to have his rights tried in a court of law".[38]

Broadly speaking, an administrative tribunal differs from a court of law on the following points, which will be fully explained hereafter :

How administrative tribunals differ from Courts?

(i) An administrative body lacks that *independence* from political forces which characterises a Judge; an administrative tribunal must, naturally, have a bias towards the administrative point of view or the interests of the administration, so that its decision cannot be as *impartial* or *disinterested* as a judicial decision.

(ii) A court cannot act until a dispute has arisen and comes before it in any of the modes laid down by law. An administrative authority may initiate proceedings in anticipation of any dispute and then exercise *quasi-judicial* powers at some stage of that proceeding.

(iii) A court, subject to rare exceptions, conducts its proceedings in public; an administrative tribunal may not.

38. Dickinson, *Administrative Justice* (1927, p. 32) quoted in Schwartz, *Law & the Executive in Britain,* (1949), p. 12; Hewart, *New Despotism,* p. 36.

(iv) The result, in a judicial proceeding, is governed by the impartial application of principles which are known and established. An administrative tribunal is not bound by precedents and has a larger freedom to act according to administrative policy and discretion.

(v) Rules of evidence are not binding on administrative tribunals.

Here, then, arises the question how far this administrative justice is consistent with the subjection of all to the ordinary courts of law.

Modern significance of Rule of Law.

Since the Rule of Law or supremacy of law[39] is a feature not only of the English political system but also of the other countries where that political system has been imported, with or without modifications, such as the *U.S.A.*[39] or *India,*[40] and the subsequent encroachments upon the Rule of Law, just stated, have taken place also in these countries, the problem of control of the administrative authorities, including tribunals, by the ordinary courts of the land, has arisen in all these countries. If the growth of administrative agencies and the expansion of their activities have become inevitable under modern conditions, the Rule of Law can be maintiained only if they are brought under the control of the ordinary law and the ordinary courts. Administrative Law, in so far as it deals with that control, has thus become a necessary safeguard for the maintenance of the Rule of Law.[40]

Control of these authorities, to anticipate, not merely means that the ordinary courts which have the power in this behalf will insist that these authorities will not exercise any power not founded on the law, but also that they must conform to the minimum standards of fairness and justice which may be expected by a litigant before the court of law. As the Report of the Franks Committee[41] observes, it further means that—

".....decisions should be made by the application of *known principles* or laws."[40]

In short, the courts interfere with the acts of the administrative authorities by the application of the principles of *ultra vires* and natural justice,[42] which will be more fully explained hereafter.

Constitutional background of Administrative Law.

U.K.

In *England,* Constitutional Law has no special impact on Administrative Law, because the English Constitution is unwritten and, as *Dicey* explained it,[43] the rules which in other countries form part of a constitutional code are, in England, the result of the ordinary law of the land. In the result, whatever control the administrative authorities can be subjected to must be deduced from the ordinary law, as contained in statutes and judicial decisions.

But, in countries having written Constitutions, there is an additional source of control over administrative action, and that is the written Constitution which imposes limitations upon all organs of the body politic. As will appear in the Chapter on Judicial Review, in countries like the *U.S.A.* or *India,* an

39. Cf. *Stark* v. *Wickard,* (1944) 321 U.S. 288 (310).

40. *India* v. *Rajnarain,* A. 1975 S.C. 2299 (2352, 2384, 2469-70); 14th Rep. of of Law Commission, (1958), Vol. II, pp. 671-73.

41. Cmd. 218, para. 20.

42. *O'Reilly* v. *Mackman,* (1982) 3 All E.R. 1124 (1130) H.L.

43. Dicey, *Law of the Constitution,* 10th Ed., p. 203.

inquiry into the sources and modes of judicial control over administrative authorities have to be studied from a twofold point of view, constitutional and non-constitutional. It is for this reason that while at the very outset we endeavoured to distinguish the scope of Administrative Law from that of Constitutional Law, we also pointed out (p. 2, *ante*) that in a country having a written Constitution with judicial review, it is not possible to separate the two into watertight compartments.

The reason is that the written Constitution, being the organic law, not only sets up but also imposes limitations upon the powers of all the organs of the State, legislative, executive or judicial, and if any of these limitations be transgressed by any of these organs, the act so done will be unconstitutional and invalid.

So far as the acts of the Executive or the Administration is concerned, this is secured in *India* in the following manner :

India.

(a) The legislative acts of the Administration, i.e., statutory instruments (or subordinate legislation) are expressly brought within the fold of Art. 13 of the Constitution, by defining 'law' as including 'order, bye-law, rule, regulation, notification....having the force of law'. A statutory instrument can, therefore, be challenged as invalid not only on the ground of being *ultra vires* the statute which confers power to make it (as in all common-law countries), but also on the additional ground that it contravenes any of the fundamental rights guaranteed by Part III of the Constitution.[44]

(b) Even where the administrative action is non-legislative and does not even rest on any statute and is purely administrative, it will be void if it contravenes any of those fundamental rights which constitute limitations against any State action. Here, then, is an additional ground for judicial review in countries like the *U.S.A.* or *India*, in a sphere where the common law doctrine of *ultra vires* is *not* applicable because the impugned act is non-statutory. Thus—

(i) A non-statutory administrative act may be void if offends against Art. 14, guaranteeing equal protection;[45] Art. 29[46] or 30,[46] guaranteeing minority rights; Art. 19, guaranteeing freedom of speech, association, etc.;[47] Art. 16, guaranteeing equality of opportunity in employment.[48]

To illustrate—

Even though the Administration is free to change its administrative policy or its non-statutory instructions to its subordinates at any time it likes,[49] the Court would strike down such change if it operates as discriminatory,

---

44. *Vide* Basu's *Shorter Constitution of India*, 11th Ed., pp. 33-34, 36; *Chandrakant* v. *Jasgit*, A. 1962 S.C. 204 (208-9); *Tahir Husain* v. *Dt. Board*, A. 1954 S.C. 630; *Rashid Ahmed* v. *Municipal Board*, (1950) S.C.R. 566; *State of Rajasthan* v. *Nathmal*, (1954) S.C.R. 982; *Dwarka Prasad* v. *State of U.P.*, (1954) S.C.R. 803; *Zafar* v. *Asst. Custodian*, A. 1967 S.C. 106 (107)

45. *Bidi Supply Co.* v. *Union of India*, (1956) S.C.R. 267 (275-77).

46. *State of Bombay* v. *Education Society*, (1955) 1 S.C.R. 568.

47. *Kameshwar* v. *State of Bihar*, A. 1962 S.C. 1166; *Ghosh* v. *Joseph*, A. 1963 S.C. 812.

48. *Krishna Chandra* v. *Tractor Organisation*, A. 1962 S.C. 602; *Gazula* v. *State of A.P.*, (1961) 2 S.C.R. 931 (948); *Mervyn* v. *Collector of Customs*, A. 1967 S.C. 52 (57).

49. *Sethi* v. *Union of India*, A. 1978 S.C. 2164 (paras. 15-16); *Sanjeev Coke* v.

so as to violate the fundamental right under Art. 14 of the person or persons discriminated against.[49-50]

(ii) It shall also be void if it seeks to affect a fundamental law by non-statutory action where the Constitution says that it can be done only by making a law, e.g., (a) Art. 19;[51] (b) Art. 21;[52] (c) Art. 300A.[53]

(c) An administrative act, whether statutory or non-statutory, will be void if it contravenes any of the mandatory and justiciable provisions of the Constitution, outside the realm of Fundamental Rights included in Part III, e.g., Arts. 265;[54] 301;[55] 311;[56] 314.[57]

(d) Where the administrative act is statutory, there is an additional constitutional ground upon which its validity may be challenged, namely, that the *statute,* under which the administrative order has been made, is itself unconstitutional.[58]

(e) Where the impugned order is *quasi-judicial,* similarly, it may be challenged on the grounds, *inter alia,*—

(i) that the order is unconstitutional;[59]

(ii) that the law under which the order has been made is itself unconstitutional.[60]

Constitutional Law thus enters into the Judicial Review Chapter in Administrative Law in a country like the *U.S.A.* or *India.* In these countries, it is the duty of the Courts to see that the administration is carried on not only subject to the Rule of Law but also subject to the Constitution. While an attack upon the constitutionality of a statute appertains to Constitutional Law, the constitutionality of an administrative action properly belongs to Administrative Law; but the provisions of the same Constitution constitute the touchstone in both the spheres.

U.S.A., India.

The object of both the common law doctrine of Rule of Law or supremacy of law and a written Constitution is the same, namely, the control of arbitrary power and while the Rule of Law insists that—

"the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim but must conform to legal rules developed and applied by the courts",[61]

the business of a written Constitution is to embody these standards

Bharat Coking, A. 1983 S.C. 239 (para. 21); *State of U.P.* v. *Vijay,* A. 1982 S.C. 1234 (para. 3)

50. *State of Mysore* v. *Srinivasamurthy,* (1976) 1 S.C.C. 817 (para. 18).

51. *Kharak Singh* v. *State of U.P.,* A. 1963 S.C. 1295 (1305).

52. *Ram Narayan* v. *State of Delhi,* (1953) S.C.R. 652.

53. *Virendra* v. *State of U.P.,* (1955) 1 S.C.R. 415; *Dwarka* v. *State of Bihar,* A. 1959 S.C. 249 (253).

54. *State of Kerala* v. *Joseph,* A. 1958 S.C. 296; *Ghulam* v. *State of Rajasthan,* A. 1963 S.C. 379 (382).

55. *Atiabari Tea Co.* v. *State of Assam,* A. 1961 S.C. 232.

56. *Sukhbans* v. *State of Punjab,* A. 1962 S.C. 1711 (1716).

57. *Accountant-General* v. *Bakshi,* A. 1962 S.C. 505 (507).

58. *State of Madras* v. *Row,* (1952) S.C.R. 597; *Dwarka* v. *State of U.P.,* A. 1954 S.C. 224; *Cooverjee* v. *Excise Commr.,* (1954) S.C.R. 873.

59. *Bidi Supply Co.* v. *Union of India,* (1956) S.C.R. 267 (277-78).

60. *Commr.* v. *Lakshmindra,* (1954) S.C.R. 1005; *Express Newspapers* v. *Union of India,* A. 1958 S.C. 578 (643); *Bengal Immunity* v. *State of Bihar,* (1955) 2 S.C.R. 603.

61. Harlan Stone, quoted in Vom Baur's *Administrative Law,* 1946, p. 5n.

in the form of constitutional guarantees and limitations and it is the duty of the Courts to protect the individual from an invasion of these guarantees not only by the departments of government but also by all administrative agencies, big or small.[62]

Some representative definitions of Administrative Law.

In course of the foregoing discussion we have occasionaly referred to the definitions given by different jurists, having in view different aspects of Administrative Law.

Most writers seek to describe the subject by analysing its components, which we have already mentioned. Thus, *Jennings*[63] points out that it has two elements :

(a) It is a law relating to the 'administration'.

(b) It determines the *organisation, powers and duties* of administrative authorities.

The two elements 'control' and 'functions' are similarly relied upon by *Wade* :[64]

(a) It is the law relating to the *control of governmental power,* its object being to bring under legal control the powers of all *public* authorities other than Parliament, and also to compel them to perform their *duties.*

(b) It is the body of general principles which govern the *exercise* of powers and duties by public authorities, or the law about the *manner* in which public authorities must exercise their functions.[64]

A more detailed and comprehensive description is to be found in *Halsbury* :[65]

". . . the law relating to the discharge of *functions* of a public nature in government and administration. It includes functions of public authorities and officers and of special tribunals, *judicial review* of the exercise of those functions, the civil liability and legal protection of those purporting to exercise them and aspects of the *means* whereby extrajudicial redress may be obtainable at the instance of persons aggrieved."

The above elements are reflected, in different phraseology, in *Prof. Schwartz's* book :[66]

"Administrative law is that branch of the law which *controls* the administrative operations of government. It sets forth the *powers* which may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides *legal remedies* to those aggrieved by administrative action."

Explaining this definition, *Prof. Schwartz* says—

"This definition divides administrative law into three parts: (1) the powers vested in administrative agencies; (2) the requirements imposed by law upon the exercise of those powers; (3) remedies against unlawful administrative action."[66]

In a similar strain, *Prof. Davis* describes Administrative Law as—

"a law that concerns with the *powers and procedure* and of administrative agencies, including specially the law governing *judicial review* of administrative action".[67]

---

62. Cf. *Jones* v. *Securities & Exchange Commn.*, (1936) 298 U.S. 1 (24).
63. Jennings, *Law and the Constitution,* (1959), p. 217.
64. Wade, *Administrative Law* (6th Ed., 1977), pp. 4-5.
65. Halsbury's *Laws of England,* 4th Ed., Vol. 1, para. 1.
66. Bernard Schwartz, *Administrative Law,* (1976), p. 1.
67. Davis, *Administrative Law Text,* (1959), p. 2.

CHAPTER 2

DEVELOPMENT OF ADMINISTRATIVE LAW

Development of Administrative Law.

Though on the Continent, *Droit Administratif* or Administrative Law was studied as a separate subject from long ago, in *England* the study of Administrative Law as a separate subject cannot be dated much beyond the twenties of the twentieth century which produced Sir Cecil Carr's *Delegated Legislation,* Prof. Robson's *Justice and Administrative Law* and Lord Hewart's *New Despotism.* Even by 1963, it has not become a developed system, as Lord Reid has observed in *Ridge* v. *Baldwin.*[1] Its growth and development in recent times is due to the fact that—

"in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed or intended to deal with".[1]

France.

In *France* and some other Continental countries, the distinction between public law and private law was observed not only in the Science of Jurisprudence but also in practice in so far as there existed, all along, a separate system of tribunals for the administration of public law.[2] *Droit Administratif* is that part of public law which deals with the rights and liabilities of individuals in relation to the administration. This law is administered by special tribunals or 'administrative courts'.

Droit Administratif.

Thus, *Droit Adminstratif,* according to *Dicey*[3], is that portion of French law which determines (i) the position and liabilities of all State officials, (ii) the civil rights and liabilities of private individuals in their dealings with officials as representatives of the State, and (iii) the procedure by which these rights and liabilities are enforced.

The system of *Droit Administratif,* according to *Dicey*[3], is based on two leading principles which are alien to the conception of English law: (1) The first of these is that the government, and every servant of the government, possess, as representatives of the nation, a whole body of *special rights,* privileges or prerogatives as against private citizens, and the extent of these rights, privileges, or prerogatives is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another. An individual in his dealings with the State does not, according to French ideas, stand on anything like the same footing as that on which he stands in his dealings with neighbour. (2) The second of these general ideas is the theory of "Separation of Powers", according to which the executive, the legislature, and the courts must, for the sake of liberty, be prevented from encroaching on one another's province.

1. *Ridge* v. *Baldwin,* (1963) 2 All E.R. 66 (76) H.L.
2. E.g., the *Conseil d'Etat* in France.
3. Dicey, *Law of the Constitution,* 10th Ed., pp. 330, 336 *et seq.*

From these two general principles follow four distinguishing characteristics of French administrative law: (1) *Firstly,* the relation of the government and its officials towards private citizens must be regulated by a body of special rules which may differ considerably from laws which govern the relation of one private person to another. (2) *Secondly,* the ordinary Courts, which determine ordinary causes between private individuals, have no jurisdiction in matters at issue between a private individual and the State and that such questions of administrative law are determined by 'Administrative Courts' which are in some way connected with the government or the administration. There are thus two sets of Courts in France,—one for administering the ordinary law, and another for administrative law. (3) *Thirdly,* if a conflict of jurisdiction arises between the two systems of Courts, it is settled by a special tribunal (viz., the Court of Conflicts), and not by ordinary Courts. (4) *Fourthly, Droit Administratif* has a tendency to protect from the supervision or control of the ordinary law courts any servant of the State who is guilty of an act, however illegal, whilst acting in *bona fide* obedience to the orders of his superiors, and in the discharge of his official duties.

Reforms in 1953 and 1962 have, however, improved the organisation of the French administrative tribunals headed by the *Conseil d'Etat,* making it more effective, while the precedents laid down by the *Conseil d'Etat* itself (unhampered by legislation) since the days of Dicey, have taken away much of the foundation from *Dicey's* criticism.[4]

England.

In *England,* Administrative Law was not differentiated as a separate branch of law in practice so long as the same hierarchy of judicial tribunals used to administer both private and public law. This led *Dicey,* writing in 1885, to observe that there was no Administrative Law in England inasmuch as every man, including a public official, was subject to the same law and the same tribunals.

Dicey's orthodox view

".....there can be with us nothing really corresponding to the 'administrative law' or the 'administrative tribunals' of France. The notion which lies at the bottom of the 'adminstrative law' known to foreign countries is that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is *utterly unknown to the Law of England,* and indeed is fundamentally inconsistent with our traditions and customs."[3]

how far maintainable today?

But the fundamental assumption of *Dicey,* just referred to, has been belied since his death inasmuch as judicial power, i.e., the power to adjudicate upon legal rights, has been vested in various bodies other than the 'ordinary courts' of the land which are traditionally entitled to exercise the judicial function.[5] The administrative authorities who have thus been conferred judicial powers, in *England,* belong to different categories :

(i) *Special Tribunals:* Though these tribunals are not courts of law, they have not to exercise any administrative function other than the adjudication

4. Brown & Garner, *French Administrative Law* (1967), pp. 3-4, 30 *et seq.;* 14th Rep. of the Law Commission of India, (1958), Vol. II, pp. 677-81.

5. In fact, Dicey himself noticed this in 1915—Dicey, *The Development of Administrative Law,* (1915), 31 Law Quarterly Review 148-53. He, however, asserted that the Rule of Law was still maintained by the fact that the ordinary courts had the power to deal with any breach of the law by any public servant.

of the questions referred to them and they possess a high degree of independence from the Ministers. To this class belong the Industrial Court which determines the trade disputes referred to them under the Industrial Relations Act and the Rent Tribunals which determine questions under the Rent Control Acts; Commissioners of Income Tax; National Insurance Tribunals.

Administrative Tribunals.

(ii) *Quasi-judicial officers:* Certain officers or civil servants exercise judicial powers by virtue of statutory provisions which even provide for regular appeal from their decisions of points of law to the superior courts and Ministers cannot interfere with these *quasi-judicial* decisions even though the officers themselves may be under their administrative control. To this class belong the Special Commissioners of Income Tax who hear appeals against assessments of income-tax under the Income Tax Act and the Chief Registrar of Friendly Societies who hears appeals from disputes under the Friendly Societies Act.

(iii) *Ministerial Tribunals:* These are of the nature of Special Tribunals but they are not independent of the Ministers and, on the other hand, sometimes appeal lies from their decisions not to the superior Courts but to the Ministers in charge of the Departments concerned. Thus, the National Health Service Tribunal hears complaints against medical practitioners under the National Health Service Act, 1946, and appeal lies from its decisions to the Minister of Health.

(iv) *Ministers with quasi-judicial powers:* Some of the Ministers themselves possess *quasi-judicial* powers. Thus, as has been already stated, the Minister of Health hears appeals from the decisions of the National Health Service Tribunal. On the other hand, the Ministers for Transport and Aviation hear appeals under the Road Traffic Act and the Civil Aviation Act.[6]

The other assumption of *Prof. Dicey,* namely, that Parliament was the sole legislative authority and that every person was subject to the ordinary law as made by that Parliament, has also been displaced by the practice of delegated legislation resorted to by Parliament itself, leading to a vast mass of subordinate legislation or statutory instruments made by *administrative* authorities or authorities other than Parliament.

Subordinate Legislation.

Owing to the increasing complexity of social and economic life, legislation has become more and more the business of the 'expert'. Members of Parliament cannot possibly possess the technical knowledge to frame the details of legislation relating to such matters as electricity, factories, unemployment insurance and the like. On the other hand, the abandonment of the principle of *laissez-faire* and the insistent cry for legislation and governmental control in all affairs of life have rendered it impossible for Parliament to cope with the volume of legislative business in all its details during the time at its disposal. Nor is it possible for Parliament, while enacting a statute, to *foresee* all the changes in conditions which may necessitate a modification in the details of the legislation, as distinguished from its policy.

The need for expeditious action in times of emergency is another important factor which has led to the growth of delegated legislation. Thus, both during the First and Second World Wars, Parliament empowered the executive to make detailed regulations to control different aspects of the

6. See *Ashbridge Investments* v. *Min. of Housing,* (1965) 3 All E.R. 371 (374) C.A. as regards the power of the Minister under the Housing Act.

national economy in conformity with the conditions created by the War [*vide* the Defence of the Realm Acts, 1914-15, Emergency Powers (Defence) Acts, 1939-40].

Parliament has, therefore, been compelled to lay down mere outlines of policy, leaving it to the discretion of the administrative department, which is to administer the law, to fill up the details as well as to change them according to changing conditions. Such subordinate legislation is made in various forms, such as Orders in Council, rules, regulations, orders and schemes. They are comprehensively referred to as statutory instruments.

Though this is legislation *under* statutory authority, it no doubt detracts from the traditional legislative sovereignty of Parliament, for, in making orders and regulations under the statute, the limits of the statutory authority or the spirit of the legislation may be transgressed. Together with this, if the statute itself is vague and confers wide powers upon the Executive to supplement it by Departmental rules and orders on matters of *principle*, there is an obvious danger of legislation by Parliament being supplanted by legislation by departmental fiat.

Committee on Ministers' Powers.

The dangers of the situation were most vehemently pointed out by Lord Hewart in his *'New Despotism'* in 1929 and this led to the appointment by Parliament of a Select Committee, called the Committee on Ministers' Powers, to inquire into this problem, and the Committee (known as the 'Donoughmore Committee') reported in 1931-32.[7]

The recommendation made by this Committee as to the need for better publication and control of subordinate legislation was implemented by enacting the Statutory Instruments Act, 1946.

Another fruitful result of the recommendations of the Committee on Ministers' Powers was the passing of the Crown Proceedings Act, 1947, which abolished the immunity of the Crown and its agencies from liability in torts, which was a basic principle of common law since the earliest days of monarchy in England, flowing from the maxim "King can do no wrong". The enactment of this statute obviously expands the scope of Administrative Law in England.

The third recommendation of the Donoughmore Committee for a better control and supervision of administrative decisions was not implemented immediately. But certain incidents in the public sphere led to the appointment of another Committee (1955) to inquire into this problem more comprehensively, namely, the Committee on Administrative Tribunals and Inquiries, headed by Sir Oliver Franks, which reported in 1957.[8] This report led to the enactment of the Tribunals and Inquiries Act, 1958, which forms a landmark in the history of English Administrative Law.

The principal recommendations of the Franks Committee were—

(i) The procedure adopted by all administrative tribunals and public inquiries should conform to the general principle of adjudication that it should be *open, fair* and *impartial.*

(ii) Decisions of such tribunals should be subject to review by the courts on points of law.

(iii) The superior Courts must possess the power to issue the prerogative writs to control all such tribunals, unfettered by any legislative interference.

7. Cmd. 4060 (popularly known as the Donoughmore Committee).
8. (1957) Cmd. 218 (popularly known as the Franks Committee).

(iv) A permanent Council, to be appointed by the Lord Chancellor, should be constituted to keep the construction and working of tribunals under continuous review.

(v) A system of administrative law and administrative judges (i.e., analogous to the French system) should not be established.

Parliament adopted the main recommendations of the Franks Committee by enacting the Tribunals and Inquiries Act, 1958. By this Act was set up the Council on Tribunals to keep the statutory Tribunals under review, and to report to the Lord Chancellor. The Act, as amended in 1971, extends the supervisory jurisdiction of the High Court over the Tribunals and provides for an appeal or statement of case on points of law to the High Court. On demand, a Minister or other Tribunal, holding a statutory inquiry, must give reasons for his decision.[9]

Tribunals & Inquiries Act, 1958.

The next landmark in the development of administrative law in England has been the passsing of the Parliamentary Commissioner Act in 1967, which has installed an Ombudsman of the Norwegian type. The Parliamentary Commissioner, appointed by the Crown, holds office during good behaviour. He is empowered to investigate, on reference being made by the House of Commons upon receipt of a written complaint by an aggrieved individual, administrative actions taken by governmental authorities specified in the Act, excepting certain actions which are excluded by the Act, e.g., relating to international affairs, extradition, prerogative of mercy and the like.[10]

Parliamentary Commissioner Act, 1967.

Next comes the Supreme Court Act, 1981, which not only codifies the Rules of Practice adopted by the Supreme Court in 1977 (R.S.C.O. 53), but widens the avenues of judicial review over administrative action by all kinds of public authorities,[11] and in one proceeding.

Supreme Court Act, 1981.

Since an application for judicial review for all the aforesaid remedies, under this Act, arising out of civil matters, goes on appeal from the Queen's Bench Division to the Civil Division of the Court of Appeal, this Division, according to Lord Denning,[11] may be called 'the Administrative Division' of the High Court of England, so that, in England, "we now have an administrative court".[11]

Side by side with these legislative changes, the Judiciary has been advancing the development of Administrative Law by revolutionising the common law on the following points, *inter alia*,—

(a) By bringing in the entire gamut of administrative action under the control of judicial review, by substituting the test of action affecting the rights and liberties of an individual for the old-fashioned test of *'quasi-judicial* obligation'.[12]

(b) By liberalising the conditions of *locus standi* in 'public interest litigation'.[13]

9. Halsbury, 4th Ed., Vol. 1, paras. 43-44.

10. Halsbury, 4th Ed., Vol. 1, paras. 40-42.

11. *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 680 (693, 695) C.A.; (1982) 3 All E.R. 800 (C.A.).

12. *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 (77, 79, 80, 115) H.L; *R.* v. *Gaming Bd.*, (1970) 2 All E.R. 528 (533) C.A.; *O'Reilly* v. *Mackman*, (1982) 3 All E.R. 1124 (1128, 1130) H.L.

13. *I.R.C.* v. *National Fed. of Self-Employed*, (1981) 2 All E.R. 93 (103-05, 113) H.L.

It is not possible to exhaust all these judicial innovations in the present context. Suffice it to mention Lord Diplock's statement in the House of Lords[13], which summarises the effect of these innovations, that any references to the pre-1950 judicial decisions on matters of public law—

"are likely to be a *misleading guide* to what the law is today".[13]

To-day, thus, English administrative law has been nearing a pole which is opposite to that where it stood in Dicey's time a century ago, and even contrary to that envisaged by the highest tribunal only a decade ago. In 1963, Lord Reid, in *Ridge* v. *Baldwin,*[14] observed that the position was not far away from what it was in *Dicey's* time, though the progressive trend had started, owing to changes in the social background, giving rise to novel problems calling for novel solutions. In the words of Lord Reid :

"We do not have a *developed system* of administrative law—perhaps because until fairly recently we did not need it."[14]

By 1971, Lord Denning, in the Court of Appeal,[15] estimated that a contrary situation had been reached :

"there have been important developments in the last twenty-two years which have transformed the situation. It may truly now be said that we have a developed system of administrative law".[15]

More emphatic 'are the words of Lord Diplock in the House of Lords in 1981 :[13]

"To revert to technical restrictions .... that were current thirty years ago or more would be to reverse that *progress* towards a *comprehensive system of administrative law* that I regard as having been the greatest achievement of the English courts in my judicial lifetime."[13]

U.S.A.

In the *United States,* the attention to Administrative Law as a subject of study was drawn by the publication of Goodnow's *Comparative Administrative Law* in the year 1893 and *Principles of the Administrative Law of the United States* in 1905. The work of jurists led the American Bar Association to appoint a special committee on administrative law in 1933, and the reports of that committee, calling for greater judicial control over administrative agencies, prompted President Franklin Roosevelt, in 1939, to appoint the Attorney General's Committee to investigate "the need for procedural reform in the field of administrative law". It was the Report of this Committee (1946) which resulted in the enactment of the Administrative Procedure Act of 1946, which may be said to constitute a statutory code relating to the judicial control of administrative action in the U.S.A.

The Federal Administrative Procedure Act, 1946 (commonly referred to as the 'APA') constitutes a great landmark in the development of Administrative Law, as compared to that in other countries inasmuch as it codifies in one comprehensive statute[16] the various functions of administrative bodies—administrative, *quasi-legislative* and *quasi-judicial,* and the procedure to be followed while exercising each of these functions, and also provides for definite avenues of judicial review of these administrative actions. While the number of administrative agencies and Commissions is soaring up to legion by federal legislation, conferring, at the same time, almost unlimited discretionary func-

14. *Ridge* v. *Baldwin,* (1963) 2 All E.R. 66 (76) H.L.
15. *Breen* v. *Amalgamated Engineering Union,* (1971) 1 All E.R. 1148 (1153) C.A.
16. *Wong Yang* v. *McGrath,* (1950) 339 U.S. 33 (40).

tions upon them by way of uncharted delegation, at the same time the engine of judicial review, exercised under the APA, has prevented the administrative machinery from turning into an engine of lawlessness or arbitrariness, or, to 'assure fairness'.[17] Even though the statute empowers the Courts to review decisions of the administrative bodies only on questions of law and interpretation of statutes, the Supreme Court has held that a literal interpretation of this provision would render the scope of judicial review practically meaningless. The Supreme Court has, accordingly, inserted its wedge into administrative decisions on fact, holding that such determination involves a question of law, calling for judicial review—

(a) Where the finding of fact is founded on no evidence at all or on no substantive evidence;[18]

(b) Where it involves a constitutional question;[19]

(c) Where the question of fact is 'jurisdictional'.[20]

Inspired by the utility of the Federal Administrative Procedure Act, the American Bar Association drew up a Model Act of the same nature for the States in 1961, and since then many States have enacted administrative procedure statutes on the lines of the Model Act.

In the result, we have in the U.S.A. a massive body of Federal and State judicial decisions establishing a full-fledged system of administrative law, protecting the citizen from arbitrary administrative action affecting his liberty and property. Though the Courts show deference to the decisions of 'experts', they would not abdicate their function of control wherever any of the foregoing apertures is available.[21]

India.

In *India,* the earliest literature on the subject of Administrative Law was N. N. Ghose's *Comparative Law,* the Tagore Law Lectures of the Calcutta University for the year 1918. In a sense, this work may be said to be a compendium of Comparative Politics, Constitutional Law and Administrative Law, as they were understood in India at that time. But though a major portion of this book was devoted to the organisation of the governmental system and Public Administration, it was a precursor of Administrative Law in the modern sense in so far as it laid stress upon the need for legal control over public officials and the remedies of the subjects against public authorities in general.[22]

The study of Administrative Law as a separate subject did not, however, receive impetus until the adoption of the written Constitution for Independent India (1949). Elaborate as this Constitution is, it could not possibly deal with the problem of legal control over the administrative system set up by it. Thus, though Art. 226 of the Constitution provided that the Government or any public authority would be subject to the jurisdiction of the superior Courts, the treatment of the different aspects of this jurisdiction could not

17. *N.L.R.B.* v. *Wyman-Gordon,* (1969) 394 U.S. 759 (764); *Chrysler* v. *Brown,* (1978) 441 U.S. 281 (303); *F.C.C.* v. *Pottsville Co.,* (1940) 309 U.S. 134 (143-44).

18. *Universal Camera* v. *N.L.R.B.,* (1951) 340 U.S. 474 (487-88); *Consolo* v. *F.M.C.,* (1966) 383 U.S. 607 (618-19).

19. *Califano* v. *Sanders,* (1977) 430 U.S. 99 (109).

20. *Social Security Bd.* v. *Nierotko,* (1946) 327 U.S. 358 (369).

21. *F.P.C.* v. *Hope Natural Gas Co.,* (1944) 320 U.S. 591 (627).

22. Mr. Ghose included these topics under the head 'Adjective Administrative Law' in Book III of his work.

be expected from the text of the Constitution. Similarly, though the principle of liability of the State to be sued is laid down in Art. 300 of the Constitution, the details as to the liability of the State in an action before the courts cannot be found in the Constitution. The existence of subordinate legislation is acknowledged in some provisions of the Constitution (e.g., Art. 13) and so also administrative tribunals (e.g., Arts. 136, 227) but the treatment of the different aspects of judicial control over these matters is beyond the scope of the Constitution. The need for the study of Administrative Law as a subject separate from and complementary to that of Constitutional Law was at once realised by the Universities and to-day Administrative Law is prescribed as a subject for study in the various Universities of India.

Reports of the Law Commission.

The Reports of the Law Commission of India, constituted in 1955, have also drawn the attention of the public, the Government and the Legislature to different aspects of Administrative Law.[23] Of these, the need for a greater judicial control over the administrative agencies has been emphasised by the Commission in these words :

"The rule of law and judicial review acquire greater significance in a Welfare State.....the vast amount of legislation which has been enacted during the last three years by the Union and the States, a great deal of which impinges in a variety of ways on our lives and occupations. Much of it also confers large powers on the executive. The greater therefore is the need for *ceaseless enforcement of the rule of law,* so that the executive may not, in a belief in its monopoly of wisdom and *in its zeal for administrative efficiency,* overstep the bounds of its power and spread its tentacles into the domains where the citizen should be free to enjoy the liberty guaranteed to him by the Constitution."[24]

Realising that there may be matters beyond the reach of the courts where an individual aggrieved by the action of an administrative authority may be without any remedy, the question of extrajudicial bodies to control the administration has also been raised in Parliament in recent times, particularly in view of allegations of corruption against people at the top, which led to the appointment of an Administrative Reforms Commission (headed by Sri Morarji Desai) in January, 1966, with very wide terms of reference :[25]

"The Commission will give consideration to the need for ensuring the highest standards of efficiency and integrity in the public services, and for making public administration a fit instrument for carrying out the social and economic policies of the Government and achieving social and economic goals of development, as also one which is responsive to the people....."

The Commission, in October, 1966, issued an Interim Report on the Problems of Redress of Citizens' 'Grievances' and recommended the creation of two institutions modelled on the Scandinavian Ombudsman, to look into complaints against the administrative acts of Ministers and other authorities at the Centre and in each State.[26] This subject deserves a separate treatment and will be taken up at the end of this work.

---

23. The First Report on the Liability of the State in Torts (1956); The Tenth Report on the Law of Acquisition & Requisitioning of Land; The Fourteenth Report on the Reform of Judicial Administration (in particular Vol. II, Ch. 31).

24. 14th Report of the Law Commission, Vol. II, p. 672, para. 4.

25. Govt. of India Notification No. 40/3/65—A.R. (P), dated the 5th January, 1966.

26. A Bill to implement this recommendation—Lokpal and Lokayukt Bill, 1969, was introduced for this purpose. Later, it has been replaced by the Lokpal Bill, 1977, leaving the subject of Lokayukt to legislation by the States, some of which have already enacted such legislation. Political vicissitudes and the operation of vested interests have stood in the way of bringing any Act of Parliament on the statute book as yet.

Not merely in the realm of legal literature or Parliamentary proceeding has the subject of Administrative Law gained prominence in the twentieth century, the superior Courts of law themselves are more concerned with cases relating to Administrative Law more than any other branch of law. Thus, in the *U.S.A.*, it has been observed by a renowned Judge of the Supreme Court that—

"Review of administrative action....constitutes the largest category of the Court's work, comprising one-third of the total cases decided on the merits."[27]

The majority of cases before *our* Supreme Court and the High Courts, in the sphere of Public Law also appertain to Administrative Law and, even those cases which complain of the violation of some constitutional provision also contain pleas under Administrative Law, such as bias, contravention of procedural natural justice, *ultra vires, mala fides* and the like.

French and English systems of Administrative Law compared.

Since the Law Commission of India, after a comparison of the various systems of administrative law, has opined[28] that the French system of *Droit Administratif* need *not* be imported into India and that the system of judicial review obtaining under India's constitutional system provides avenues of redress to an individual affected by State action, including acts of public servants, there is no need to supplant it by the French system, though there may be a scope for improving upon or extending the system of control by the ordinary Courts upon public action.

In order to appreciate the view of the Law Commission, it would be useful to make an impartial assessment of the French system, so that even though we may not benefit by its wholesale importation, we may keep in view its beneficial principles so that those of them which are consistent with the constitutional system in India may still be infused by judicial or legislative innovation.

First of all, it must be pointed out that whatever might have been the authenticity of *Dicey's* assessment of the French system as it existed in his time, it has, as observed by a host of English scholars, ceased to represent the correct state of affairs not only in France, but also in England, which has since adopted adjudication of many disputes by administrative tribunals, separate from the ordinary courts.

In fact, some scholars maintain that the French system is superior to the English system of 'Rule of Law' in the following respects :

i. While the doctrine of 'sovereign immunity' of the State and its agents is still lingering in the *U.K.* and *India* and the liability of the State is confined to the common law doctrine of negligence, the French system of *Droit Administratif makes the State absolutely* liable[29] for damage caused by the State and its officials and makes them liable to compensate the aggrieved citizen, irrespective of the uncertain test of 'negligence'.

ii. Though the *Conseil d'Etat* is not a court governed by the ordinary law of the land, it would be a mistake to suppose that its function is to shield the State against the citizens; on the other hand, whatever might be its origin, to-day it is an institution for controlling the State and for protecting the citizen against arbitrary action of the State in a far more comprehensive and effective extent than under the system of judicial review in the Anglo-Indian

27. Frankfurter, J., quoted in Davis, *Administrative Law Text*, 1959, p. 3.
28. 14th Rep. of the Law Commission (1958), Vol. II, pp. 677 *et seq.*
29. Schwartz, *American Administrative Law*, pp. 221-22.

world. French administrative law is a fully developed system and not a *developing* system as in the *U.K.*[30] or *India*. The *Conseil d'Etat* stands at the head of a highly organised hierarchy of administrative tribunals and a mass of precedents; at the same time, its scope is more elastic than that of ordinary courts under the English system, because the *Conseil d'Etat* is hardly fettered by any statute and the whole of French administrative law is 'judge-made law'. Being specialised in the matter of administration,[31-32] the French administrative tribunals are more competent to probe into matters involving expertise or administrative discretion[31] than the ordinary courts under the Anglo-Indian system and their procedure and remedies are simpler.[31]

Notwithstanding the foregoing merits of the French *Droit Administratif*, however, it cannot be transplanted in India because of *our* Constitutional system. Even though France, like India, has a written Constitution, there is no judicial review of legislation in France as in the *U.S.A.* or *India*. Of course, before the presentation of a public Bill in Parliament, it has to be referred to the *Conseil d'Etat* for its advice (which is not binding upon the Government), after a law is enacted and promulgated; but no Court in France,—whether civil, constitutional or administrative,—can strike down such law as unconstitutional and void.[33]

Why French system not preferable in *India*?

The result is that though the *Conseil d'Etat* makes every attempt to interpret a statute so as not to exclude its review of any administrative act,[33] it is powerless to strike down a statute itself as unreasonable or arbitrary on the ground that it offends against a fundamental right (which, in the French Constitution, is to be derived from the Preamble).

In *India*, the Supreme Court, at the head of the judicial system, is competent to give relief to an individual affected by governmental action, in the same proceeding, not only on constitutional grounds but also on grounds under administrative law, such as *ultra vires, mala fides*, absence of fairness, abuse of power or discretion, and the like. A separate system of administrative courts is, therefore, unnecessary.

Of course, the insertion of Arts. 323A-323B in the Constitution itself, by the Constitution (42nd Amendment) Act, 1976,[34] has paved the way for establishing, by appropriate legislation, a hierarchy of 'administrative tribunals' for the adjudication of disputes relating to specified matters, such as service of Government employees, taxation, labour, election and the like, but these Articles save the jursidiction of the Supreme Court over such tribunals, under Art. 136. Of course, when Parliament undertakes such legislation, the jurisdiction of the Supreme Court under Art. 32 or of the High Courts under Arts. 226-227 over such tribunals will be gone; but so long as the doctrine of 'basic features' and of 'judicial review' as being one of such features is not overruled by the Supreme Court, any such legislation excluding judicial review under Arts. 32, 226-227 will be liable to be declared unconstitutional as violative of the doctrine of 'basic features'.[35]

30. Cf. *Ridge* v. *Baldwin*, (1963) 2 All E.R. 66 (76, Lord Reid) H.L.
31. Brown & Garner, *French Administrative Law* (1967), pp. 37, 127-31, 134.
32. Members of the *Conseil d' Etat* are either successful trainees in the National School of Administration or distinguished members of the civil service, having practical experience of the administration [*Brown & Garner, ibid.*, pp. 38, 132], with knowledge of law as well [p. 135].
33. Brown & Garner, *French Administrative Law* (1967), pp. 7, 31, 85.
34. *Vide* Author's *Shorter Constitution of India*, 10th Ed., pp. 953 *et seq.*
35. *Ibid.*, pp. 868-69.

CHAPTER 3

SEPARATION OF FUNCTIONS AND DELEGATION

Separation of Powers.

A constitutional doctrine which has a bearing upon Administrative Law, in the *United States,* and to some extent in *India*, is that of Separation of Powers.

The theory of Separation of Powers, as it was originally enunciated, aimed at a *personal* separation of powers. This is the sense in which *Montesquieu*,[1] the modern exponent of the doctrine, asserted—

"When the legislative and executive powers are united in the same *person,* or in the same body or magistrates, there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and executive powers. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Where it joined with the executive power, the Judge might behave with violence and oppression. There would be an end of everything were the same man or the same body to exercise these three powers..."

It is in this sense that the framers of the American Constitution imported the doctrine in framing that Constitution. Thus, *Madison*[2] said—

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

Upon the principle just discussed, the framers of the American Constitution vested the legislative, executive and judicial powers in three distinct authorities, by the express letters of the Constitution. Thus,

Art. I says—

U.S.A. "All legislative powers herein granted shall be vested in a Congress."

Art. II says—

"The executive power shall be vested in a President."

Art. III, similarly, states—

"The judicial power....shall be vested in one Supreme Court...."

The impossibility of having a rigid *personal* separation of powers has, however, been illustrated by the *American* Constitution under which the President has got legislative powers in his right to send messages to Congress[3] and the right to veto,[4] while Congress has the judicial power of trying impeachments[5] and the Senate participates in the executive power of treaty-making and making appointments.

Another prominent confrontation with the traditional theory of separation of functions in all modern countries, including the *U.K.*, the *U.S.A.* and *India*,

1. Montesquieu, *De L'Espirit des Lois,* 1748.
2. Madison, *The Federalist,* No. 47.
3. Art. II, s. 3, *ibid.*
4. Art. I, s. 7(2), Constitution of the U.S.A.
5. Schwartz, *Constitution of the United States,* 1963, Vol. 1, p. 115.

is the ever-growing volume of subordinate legislation by the Executive, which shows that some amount of legislative power must be left with the administration, to effectuate its task of administering the law.

Independent power to legislate by Ordinances in emergent situations is, again, vested in the Executive in countries such as *India*.[6]

In modern practice, therefore, the theory of Separation of Powers has come to mean an *organic* separation or a separation of *functions*, viz., that one organ of government should not usurp[7-8] or combine[9] functions belonging to another organ.

It is in this sense that the American Supreme Court observed in 1881—

Modern significance of the doctrine.

"It is essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and not other...."[7]

In the result,

"It may be stated...., as a general rule inherent in the American constitutional system, that, *unless otherwise expressly provided or incidental to the powers conferred*, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power."[8]

But even there any rigid separation is impracticable under modern conditions when the problems of government are interdependent. Hence, a distinction is made between 'essential' and 'incidental' powers of an organ of government. One organ cannot claim to exercise the powers essentially belonging to another organ but may, without a violation of the principle of separation of powers, exercise some of the incidental powers of another organ.

Though it may still be possible to acknowledge that the functions of government are divisible into three categories,—deliberative, magisterial and judicial, as they were in the days of *Aristotle*, it is impossible, in a modern State, to assign these functions exclusively to the three organs—the Legislature, the Executive and the Judiciary. To put it conversely, it is not possible to define the functions of the three organs with mathematical precision and say that the business of the Legislature is to make the law, of the Executive, to execute it, and of the Judiciary to interpret and apply the law to particular cases. An eminent authority illustrated this interaction among the different organs with reference to modern conditions thus :

"Functions have been allowed to courts, as to which Congress itself might have legislated; matters have been withdrawn from courts and vested in the executive; laws have been sustained which are contingent upon executive judgment on highly complicated facts. By this means Congress has been able to move with freedom in modern fields of legislation, with their great complexity and shifting facts, calling for technical knowledge and skill in administration. *Enforcement of a rigid conception of separation of powers would make modern government impossible.*"[10]

In order to function efficiently, each department must exercise some *incidental* powers which may be said to be strictly of a different character

6. Arts. 123, 213, Constitution of India.
7. *Kilbourn* v. *Thompson*, (1881) 103 U.S. 168 (190).
8. *Satinger* v. *Philippine Islands*, (1928) 103 U.S. 168 (192).
9. *A.G. of Australia* v. *Boilermakers' Society*, (1957) 2 All E.R. 45 (P.C.)
10. Frankfurter, *The Public and its Government*, quoted in Schwartz, *American Constitutional Law*, 1955, p. 286.

than its essential functions. For example, the Courts must, in order to function efficiently, possess the power of making rules for maintaining discipline or regulating procedure, even though that power may be of the nature of a legislative power. The power of making rules of procedure in the Courts is not regarded as of the *essence* of the functions of the Legislature.[11] Again, in interpreting laws and in formulating case law, the Courts do, in fact, perform a function analogous to law-making. In particular, in dealing with new problems where authority is lacking, the Courts have to create the law, even though under colour of interpretation of and deduction from the existing law.

Similarly, the ascertainment of a state of facts upon the testimony of witnesses may be incidental to some executive action and is not confined to the judicial powers.[12] In fact, the most glaring violation of the strict theory of separation of powers is to be found in the administrative agencies in the *American* system of government today. Most of these bodies combine in themselves the legislative function of subordinate legislation; the executive function of investigation and prevention of complaints against breaches of the statute which it has to administer as well as of the rules and regulations made by itself;[13] and the judicial function of adjudicating disputes and complaints[14] arising under such statute and subordinate legislation.[14-15] Questions have indeed been raised from time to time whether such concentration of functions offends against the principle of Separation of Powers or even the more widely acknowledged common law principle that the functions of prosecutor and judge should not be combined in the same hands.[16] Nevertheless, the American Supreme Court has upheld such concentration of functions, by resorting to some quibbles :

Firstly, it has said that the functions of subordinate legislation and administrative adjudication are not essentially legislative or judicial functions, but only *quasi-legislative* and *quasi-judicial.*[17]

Secondly, as to the concentration of the functions of the investigator, prosecutor and judge in the same administrative tribunal, the Court has said that it is necessary for effectuating the policy of the Legislature in a matter requiring administrative determination, the subject being not fit for determination by a court of law.[14-15] Even the charge of bias against an administrative tribunal because of its having preconceived views on the subject-matter of adjudication has been brushed aside on the same ground. In *England,* it has been held that persons who had taken part in the promulgation of an order or regulation cannot afterwards sit for adjudication of a matter arising out of such order,[18] because of the likelihood of their being biased. In the *United States,* on the other hand, it has been held that members of the Federal Trade Commission, who in their testimony before Congressional committees had expressed the opinion that the multiple basing point system was in the nature of a restraint of trade in violation of the Sherman Act, were not disqualified from deciding a complaint of violation of

11. *Wayman* v. *Southward,* (1825) 10 Wh. 1 (42).
12. Willoughby, *Constitutional Law,* Vol. III, p. 1653.
13. Cf. *Boyce Motor Lines* v. *U.S.,* (1952) 342 U.S. 337.
14. *Fed. Trade Commn.* v. *Cement Institute,* (1948) 333 U.S. 683.
15. *Marcello* v. *Bonds,* (1955) 349 U.S. 302.
16. *Wong Yang Sang* v. *McGrath,* (1950) 339 U.S. 33 (45)—Jackson, J.
17. *Humphrey's Executor* v. *U.S.,* (1935) 295 U.S. 602.
18. *R.* v. *Sunderland Justices,* (1901) 2 K.B. 357.

that Act by resorting to the multiple basing point system, because it was the policy of Congress that complaints against such trade practices should be heard by persons who had gained experience from their work as commissioners.[14] No English case has gone so far.

The *modern* interpretation of the doctrine of Separation of Powers, therefore, is that one organ or department of government should not usurp the functions which *essentially* belong to another organ. Thus, the formulation of legislative *policy* or the *general principles* of law is an essential function of the Legislature and cannot be usurped by another organ, say, the Executive.[19] It also includes the converse of this proposition, namely, that no organ can abdicate its essential functions (see pp. 31, 60, *post*).

Before proceeding to *India,* we should advert to the application of the doctrine in the *U.K.* It is a paradox that the theory of Montesquieu was inspired by the political system as it obtained in England in the 18th century; the concentration of power in an absolute monarch had been replaced by legislative function being exercised by Parliament and judicial powers being exercised by the Courts. But the emergence of the Cabinet system of government presented a standing refutation to the doctrine of separation of powers because the Cabinet, as *Bagehot* observed, "is a hyphen which joins, a buckle which fastens, the legislative part of the State to the executive part of the State".[20] In personnel, it is virtually a committee of the Legislature, but it is the real head of the executive power of the State,—the Crown being only a constitutional or nominal head. On the other hand, the Cabinet initiates legislation and controls the Legislature, wielding even the power to dissolve the Legislature. There is thus a complete 'fusion' in spite of a separation of the legislative and executive powers in the same hands.

U.K.

So far as the Judiciary is concerned, however, there is a shred of opinion that the Judiciary in England is independent of any control by the Executive, so that the doctrine of separation of powers has its relic in England, in the shape of independence of the Judiciary,[21] in its function of administration of justice.[21-22]

Though the executive power of the Union and of a State is vested by *our* Constitution in the President and the Governor, respectively, by Arts. 53(1) and 154(1), there is no corresponding provision in the Indian Constitution vesting the legislative and judicial powers in any particular organ. It has, accordingly, been held that there is no rigid separation of powers[23-24] under *our* Constitution.

India.

But though the Supreme Court, in the *Delhi Laws Act case,*[23] noticed that *our* Constitution does not *vest* the legislative and judicial powers in the

19. *Mutual Film Corporation* v. *Industrial Commission,* (1915) 236 U.S. 230; *Yakus* v. *U.S.* (1943) 321 U.S. 414.

20. Bagehot, *English Constitution* (1867), *World's Classics,* 1963, p. 12.

21. Halsbury, 4th Ed., Vol. 1, para. 5; Vol. 8, para. 813; Hood Phillips, *Constitutional & Administrative Law* (1978), p. 31; Wade & Phillips (1970), p. 32; de Smith, (1973) pp. 40, 363-65.

22. See elaborate discussion about 'Independence of the Judiciary' in Author's *Commentary on the Constitution of India,* 6th Ed., Vol. G, p. 199 *et seq.*

23. *In re Delhi Laws Act,* 1912, (1951) S.C.R. 747; (1950-51) C.C. 328 (337, Kania, C.J.; 342-44, Mahajan, J.; 349-50, Mukherjea, J.).

24. *A.C. Companies* v. *Sharma,* (1965) 1 S.C.A. 723 (737); *Ram Jawaya* v. *State of Punjab,* A. 1955 S.C. 549; *Udai* v. *Union of India,* A. 1968 S.C. 1138 (para. 26).

Legislature and the Judiciary in so many words, the majority, in effect, imported the *essence* of the modern doctrine of Separation of Powers, applying the doctrines of constitutional limitation and trust.[23] None of the organs of government under the Constitution can, therefore, *usurp* the functions or powers which are assigned to another organ by the Constitution, expressly, or by necessary implication. On the same principle, none of the organs can divest itself of the essential functions which belong to it under the Constitution.

It was pointed out that though the functions (other than the executive) were not *vested* in particular bodies, the Constitution, being a written one, the powers and functions of each must be found from the Constitution itself. Thus, subject to exceptional provisions like Arts. 123 and 213 (power to make ordinances during recess of Legislature) and Art. 357 (exercise of legislative powers by the President in case of a breakdown of constitutional machinery in the States), it is evident that the Constitution intends that powers of legislation shall be exercised exclusively by the Legislature created by the Constitution, i.e., by Parliament in the case of the Union. As Kania, C.J., observed—

"Although in the Constitution of India there is no express separation of powers, it is clear that a Legislature is created by the Constitution and detailed provisions are made for making that Legislature pass laws. Is it then too much to say that under the Constitution the duty to make laws, the duty to exercise its own wisdom, judgement and patriotism in making laws is primarily cast on the Legislature? Does it not imply that unless it can be gathered from other provisions of the Constitution, other bodies—executive or judicial—are not intended to discharge legislative functions?"[23]

The same thing was expressed by Mahajan, J., as regards the judicial power thus :

".....the Constitution trusts to the judgement of the body constituted in the manner indicated in the Constitution and to the exercise of its discretion by following the procedure prescribed therein. On the same principle the Judges are not to surrender their judgement to others. It is they and they alone who are trusted with the decision of a case. They can, however, delegate *ancillary* powers to others, for instance, in a suit for accounts and in a dissolution of partnership, commissioners can be entrusted with powers authorising them to give decision on points of difference between parties as to items of account."[25-26]

Any account of the application of the doctrine of Separation of Powers in *India* would be incomplete without mentioning that it has been since the case of *Indira* v. *Rajnarain*[27] elevated even to the constituent sphere, i.e., of amending the Constitution, in exercise of the constituent power conferred by Art. 368. It has been held *therein*[27] that though the doctrine of rigid separation of powers in the *American* sense does not obtain in *India*, the principle of 'checks and balances' underlying that doctrine does, in the sense that none of the three organs of Government can usurp the essential functions of the other organs, constitute a part of the 'basic structure' of the Constitution or one of its *'basic features'* which cannot be impaired even by amending the Constitution; if any such amendment of the Constitution is made, the Court would strike it down as unconstitutional and invalid.[27]

Indira v. *Rajnarain.*

25. A corollary from this principle, acknowledged by *our* Constitution, is that the Judiciary should be separate from and independent of control by the Executive [*Chandra Mohan* v. *State of U.P.*, A. 1966 S.C. 1987 (1993)].

26. *Gupta* v. *Union of India*, A. 1982 S.C. 149 (paras. 26; 318; 596; 609; 1051).

27. *Indira* v. *Rajnarain*, A. 1975 S.C. 2299 (2742, Chandrachud, J.; 2426-30, 2472, Beg, J.; 2320, Ray, C.J.).

The conclusions that emerge out of the functional separation of powers, from the standpoint of Administrative Law, are—

Place of separation of powers in Administrative Law.

(i) The essentials of the legislative function being the determination of the legislative *policy*[28] and its formulation and promulgation as defined and binding rules of conduct, the Executive cannot, in the exercise of its administrative powers, assume the power to make laws.[23] The power to 'make law' means the power to determine what the law shall be, as distinguished from any question relating to execution of a law.[29] Similarly, *taxation* and *appropriation of public money* are regarded as legitimate functions of the Legislature in all countries which have adopted the English system of representative government.[30] The Executive would not be allowed to usurp these functions even indirectly. Hence, the Executive cannot make an agreement involving expenditure of public money,[31] nor can impose a financial burden on the subject without authority of the Legislature.[32] Similarly, the setting up of Courts is a legislative power,[33] and the Executive cannot, therefore, establish a tribunal without Parliamentary authority.[34]

(ii) Since the legislative function consists in the laying down of rules of conduct binding on the members of the State and includes the making of new law, and the alteration or repeal of existing law, or the application of existing law *with substantial modification*,[35] these essential legislative functions cannot be delegated by the legislature to any other authority.[36]

But conditional legislation and the conferment of the power of subordinate legislation to administrative or other authorities, short of delegation of the essential legislative functions, are valid. Thus,

(a) The Legislature may authorise an administrative agency to ascertain the factual conditions upon the existence of which the law made by the Legislature shall be operative.[28]

(b) The Legislature may, after laying down the standards, authorise[37] an administrative agency to fill in the details.

"In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of its authority."[38]

(iii) Since it is the business of the Courts to apply the Constitution and the laws in cases properly brought before them, the Judiciary exercises control over Executive action in so far as it would refuse to uphold as valid any act of the government which is not supported by the Constitution[39] or by some law.[39] The authority of the Courts as regards executive action arises

28. *Yakus* v. *U.S.*, (1943) 321 U.S. 414; *U.S.* v. *Robel*, (1967) 389 U.S. 258 (267).
29. Cf. *Jatindra* v. *Province of Bihar*, (1949) F.L.J. 225 (239, 248).
30. Cf. Arts. 110, 114-117, 265-266 of *our* Constitution.
31. *Commonwealth* v. *Colonial Combing Co.*, (1822) 31 C.L.R. 421.
32. *A.G.* v. *Commonwealth*, (1935) 52 C.L.R. 533.
33. Cf. Entry 3 of List II of Sch. VII of *our* Constitution.
34. *Waterside Workers' Federation* v. *Commonwealth*, (1920) 14 C.L.R. 276.
35. *Rajnarain* v. *Chairman, Patna Administration Committee*, (1955) 1 S.C.R. 290; *Vanarasi* v. *State of M.P.*, A. 1958 S.C. 909.
36. See next caption.
37. See next chapter: *State of Bihar* v. *Kameswar*, (1952) S.C.R. 889 (954-55).

when the Executive *exceeds* its authority, in which case not only the executive action becomes invalid, but the agents and instruments, through which the action is carried out, become personally responsible to the Courts. Even under the unwritten Constitution of *England,* it is the duty of the Courts to see whether the Executive acts in *excess* of the law.[37]

Judicial control over executive action is, however, limited by the principle that the Judiciary will not encroach upon what belongs properly to the executive sphere. From this it follows that—

(a) It is not the business of the Courts to pass judgment upon the *policy* of executive action, e.g., the acts of the department of foreign affairs.[40] The exercise of *political* power is not within the province of the judicial department.[41]

(b) Another self-imposed limitation is that Courts will not interfere with matters which are by the Legislature committed to the *discretion* of administrative authorities.[42] Of course, where the administrative authority refuses to exercise the discretion, which it is his duty to exercise under the law, the Court may compel him to exercise it; but the Court will never direct how the discretion is to be exercised.[41] [See, further, Ch. XV, *post.*]

Delegation of legislative power.

The Legislature, properly speaking, is not the subject-matter of Administrative Law but of Constitutional Law, because the Legislature is not an administrative but a law-making body. Nevertheless, the topic of the competence of the Legislature to delegate legislative power to some administrative body or other subordinate authority becomes relevant in so far as it has a bearing on (or, rather, issues from) the doctrine of Separation of Powers which we have just discussed.

That under modern conditions the Legislature cannot foresee or anticipate all the circumstances to which a legislative measure should be extended and applied, is acknowledged on all hands. Rules and Regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act. The delegate has to act within the limits of the authority conferred by the Act. Rules cannot supplant the provisions of the enabling Act. But it can supplement the Act. Subordinate legislation is intended to fill up details. The legislature may lay down the legislative policy and thereafter confer discretion on an administrative agency to execute the policy. Such agency will work out the details within the framework of the policy. Regulations are in aid of enforcement of the provisions of the statute. Regulation saves time and is intended to deal with local variations. The regulation made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature. The legislature is over-burdened and the needs of the modern society is complex. Every administrative difficulty cannot be foreseen after the statute has begun to operate. So there lies the need for delegated legislation.[42a] Some amount of delegation of its own authority to a subordinate

39. *H. Kendall* v. *United States,* (1838) 12 Pet. 524; *Eastern Trust Co.* v. *McKenzie Co.,* (1915) A.C. 750; *Eshugbayi* v. *Nigerian Government,* (1931) A.C. 662; *Liversidge* v. *Anderson,* (1942) A.C. 206.

40. *Cherokee Nation* v. *Georgia,* (1831) 6 Wall. 50.

41. *Williams* v. *Suffolk Ins. Co.,* (1839) 13 Pet. 415; *Quackenbush* v. *U.S.* (1900) 177 U.S. 25.

42. *F.C.C.* v. *Pottsville Broadcasting Co.,* (1940) 309 U.S. 134.

42a. *St. John's Teachers Training Institute* v. *Regional Director, NCTE,* AIR 2003 SC 1533: (2003)3 SCC 321.

body is thus permissible on the part of the Legislature. But, if it goes beyond a measure and seeks to *abdicate* its essential powers, such delegation will be unconstitutional where the written Constitution vests the legislative power in the Legislature expressly, or will be a violation of the doctrine of Separation of Powers which postulates that the essential functions of one organ of the State cannot be assumed by another even by delegation by the latter.[43]

The Central Government can delegate any of its statutory power to the State Government, if permitted by law. Three things should be clearly understood, (1) since in practice the Government demands a great deal of delegation this has to be authorized by statute, either expressly or impliedly, (2) a statutory power to delegate functions, even if expressed in wide general terms will not necessarily extend to every thing, (3) implied power to delegate is not commonly found in peace time legislation.[43a]

Before we may take up the question of the limits up to which delegation of legislative power would be constitutional and beyond which it would be 'excessive' or unconstitutional, we have to distinguish between the allied concepts of 'subordinate', 'conditional' and 'delegated' legislation.

Constitutionality of delegated legislation.

U.K.

In the *U.K.*, since the legal sovereignty of Parliament is unquestionable in the Courts, it is competent for Parliament to delegate its legislative power to the Administration *to any extent*, without the risk of the Judiciary invalidating such law on the ground that, by excessive delegation, Parliament has abdicated its legislative function.[44] Hence, no question of unconstitutionality of delegated legislation can possibly arise in the U.K.[45]

Even if Parliament delegates unlimited power to an administrative authority to amend or modify the statute itself while giving effect to it, by providing what is known as the 'Henry VIII Clause', the *Courts* are powerless to strike down such clause.[46]

U.S.A.

In the *U.S.A.*, on the other hand, the doctrine against excessive delegation by the Legislature was early deduced from the wider doctrine of Separation of Powers which, we have seen, was held to be a basic principle of the American constitutional law. It was accordingly held that for Congress to delegate the *legislative* power entrusted to it by the Constitution to some other organ would be to violate the principle of Separation of Powers which lay at the foundation of the American constitutional system.[47]

But it was soon acknowledged that since in modern democracy subor-

43. Cf. *Vasantlal* v. *State of Bombay*, A. 1961 S.C. 4; *Avinder* v. *State of Punjab*, A. 1979 S.C. 321 (para. 10).

43a. *S. Samuel* v. *Union of India*, (2004)1 SCC 256.

44. Halsbury, 4th Ed., Vol. 1, para. 18; cf. *Institute of Patent Agents* v. *Lockwood*, (1894) A.C. 347 (360-61) H.L.

45. Of course, even though the validity of the *law* cannot be challenged, as we shall see, hereafter, the exercise of the delegated power by the Administration, in making an instrument of subordinate legislation, is liable to be challenged as invalid on the ground that the Administration, in making such instrument, has exceeded the power conferred upon it by the law, so that it has been *ultra vires* [Halsbury, 4th Ed., Vol. 44, para. 1000].

46. Wade, *Administrative Law* (1977), pp. 700-01.

47. *Field* v. *Clark*, (1892) 143 U.S. 649 (692).

dinate legislation by administrative agencies was unavoidable,[48] some delegation must be allowed as constitutionally permissible, subject to the following conditions :

(a) While the function of the Legislature is to lay down the policy and the general principles of a law, the power to prescribe details of the legislative measure could be delegated by the Legislature to any subordinate body.[49]

(b) No delegation can be challenged as unconstitutional if Congress has laid down the policy or the standards, within the limits of which the subordinate body was to exercise its delegated power.[48]

In the absence of such principles or standards, in the statute, the delegation would be declared excessive and unconstitutional and the statute would be struck down.[49]

In two cases,[49-50] decided in the same year (1935), the Supreme Court struck down two provisions of the same Act of Congress,— the National Industrial Recovery Act, 1933,—on the ground that the standards laid down by Congress by these provisions were so inadequate that they virtually amounted to an abdication by Congress of its power to legislate with respect to commerce.

Whether the standard laid down in the impugned statute was adequate or not is, of course, for the Court to determine. The Second World War which followed the 1935 decisions[49-50] convinced the Supreme Court that the Administration needed greater flexibility in its delegated rule-making power in order to meet the myriads of challenging problems raised by the War, and, once it was so convinced, the Court went on relaxing its judicial review over the standard which was being diluted by the Legislature almost at each step. This results in the curious phenomenon that although the 1935 decisions or the doctrine against unconstitutional delegation have not been brushed off, the American Supreme Court has not, in any case, since 1935, found the delegation to be excessive, because it has come to hold illusory standards as adequate.[51]

But even though the American Supreme Court has not, since 1935, struck down any statute on the ground of excessive delegation, even now the principle that the Legislature must lay down discernible standards for the guidance of the administrative authority for exercising the delegated power is, occasionally, reiterated by the Court.[52]

India.

The law on this point in India has followed the trend of decisions of the American Supreme Court. Thus, as early as 1951,[53] it was held that the Legislature could not delegate its *essential* functions. Though it could

48. *Wichita R. & L. Co.* v. *Public Utilities Commn.*, (1922) 260 U.S. 48 (58-59); *Hampton* v. *U.S.*, (1928) 276 U.S. 394 (409).

49. *Panama Refining Co.* v. *Ryan*, (1935) 293 U.S. 388.

50. *Schechter Corp.* v. *U.S.* (1935) 295 U.S. 495.

51. *Yakus* v. *U.S.*, (1944) 321 U.S. 414; *American Power Co.* v. *S.E.C.*, (1946) 329 U.S. 90 (105); *Fahey* v. *Mallone*, (1947) 332 U.S. 245; *Lichter* v. *U.S.*, (1948) 334 U.S. 742; *Secy. of Agriculture* v. *Central Refining Co.*, (1950) 338 U.S. 604; *N.Y. Central Securities* v. *U.S.* (1974) 415 U.S. 336 (341); *Fed. Energy Admn.* v. *Algonquine*, (1976) 426 U.S. 549 (550, 559).

52. *National Cable* v. *U.S.* (1974) 415 U.S. 336 (342); *Eastlake* v. *Forest City*, (1976) 426 U.S. 668 (675); *FEA* v. *Algonquine*, (1976) 426 U.S. 548 (559); *Industrial Dept.* v. *American Petroleum*, (1980) 448 U.S. 607 (675, 686); *American Textile Inst.* v. *Donavan*, (1981) 452 U.S. 490 (543, 547-48).

53. *In re Delhi Laws Act*, (1951) S.C.R. 747 (767-68, 792, 798, 904, 938-939, 941, 946, 973-74, 982, 997; 1076-77.)

delegate the power to formulate details, an excessive delegation of legislative power would be struck down as unconstitutional and invalid, as an abdication of the legislative power.[54]

The Delhi Laws Act case.

I. In other words, contrary to the position in *England,* the Legislature in *India* has no inherent or unlimited power to delegate its power. Because of the doctrine of 'constitutional trust', the Indian Legislature must retain in its own hands the essential legislative functions though it can delegate the task of subordinate legislation necessary for implementing the purposes and objects of the law made by the Legislature.[55]

II. Soon, however, *our* Supreme Court came to hold that no delegation could be held to be excessive or unconstitutional if the statute laid down the policy or the principles to guide the exercise of the delegated power and also that in finding such policy and principles, the Court would liberally construe the provisions of the statute, starting from its very Preamble,[54] or even from the history of the legislation,[54] or its scheme.[56] In course of time, the Court has diluted this process of construction so much so that almost slender indications in the statute have been upheld as sufficient guidance,[57] and, as a result, it is only in a few cases that the Court has actually invalidated[58] a statute on the ground of excessive or unconstitutional delegation.

III. Of course, in analysing the provisions of the statute for discovering the guidelines, the Court shows the greatest latitude in statutes for taxation[59-60] or implementation of the Directives in Part IV of the Constitution[54] but it is not limited to those spheres.[61] The Court has, by 1972, receded a long way behind its 1951 position. The words of Hegde, J., speaking for the Court in 1972,[62] represent the current attitude of the Court.

"However much one might deplore the 'New Despotism' of the Executive, the very complexity of the modern society and the demands it makes on its Government have set in motion forces which have made it *absolutely necessary* for the Legislature to entrust *more and more powers* to the Executive. Textbook doctrines evolved in the 19th century have become out of date."[62]

54. *Registrar v Kunja,* A. 1980 S.C. 350 (para. 3); *D.C.G.M.* v. *Union of India,* A. 1983 S.C. 937 (para. 32); *Parasuraman* v. *State of T.N.,* A. 1990 S.C. 40.

55. *Municipal Corpn.* v. *Birla Cotton Mills,* A. 1968 S.C. 1232 (1244).

56. *Raghubar* v. *Union of India,* A. 1962 S.C. 263 (paras. 29-30); *Izhar Ahmad* v. *Union of India,* A. 1962 S.C. 1052 (para. 39).

57. Cf. *Harishankar* v. *State of M.P.,* (1955) 1 S.C.R. 380 (388); *Banarsi* v. *State of M.P.,* (1959) S.C.R. 427; *Garewal* v. *State of Punjab,* A. 1959 S.C. 512; *Jyoti Pershad* v. *State of Bombay,* A. 1961 S.C. 1602; *Ghulam* v. *State of Bombay,* A. 1962 S.C. 97; *Papiah* v. *Excise Commr.,* A. 1975 S.C. 1007 (paras. 11, 22); *Babu Ram* v. *State of Punjab,* A. 1979 S.C. 1574 (paras. 12, 31); *Moghe* v. *Union of India,* A. 1981 S.C. 1495 (para. 30).

58. *Hamdard Dawakhana* v. *Union of India,* A. 1960 S.C. 554 (paras. 29, 34-35); *Devi Das* v *State of Punjab,* A. 1967 S.C. 1895 (para. 16); *Jalan Trading* v. *Mill Mazdoor Union,* A. 1967 S.C. 691 (para. 21); *Shama Rao* v. *Union Territory,* A. 1967 S.C. 1480; *Air India* v. *Nergesh,* A. 1981 S.C. 1829 (paras. 117, 128) (a case relating to sub-delegation).

59. *Corpn. of Calcutta* v. *Liberty Cinema,* A. 1965 S.C. 1107; *Municipal Bd.* v. *Raghuvendra,* A. 1966 S.C. 693; *Sita Ram* v. *State of U.P.,* A. 1972 S.C. 1168; *Papiah* v. *Excise Commr.,* A. 1975 S.C. 1007 (paras. 16, 24); *Babu Ram* v. *State of Punjab,* A. 1979 S.C. 1475 (paras. 30-31); *Gwalior Rayon* v. *Asst. Commr.,* A. 1974 S.C. 1660; *State of Mysore* v. *Nagade,* A. 1983 S.C. 762 (para. 21); *Nagappa* v. *I.O.M. Cess Commr.,* A. 1973 S.C. 1374 (para. 10).

60. *Avinder* v. *State of Punjab,* A. 1979 S.C. 321 (para. 10).

61. Cf. *Jyoti Pershad* v. *Union Territory,* A. 1961 S.C. 1602.

62. *Sitaram* v. *State of U.P.,* A. 1972 S.C. 1168.

IV. Thereafter, the Court has held that the Legislature would be absolved of its duty to lay down the policy if it simply uses the words 'for the purposes of the Act'.[59]

Thus,—

A provision which empowered a Municipal Corporation to levy (besides the specified taxes) "any other tax which the State Government has power to impose" has been upheld, even though the rates of tax were not laid down in the Act.[63]

V. Guidelines would not be required where the function is *quasi-judicial* in nature and the authority has to make a speaking order on *objective* consideration of the relevant facts, after hearing the parties.[64]

Subordinate, Conditional and Delegated Legislation.

A. As explained by *Salmond,*[65] legislation is either supreme or subordinate.

"Subordinate legislation is that which proceeds from any authority other than the sovereign power and is therefore dependent for its continued existence and *validity* on some superior or supreme authority.....They may be regarded as having their origin in a *delegation* of the power of Parliament to inferior authorities, which in the exercise of their delegated functions remain subject to the control of the sovereign Legislature."[63]

Broadly speaking, the power of subordinate legislation may be conferred by the sovereign Legislature upon—

(i) The Executive or Departments of the Administration; or

(ii) A subordinate body, such as municipal or other local body; or

(iii) A statutory corporation or juristic person, such as a railway company, a university or other society, to regulate matters concerning itself.

Legislation by such bodies is 'subordinate' in the following respects—

(i) While, apart from constitutional limitations (if any), the powers of a sovereign Legislature are plenary, the powers of a subordinate law-making body are derived from a statute made by such sovereign Legislature and are subject to the limits imposed by such statute, expressly or impliedly.

(ii) Where the limits imposed by the statute are exceeded by the subordinate law-making body, its legislation becomes *ultra vires.*

Total abdication at legislative power, excessive delegation or transfer of legislative function by the legislature is impermissible. Legislature must retain control in its hand.[65a]

Courts have the authority to declare as void any subordinate legislation which is *ultra vires,* either because it has transgressed the power conferred upon the subordinate body *substantively,* e.g., by legislating on a subject-matter with respect to which it has not been authorised by the statute to deal with; or *procedurally* by not complying with the procedure prescribed by the statute for making the subordinate legislation [see next Chapter].

B. While *subordinate* legislation refers to the process of making rules and regulations by an administrative or other subordinate authority for the carrying out of the purposes of a statute and for its detailed application, under powers conferred by the statute itself, *conditional* legislation refers to a statute which authorises an administrative authority to determine *when*[66]

63. *Gwalior Rayon Mills* v. *Assistant Commissioner of Sales Tax.* A. 1979 S.C. 321.
64. *Workmen* v. *Meenakshi Mills,* (1992) 3 S.C.C. 336 (para. 42) (C.B.).
65. Salmond, *Jurisprudence,* 9th Ed., p. 210.
65a. *Mahe Beach Trading Co.* v *Union Territory of Pondicherry,* (1996)3 S.C.C. 741.
66. *Basant* v. *Eagle Rolling Mills,* (1964) 6 S.C.R. 913 (916-17); *State of Bombay* v. *Narottamdas,* (1951) S.C.R. 51 (80).

or *where*[67] the provisions of the statute shall become operative. In other words, a conditional statute comes into operation not of itself but by virtue of the administrative determination.

C. But it is not competent for the Legislature to delegate its essential functions. It has already been pointed out that though the doctrine of Separation of Powers has not been imported into *our* Constitution in the American sense, and though the legislative power as such has not been 'vested' in Parliament or the State Legislature (as the case may be), it has nevertheless been held in India that while either Legislature may delegate the function of making subordinate regulations, neither can delegate the function of *'making laws'*,[68] which is given to it by the Constitution [Art. 245].

The problem of delegated legislation, thus, relates to the question whether, in making a particular statute, the Legislature has, in fact, delegated its 'essential' functions.

D. In delegated legislation, the delegate completes the legislation by supplying the details within the limits prescribed by the statute; in the case of conditional legislation the power of legislation is exercised by the Legislature conditionally,[54] leaving to the discretion of an external authority the time and manner of carrying the legislation into effect as also the determination of the area to which it is to extend.[69] In other words, in delegated legislation, the rule-making power is delegated; in conditional legislation, the power conferred upon the delegate is to determine when or where the law shall apply,—the legislation being complete in other respects.[54, 69]

E. The power to apply the statute to *objects* other than those specified in the statute, but subject to its policy, has also been dubbed as conditional legislation.[70]

F. Just as it is permissible for the Legislature to make a conditional legislation to confer upon the administrative authority the power to determine when the statute shall come into operation, on the happening of specified contingencies, so it has been held that it is permissible for the Legislature to confer upon the administrative authority the power to *extend the duration* of a statute beyond the period which was specified, in the first instance, by the Legislature, leaving it to the Administration to determine whether the same circumstances which justified the bringing into force of the statute are still continuing so as to justify the continuance of the statute for a further period.[71] This has been considered to be another instance of conditional legislation.[71]

Delegated Legislation : Scope of

Delegated legislation is defined as "that which proceeds from any authority other than the sovereign power, and is therefore dependent for its continued existence and validity on some superior or supreme authority"[71a]. Delegated legislation is a necessity today. When the legislatures enact laws to meet the challenge of the complex socio-economic problems, it becomes

67. *R.* v. *Burah*, (1878) 5 I.A. 178 (195); *R.* v. *Benoari*, (1945) 72 I.A. 57.
68. *In re Delhi Laws Act*, (1951) S.C.R. 747 (Kania, C.J., Mahajan, J.).
69. *Hamdard Dawakhana* v. *Union of India*, A. 1960 S.C. 554 (566-67).
70. *Arnold* v. *State of Maharashtra*, A. 1966 S.C. 1788; *Bangalore Mills* v. *Bangalore Corpn.*, A. 1962 S.C. 1263 (1266).
71. *Inder Singh* v. *State of Rajasthan*, A. 1957 S.C. 510 (paras. 10-11) C.B., dissenting from *Jatindra Nath* v. *State of Bihar*, A. 1949 F.C. 175.
71a. Salmond, *Jurisprudence*, 12th Ed., p. 116.

necessary to delegate subsidiary or ancillary power to delegates of their choice for carrying out the policy laid down by the Acts as part of the Administrative law. Legislature has to lay down the legislative policy and principle to afford guidance for carrying out the said policy before it delegates its subsidiary powers in that behalf.[71b] Legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purpose and objects of the Act.[71c] Tests for valid delegation of legislative power are : (1) Legislature cannot efface itself, (2) legislature cannot delegate the plenary or essential legislative function, (3) even if there is delegation, parliamentary control over delegated legislation should be a living continuity as a constitutional necessity.[71d] The legislature is the master of legislative policy, and if the delegate is free to switch policy it may be usurpation of legislative power itself.[71d] The essential legislative function consists of the determination of legislative policy and the legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates. The delegate which has been authorized to make subsidiary rules and regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down thereunder. It cannot, in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of that Act.[71e]

A rule framed under the statute must give way to substantive statute in case of conflict. In case of conflict between a substantive Act and delegated legislation the former shall prevail.[71f]

By an execution order passed by the State in terms of Art. 162 of the Constitution Government authorized the personnel department to determine seniority. Personnel department failing to determine Water Resources department could not arrogate the power and issue order laying down the eligibility criteria. Order passed by Water Resource Department is illegal and without jurisdiction.[71g]

What delegation is permissible.

A. It is now admitted on all hands that in the complex conditions of modern society, it is not possible for any Legislature to undertake the entire process of legislation and that it is permissible for it to confer upon an administrative authority powers of either of the above two kinds (i.e., subordinate and conditional legislation).[72] Thus, *after laying down the legislative policy*—

(i) The Legislature may leave it to the judgement of a local administra-

71b. *Vasantlal* v *State*, (1961) 1 S.C.R. 341 : A. 1961 S.C. 4; *Agricultural Market Committee* v *Shalimar Chemical*, (1997) 5 S.C.C. 516, 524.

71c. *Municipal Corporation of Delhi* v *Birla Cotton*, A. 1968 S.C. 1232; *Agricultural Market Committee* v *Shalimar Chemical*, (1997)5 S.C.C. 516.

71d. *Avinder Singh* v *State*, (1979) 1 S.C.C. 137; *Agricultural Market Committee* v *Shalimar Chemical*, (1997)5 S.C.C. 516, 525.

71e. *Agricultural Market Committee* v *Shalimar Chemical*, (1997)5 S.C.C. 516, 525.

71f. *I.T.W. Signode India Ltd.* v. *Collector of Central Excise*, (2004)3 SCC 48.

71g. *Pramod* v. *State*, (2004)3 SCC 723.

72. *Tata Iron & Steel Co.* v. *Workmen*, A. 1972 S.C. 1917 (1922).

tive body as to the necessity of applying or introducing the Act in a local area; or the determination of a contingency or event, upon the happening of which the legislative provisions are made to operate.[73] This is known as 'conditional legislation'.

(ii) The Legislature may leave it to a subordinate agency or some executive authority, the power of making rules and regulations for filling in the details to carry out the purposes of the Legislation, and to execute that legislative policy.[74-75] When legislative power is so exercised by an administrative or other subordinate body, it is called 'subordinate legislation'. On the part of the Legislature, it is delegated legislation, but it is a permissible delegation if it has laid down the policy.[76]

(iii) It is permissible for the Legislature to empower the Executive to extend to a local area an enactment in existence in another State or another part of the same State, with such modifications, if any, 'as it thinks fit'.[68, 77] But, in order to be constitutionally valid, it must comply with certain conditions :

i. Policy-making is an essential function of the Legislature. In the instant case, the Legislature, instead of itself enacting the law for the local area in question, declares that its policy is the same as that of the enactments existing in other parts of the country, out of which the Executive is empowered to make its selections according to the needs of the local area in question. Hence, there is no delegation of any essential legislative function in the mere delegation of the power to *extend* or to apply existing laws to a local area according to its needs.[57,68]

ii. The question is whether it would be permissible also to delegate to the Government the power to *modify* such enactments while extending them to the local area in question, for the power to modify an Act in its essential particulars, so as to change its *policy*, is an essential legislative function (see *post*). On the other hand, some modification may be necessary in order to *adapt* the extended statute to the local area, to meet its local needs. Hence, it has been held that the delegation of the power to modify will be permissible only if and so far as it is necessary as *ancillary* to the power to extend the statute.[77] Hence,

(a) The power to modify would be legitimate only in so far as it is necessary to make the enactment *suitable* to the peculiar local conditions of the area in question. If, therefore, the Legislature seeks to confer unfettered power to modify, by the use of words such as 'as it thinks fit', the Court should read these words narrowly to comprehend only such changes as do not include any change in the *policy* of the extended enactment, in order to save the Legislature from the vice of excessive delegation.[77]

If the Government, nevertheless, in exercise of its power to modify, makes any change in the policy or the basic concepts or the essential features of the enactment which it was empowered by the Legislature to extend to the area, such order or notification of the Government would be struck down by the Court on the ground of *ultra vires*.[77] The power to extend even future

73. *Inder Singh* v. *State of Rajasthan*, A. 1957 S.C. 510 (515); *Bhatnagars* v. *Union of India*, A. 1957 S.C. 478 (485).
74. *Harishankar* v. *State of M.P.*, (1955) 1 S.C.R. 380.
75. *Makhan Singh* v. *State of Punjab*, A. 1964 S.C. 381 (401).
76. *Sri Ram* v. *State of Bombay*, A. 1959 S.C. 459 (473-74).
77. *Lachmi Narain* v. *Union of India*, A. 1976 S.C. 714 (paras. 48, 58-60, 69).

laws of another State may be delegated, provided the essential character or particulars of the law are not changed.[78]

(b) Since the power to modify is only ancillary to the power to *extend*, in order to make it effective, it follows that the power to modify exhausts itself on the extension of the enactment; it cannot be exercised repeatedly or subsequently to such extension, or for a purpose other than that of extension.

If, therefore, the Government issues a notification to modify the extended law, subsequent to the notification of its extension, such notification would be struck down as *ultra vires*.[77]

B. On the other hand—

Delegation, if coupled with uncanalised discretion, may infringe Article 14 of the Constitution.

Thus, while a Central Act often leaves it to the State Government to fix the date for commencement of the Act in that particular State, conferment of such power may be unconstitutional where the subject-matter of the Act is enhanced pensions for High Court Judges, as different dates in different States would mean discrimination as regards Judges of different High Courts.[79]

What functions cannot be delegated by the Legislature.

It follows, therefore, that when a question as to the constitutionality of a statute is challenged on the ground that it involves delegated legislation, what is to be determined by the Court is whether the function which has been delegated by the Legislature is an 'essential' function of the Legislature or not.

Broadly speaking, it has been established that—

"The essential legislative function consists in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct."[74-80]

It follows that the following functions *cannot* be delegated—

(i) To declare what the laws shall be in relation to any particular territory or locality,[68] is an essential legislative act.

The essential legislative functions are the determination of the *legislative policy* and its formulation as a rule of conduct.[68, 74] In other words, the Legislature cannot delegate to another agency the exercise of its judgment on the question as to *what the law should be*.[68]

S. 3 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954, provides—

"Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drug in terms which suggest or are calculated to lead to the use of that drug for—

Hamdard Dawakhana v. *Union of India.*

(a) the procurement of miscarriage in women or prevention of conception in women; or

(b) the maintenance or improvement of the capacity of human beings for sexual pleasure; or

(c) the correction of menstrual disorder in women; or

(d) the diagnosis, cure, mitigation, treatment or prevention of any veneral disease

78. *Brij* v. *First A.D.J.*, A. 1989 S.C. 572 (587).
79. *M. L. Jain* v. *Union of India*, A. 1989 S.C. 669: (1988) 4 S.C.C. 121.
80. *Municipal Corpn.* v. *Birla Cotton Mills*, A. 1968 S.C. 1232 (1244).

or *any other disease or condition which may be specified in rules made under this Act.*"

Held, that the words in clause (d) above *"or any other disease or condition which may be specified in rules"* conferred[67] "uncanalised and uncontrolled power to the Executive to specify any disease and established no criteria, no standards, and has not prescribed any principle on which a particular disease or condition is to be specified..... It is not stated what facts or circumstances are to be taken into consideration to include a particular condition or disease. The power of specifying diseases and conditions as given in section 3(d) must, therefore, be held to be going beyond permissible boundaries of valid delegation". The Court, accordingly, struck down this portion of section 3(d).[81]

A critique.

It is to be noted that the decision in the instant case is in striking contrast to the case of *Sri Ram* v. *State of Bombay*.[82] The impugned provisions of the enactments in both the cases were similar in so far as the Legislature added a residuary clause after enumerating certain specific cases where the power could be exercised. But, while in *Sri Ram's case*[82] the Court applied the *ejusdem generis* rule in interpreting the residuary power, that doctrine was not mentioned at all in the unanimous judgment in the *Hamdard case*,[81] per Kapur, J.

The decision in the instant case[81] is also at variance with that in a number of previous cases where the legislative policy was taken as the standard for determining whether the power of subordinate legislation was uncanalised or not. In the instant case, the Court analysed the history of the legislation and the different provisions of the statute and had no difficulty in discovering the policy and purpose of the legislation and found that the object of the Act "was to control the advertisement of drugs in certain cases, i.e., diseases and to prohibit advertisements relating to remedies pretending to have magic qualities and provide other matters connected therewith". The danger aimed at was found to be the danger of 'self-medication' and the 'consequences of unethical advertisements' relating thereto. If the policy was thus ascertained and the preceding clauses of section 3 specified advertisements relating to the procurement of miscarriage; the improvement of sexual capacity; the correction of menstrual disorder and the treatment etc. of a venereal disease, was it not possible to hold that the impugned part of clause (d) related to a disease or condition *ejusdem generis* with the preceding categories, consonant with the policy of the enactment as ascertained by the Court? In the circumstances it was possible for the Court to hold, as in previous cases, that the Legislature was not guilty of unconstitutional delegation but that if the subordinate authority ever made a rule specifying a disease or condition which was extraneous to the policy of the enactment and not *ejusdem generis* with the categories enumerated, the rule itself would be void on the ground of *ultra vires*.[83]

Since the judgment in the instant case does not refer at all to the previous decisions on delegated legislation, it is difficult to suggest any ground which led the Court in the instant case to distinguish it from the previous line of decision. It remains for a future Bench to perform that task.

Subsequent to the foregoing comment of the Author at p. 25*n* of the previous Edition of this book, the Supreme Court, in the *Bangalore case*,[84] was, in fact, confronted with the contrary decision in the *Hamdard case*,[81] but Kapur, J., (for the Court), brushed aside his own judgment in that case by simply saying that the instant case "is not a case which falls under the rule laid down by this Court in A. 1960 S.C. 554". It is, however, difficult for an impartial observer to discern that distinction. It is reasonable to expect

81. *Hamdard Dawakhana* v. *Union of India*, A. 1960 S.C. 554 (568)
82. *Sri Ram* v. *State of Bombay*, A. 1959 S.C. 459; *see post.*
83. Cf. *Rajnarain* v. *Patna Admn.*, (1955) 1 S.C.R. 290 (303-04).
84. *Bangalore Mills* v. *Corpn.*, A. 1962 S.C. 1263 (para. 10).

that, in some future case, the *Hamdard* decision[81] shall be reviewed more fully and overruled.

On the other hand, if the Legislature lays down the policy in clear and unambiguous terms the delegation of the power to execute that policy by framing appropriate rules cannot be impugned as impermissible[85]; such delegation cannot be held unconstitutional because of the possibility of the power being abused.[86]

(ii) The power to *repeal* a law is an essential legislative power.[87] What the Legislature can validly delegate is the power to make regulations 'for carrying out the purposes of the Act, not to amend it'.[88]

(a) From this standpoint, there should be no distinction between express and 'implied repeal', for implied repeal is nothing but the construction of a repealing statute which does not expressly say that the previous statute in question is 'repealed'.

(b) It is also to be determined whether the implied repeal is to be made by the delegate or is made by the Legislature itself. In the latter case, there is no question of unconstitutionality since the Legislature is competent to repeal its own law.[89]

i. Section 3 of the Essential Supplies Act empowered the Central Government to make orders for the regulation of the production etc. of essential commodities, and s. 4 empowered the Central Government to delegate this function to officers under the Central Government, and Provincial Government or its officers. S. 6 then enacted—"Any order made under s. 3 shall have effect nowithstanding anything inconsistent therewith contained in any enactment other than this Act. . . . "

The Supreme Court held that s. 3 of the Essential Supplies Act did not, in fact, effect the 'implied repeal' of any existing law. But conceding for the sake of argument that the repugnancy of an order under s. 3 with the existing law constituted an implied repeal of the latter, the Supreme Court held that there was no delegation of this power since the repeal, if any, was being made by the Central Legislature itself, by s. 6 of the impugned Act :

"By enacting s. 6 Parliament itself declared that an order made under s. 3 shall have effect notwithstanding any inconsistency in this order with any enactment other than this Act. This is not a declaration made by the delegate but the Legislature itself has declared its will that way in s. 6. The abrogation or the implied repeal is by force of the legislative declaration contained in s. 6 and is not by force of the order made by the delegate under s. 3. The power of the delegate is only to make an Order under s. 3. Once the delegate has made that order, its power is exhausted. S. 6 then steps in wherein the Parliament has declared that as soon as such an order comes into being, that will have effect notwithstanding any inconsistency therewith contained in any enactment other than this Act. Parliament being supreme, it certainly could make a law abrogating or repealing by implication provision of any pre-existing law . . . ."[89]

ii. Section 48(2)(cc), Life Insurance Corporation Act, 1956 (as amended in 1981) which authorises the Central Government to make rules to carry out the purposes of the parent Act, notwithstanding anything contained in the Industrial Disputes Act or any other law, has been upheld, on the ground that repeal or abrogation of any other law was by virtue of the parent Act.[90]

---

85. *Makhan Singh* v. *State of Punjab*, A. 1964 S.C. 381 (401).
86. *Khanbhalia Municipality* v. *State of Gujarat*, (1967) S.C. [C.A. 1340/66].
87. *In re Delhi Laws Act*, (1951) S.C.R. 747 (Kania, C.J., Mahajan, Mukherjee & Bose, JJ.); *Tika Ramji* v. *State of U.P.*, (1956) S.C.R. 393.
88. *Miller* v. *U.S.*, (1935) 294 U.S. 435.
89. *Harishankar* v. *State of M.P.*, (1955) 1 S.C.R. 380.
90. *A.V. Nachane* v. *Union of India*, A. 1982 S.C. 1126.

(iii) The power to modify an Act in its essential particulars (so as to involve a change of policy[90]) is also an essential legislative function.

"To alter the essential character of an Act or to change it in material particulars is to legislate, and that, namely, the power to legislate, all authorities are agreed, cannot be delegated by a Legislature which is not unfettered."[91]

It follows that the conferment of the power on the Executive to *modify* an Act *without any limitation* on the power to modify constitutes an unconstitutional delegation of legislative function. For, in making modification, the whole aspects of an Act or a section may be changed.[92]

On the other hand—

The delegation of a power to modify would not be unconstitutional if it relates not to the legislative policy but to matters of detail which may be considered as *not essential* to the legislative function,[92-93] e.g., the power to modify the Schedule of an Act,[94-95] i.e., so long as it does not amount to an abdication of essential legislative power by the Legislature.[95]

It follows that where the Legislature confers unfettered power upon the Executive to modify the provisions of the statute by using words such as 'such restrictions and modifications as it thinks fit', the Court should so construe the words as to save the statute from the unconstitutionality of excessive delegation; that is, to hold that the power conferred would include only modifications which do not involve any change in the *policy* of the statute.[75] If in exercise of such unfettered power, the Executive does make such changes of substance which alter the very policy of the Act, the Court will strike down the Government order or notification in question on the ground of *ultra vires* the Act, as narrowly interpreted by the Court.[77]

(iv) The Legislature cannot delegate to the Executive the power to make *exemptions* from the operation of an Act, without laying down the policy for the guidance of the latter.[96]

But a greater latitude has been allowed in respect of taxing legislation, on the principle that it is always open to the State to tax certain classes of goods and not to tax others.[97]

(v) Prescribing an offence and its punishment is essentially a legislative act.[98-99]

A Legislature may delegate the power of rule-making and provide the penalty for violation of the rules. But instead of prescribing the precise penalty, it may lay down the limit or the standard, leaving it to the administrative body to prescribe the penalty within such limits or in accordance with the standard laid down.[99]

91. *In re Delhi Laws Act,* (1951) S.C.R. 747.

92. *Vanarsi* v. *State of M.P.,* A. 1958 S.C. 909 (S. R. Das, C.J., Venkatarama Aiyar, Das, Sarkar, J.J; Bose, J., did not concur).

93. *Rajnarain* v. *Patna Administration,* (1955) 1 S.C.R. 290.

94. *Arnold Rodricks* v. *State of Maharashtra,* A. 1966 S.C. 1788 (1796); *State of Madras* v. *Gannon Dunkerley,* (1959) S.C.R. 379 (435); *Mahomedalli* v. *Union of India,* A. 1964 S.C. 980 (983); *Ghulam* v. *State of Bombay,* A. 1962 S.C. 97.

95. *Babu Ram* v. *State of Punjab,* A. 1979 S.C. 1475 (para. 14); *Edward Mills* v. *State of Ajmer,* A. 1955 S.C. 25 (32); *Bangalore Woollen Mills* v. *Corpn.,* A. 1962 S.C. 1263 (1266).

96. *Dwarka Prasad* v. *State of U.P.,* A. 1954 S.C. 224.

97. *Vanarsi* v. *State of M.P.,* A. 1958 S.C. 909.

98. *U.S.* v. *Cohen,* (1921) 255 U.S. 81; *Fahey* v. *Malonee,* (1947) 332 U.S. 345.

99. *D.N. Ghose* v. *Addl. Sessions Judge,* (1950) 63 C.W.N. 147 (156); *Bachan Singh* v. *State of Punjab,* A. 1980 S.C. 898 (paras. 175-76).

The power 'to remove difficulties'.

While entrusting an administrative authority to administer an Act, the Legislature may sometimes empower that authority to remove any difficulty that might arise in course of such administration, by an administrative order.[100]

A provision like this becomes necessary particularly when the Legislature extends a law to a new area which was so long governed by some other law or where the conditions prevailing are not identical with those which the Legislature had in its mind at the time of enacting the parent Act.[1-2] It may also be used in a statute creating a new statutory authority.

S. 45(10) of the Banking Companies Act, 1949, offers an illustration of this power :

"If any difficulty arises in giving effect to the provisions of the scheme, the Central Government may by order do anything not inconsistent with such provisions which appears to it necessary or expedient for the purpose of removing the difficulty."

Such a provision may also be necessary to facilitate the transition from one legal or constitutional system to another, e.g., in s. 310(1) of the Government of India Act, 1935 and Art. 392(1) of the Constitution of India. The latter provision is—

"The President may, for the purpose of removing any difficulties, particularly in relation to the transition from the provisions of the Government of India Act, 1935, to the provision of this Constitution, by order direct that this Constitution shall, during such period as may be specified in the order, have effect subject to such adaptations, whether by way of modification, addition or omission, as he may deem to be necessary or expedient :

Provided that no such order shall be made after the first meeting of Parliament duly constituted under Chapter II of Part V."

It is evident that in the exercise of the power to remove difficulties, the question of *ultra vires* is bound to arise because if what the administrative authority does cannot be held to be a 'removal of difficulties', the act would be *ultra vires* the statutory provision which conferred the power.

The following propositions may be noted, in this context :

I. In the absence of any statutory limitations, it is the authority upon whom the Legislature has conferred this power, who is to determine whether any 'difficulty' has arisen, in the matter of giving effect to the Act, for which it is necessary for the authority to make an order or to give a direction.[1]

But his determination is not a matter of subjective satisfaction and, therefore, not final.[2] It would be open to judicial review, objectively, on the grounds of *ultra vires*[2-3] and *mala fides*.[4]

II. In the absence of any statutory limitations, the power to remove the difficulty may be exercised retrospectively, so as to remove the difficulty from the time it arose.[1]

But where the Act itself made no provision for imposing a liability with retrospective effect, retrospective effect could not be given to a Removal of Difficulty Order where such effect would change the very scheme of the Act and impose a liability upon an assessee for past years, which could be done only by the Legislature itself.[2]

100. *Gammon* v. *Union of India*, A. 1974 S.C. 960 (para. 38).
1. Cf. *C.I.T.* v. *Ramgopal Mills*, A. 1961 S.C. 338 (341).
2. *Sinai* v. *Union of India*, A. 1975 S.C. 797 (paras. 47, 49, 61, 62, 66) C.B.
3. *Straw Products* v. *I.T.O.*, A. 1968 S.C. 579 (paras 14, 19)—7-Judge Bench.
4. *Mahalaxmi Mills* v. *C.I.T.*, (1964) 1 S.C.J. 23.

III. No order for the purpose of 'removal of difficulty' could be made by the administrative authority after the difficulties arising out of the application of the Act had been over and there was no further difficulty to be overcome.[3]

IV. Until the Supreme Court decision in *Jalan Trading Co.* v. *Mill Mazdoor Sabha,*[5] it was understood that the conferment upon the Executive of such power to remove difficulties in the matter of application of a statute did not constitute an abdication of essential legislative powers by the Legislature, provided the power was confined to facilitate the application of the statute and did not include any power to *modify* its essential principles.[6] It was also adverted to in several Supreme Court[7] decisions without questioning the validity of such delegation.

But, in the case of *Jalan Trading Co.*[5] the Supreme Court has, by a majority of 3 to 2 (Shah, Wanchoo & Sikri, JJ.), struck down s. 37 of the Payment of Bonus Act, 1965, as constituting excesssive delegation. It says—

"If any difficulty or doubt arises *in giving effect to the provisions of this Act,* the Central Government may, by order published in the Official Gazette, make such provision, *not inconsistent with the purposes of this Act* as appears to it to be necessary or expedient for the removal of the difficulty or doubt; and *the order of the Central Government shall be final.*"

The majority[5] seems to have been influenced by the fact that the power of the Government was made 'final', and also by the fact that the Government was empowered to *alter* the provisions of the Act itself, which could be done only by the Legislature itself :

"If in giving effect to the provisions of the Act any doubt or difficulty arises normally, it is for the Legislature to remove that doubt or difficulty. Power to remove the doubt or difficulty *by altering the provision of the Act would in substance amount to exercise of legislative authority* and that cannot be delegated to an executive authority."[1]

But, on principle, where the Legislature has laid down the policy and the essential principles in the statute, and the power is exercised by the Executive to adapt the provisions of the statute to the circumstances which could not be envisaged by the Legislature, without modifying the principles laid down by the Legislature, such delegation would not appear to be different from the case of subordinate legislation where the Executive is empowered to fill in the details of a statute for the purpose of a proper administration in particular circumstances. Of course, if the Executive seeks to modify or transgress the principles or policy laid down by the statute, the order of the Executive would be liable to be struck down by the courts as *ultra vires*[8] or *mala fide*.[9] It cannot, therefore, be said to be a case of uncharted delegation.

The real trouble in the *Jalan Trading case*[5] was that Parliament sought to preclude judicial review of the subordinate legislation by making the order of the Central Government 'final'. But even then, it would not alter the legal situation; for, as will be explained more fully hereafter, judicial review on the ground of *ultra vires,* which includes both excess and abuse

5. *Jalan Trading Co.* v. *Mill Mazdoor Sabha,* A. 1966 S.C. 691 (703) (known as the 'Bonus case').

6. Cf. *Rajnarain* v. *Patna Administration,* A. 1954 S.C. 569 (575).

7. *C.I.T.* v. *Ramgopal Mills,* A. 1961 S.C. 338; *Mahalaxmi Mills* v. *C.I.T.,* (1964) 1 S.C.J. 23.

8. *Lachmi Narain* v. *Union of India,* A. 1976 S.C. 714.

9. *Mahalaxmi Mills* v. *C.I.T.,* (1964)1 S.C.J. 23.

of statutory power, cannot be excluded by the Legislature by engrafting any statutory clause of 'finality'.[10]

The majority view in *Jalan Trading case,*[5] it is submitted, deserves further consideration, particularly because the Legislature had, in s. 37, assumed that the Executive would make only *intra vires* orders, by providing that they shall "not be inconsistent with the purposes of this Act".

It is gratifying to note that since the foregoing comment at p. 29 of the 1st Edition of the book, it has been laid down by the Supreme Court that unless there is any change made in the fundamental scheme of the Act or any new concepts are introduced,[11] it would be competent for the Executive, in its Removal of Difficulty Order, to make modifications which would make the Act workable and to give effect to it, but no further.[11]

Ascertainment of the legislative policy.

1. The legislative policy has to be ascertained by the court from the provisions of the Act, including its Preamble,[12] and, where the impugned Act replaces another Act, the Court may even look into the provisions of that Act in order to determine whether the Legislature has conferred unguided power to the Executive.[13]

Even the *history of the legislation,* read with the statute, as a whole, has been considered sufficient for the purpose.[14]

Further, the very nature of the body to which the power has been delegated is also a factor to be taken into consideration in determining whether the guidance offered is sufficient.[15]

In short, in order to meet the challenge of excessive delegation, it is not necessary that the guidelines offered by the Legislature, must be contained in the very section which made the delegation.[16]

2. Once it is held that the Legislature has offered sufficient guidance, the Courts cannot interfere on the ground of excessive or unconstitutional delegation.[15]

Adequacy of the standard laid down by the Legislature.

Though decisions are uniform on the point that delegation of power to the administrative authority is constitutional only if the Legislature lays down the standards to guide the administration,[17] they are not uniform as to the adequacy of the standards that the Legislature is constitutionally bound to provide.

10. *Radha Kishan* v. *Municipal Committee,* A. 1963 S.C. 1547 (1551); *Collector of Kamrup* v. *Kamakhya,* (1964) S.C. [C.A. 412/62]; *Kamala Mills* v. *State of Bombay,* A. 1965 S.C. 1942 (1948).

11. *Sinai* v. *Union of India,* A. 1975 S.C. 797; *State Bank* v. *Goodfield Plantations,* A. 1980 S.C. 650.

12. *Vasantlal* v. *State of Bombay,* (1961) S.C.J. 394 (397); *State of M.P.* v. *Champalal,* A. 1965 S.C. 124 (128); *Union of India* v. *Bhanmal,* A. 1960 S.C. 475 (479); *Makhan Singh* v. *State of Punjab,* A. 1964 S.C. 381 (401); *State of Nagaland* v. *Ratan Singh,* A. 1967 S.C. 212 (223).

13. *Bhatnagar* v. *Union of India,* A. 1957 S.C. 478 (486).

14. *D.C.G.M.* v. *Union of India,* A. 1983 S.C. 937 (para. 32).

15. *Municipal Corpn.* v. *Birla Cotton Mills,* A. 1968 S.C. 1232 (1244); *Mahomedalli* v. *Union of India,* A. 1964 S.C. 980 (983).

16. *Bhandara D.C.B.* v. *State of Maharashtra,* (1993) Supp. (3) S.C.C. (para. 3)—3 Judges.

17. *Panama Refining Co.* v. *Ryan,* (1935) 293 U.S. 388; *Schechter Poultry Corpn.* v. *U.S.,* (1935) 295 U.S. 495.

I. *Defence and Emergency legislation.*

(A) *U.S.A.*—It would appear from the decision in *Lichter* v *U.S.*[18] that the Court is inclined to permit a greater amount of discretion to the administrative authority in times of *war,* so that the very existence of the nation and the Constitution may not be defeated. In this case, the Federal Renegotiation Act, 1942, authorised the Secretary of each Department to renegotiate the contract price and to recover the balance, whenever in his opinion it appeared that the contract price payable under any contract with the Government represented "excessive profits". The statute contained no definition of excessive profits. Nevertheless, the Supreme Court held that there was no unconstitutional delegation of legislative authority because—

(i) "A constitutional power implies a power of delegation of authority *sufficient to effect its purpose.* This power is specially significant in connection with constitutional 'war powers' under which the exercise of broad discretion as to methods to be employed may be *essential to an effective* use of its war powers by Congress."[18] In the instant case,[18] the vesting of a discretion in the executive authority was essential to meet the situation brought about by the war, and the delegation, therefore, was impliedly sanctioned by the 'war power' expressly granted to Congress by the Constitution.

(ii) "The statutory term 'excessive profits', in its context, was a sufficient expression of legislative policy and standards to render it constitutional."[19] The Supreme Court pointed out that the expression "excessive profits" had, in 1942, acquired a definite meaning (and, hence, no statutory definition was necessary in 1942), for taxation of excess profits had been a familiar legislative practice since the First World War and had been upheld by the Supreme Court in many cases since 1924.[20]

(B) *England.*—The problem of defence is similar in all countries and has to be met in the same way, irrespective of the nature of the political system.

In *England,* during World War I, the Defence of the Realm Consolidation Act, 1914, was passed, giving uncharted power to the Executive to make regulations, by s. 1(1) which was as follows—

"His Majesty-in-Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm ....."

Similar power was conferred by the Defence of India Act, 1939, and the Defence of India Act, 1962, enacted in view of the Chinese aggression contains a similar blanket provision in s. 3(1)—

"The Central Government may, by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community."

The question of the validity of the Regulations made under the Act of 1914 was raised in *England* in *R.* v *Halliday.*[21] The point for decision in the case which went on appeal to the House of Lords was whether Regulation 14B, which authorised detention without trial, was *ultra vires* or authorised by the power conferred by the Act. The question if it was permissible for

18. *Lichter* v. *U.S.,* (1947) 344 U.S. 743. [See also *Woods* v. *Miller,* (1948) 333 U.S. 138].

19. Of the various reasons assigned by the Supreme Court in support of the impugned delegation, this is by far the strongest, for, if owing to legislative practice, a word had acquired a settled connotation, there was no need of defining it and the standard cannot, in such a case, be said to be insufficient.

20. *Dayaton-Goose R. Co.* v. *U.S.,* (1024) 263 U.S. 456.

21. *R.* v. *Halliday,* (1917) A.C. 260 (H.L.).

Parliament itself to confer such unlimited power could not be raised in *England,* as there was no constitutional limitation upon the legislative competence of Parliament (p. 29, *ante*). Lord Finlay, who spoke for the majority, referred to the question in one sentence—

"It is beyond all dispute that Parliament has power to authorise the making of such a regulation."

Lord Shaw, in the minority, pleaded vehemently for a strict construction of the statute and an effective application of the doctrine of *ultra vires* as the law imposed restrictions upon individual liberty, but did not question the competence of Parliament from the standpoint of excessive delegation.[21]

(C) *India.*—Similarly, in *India,* prior to the Constitution, there could not be any challenge to an Act on the ground of an unconstitutional delegation, so that in cases where the power under the Defence of India Act, 1939, was challenged, it was on the ground of *ultra vires* of the rules made and not the validity of the delegation itself.[22] There is little doubt that the Courts would similarly view the need for delegation of legislative power for the purpose of ensuring elasticity of measures required to prepare for an effective defence, also under the Constitution.[23]

(i) S. 3 of the Defence of India Act, 1962, provided—

"3. (1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life or the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may empower any authority to make orders providing for all or any of the following matters, namely:—

* * * *

(15) Notwithstanding anything in any other law for the time being in force—

(i) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain (the authority empowered to detain not being lower in rank than that of a District Magistrate) suspects, on grounds appearing to that authority to be reasonable, of being of hostile origin or of having acted, acting, being about to act or, being likely to act, in a manner prejudicial to the defence of India and civil defence, the security of the State, the public safety or interest, the maintenance of public order, India's relations with foreign States, the maintenance of peaceful conditions in any part or area of India or the efficient conduct of military operations, or with respect to whom that authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner."

The contention that by conferring the power under s. 3(2)-(15)(1), Parliament had abdicated its essential legislative power was negatived by the Supreme Court on the ground that the legislative policy behind the statute was clear not only from its preamble which stated that it was enacted "to provide for special measures to ensure the public safety and interest, the defence of India...". but also sub-sec (1) of s. 3 itself which made it clear that the rule-making power was to be exercised with that object in view.[23]

(ii) The preamble of the Essential Supplies (Temporary Powers) Act, 1946, stated that it was intended to provide for the continuance, during a limited period, of powers to control the production, supply and distribution of and trade

22. Cf. *Emp.* v. *Sibnath,* A. 1945 P.C. 156.
23. *Makhan Singh* v. *State of Punjab,* A. 1964 S.C. 381 (400).

and commerce in certain commodities which were deemed to be essential. Such commodities were specified in section 2 of the Act, and section 3(1) provided—

"The Central Government so far as it appears to it to be necessary or expedient for maintaining or increasing the supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, may by order provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein..."

Held, the delegation made by section 3(1) to the Central Government was not excessive or unconstitutional inasmuch as the preamble and the body or the section sufficiently formulated the legislative policy and the subordinate authority to whom the power to make an order was delegated was to exercise that power within the framework of that policy.[23] In other words, the Legislature had declared its decision that the commodities in question were essential for the maintenance and progress of national economy and it had also expressed its determination that in the interest of national economy it was expedient that the supply of the said commodities should be maintained or increased as circumstances may require and the commodities should be made available for equitable distribution at fair prices. The concept of 'fair prices' introduced by the Legislature gives sufficient guidance to the Central Government in prescribing the price structure for commodities from time to time. The delegation cannot, therefore, be held to be uncanalised or unguided.[24]

II. *Foreign Affairs.*

(A) *U.S.A.*—It has been acknowledged that, in *foreign affairs,* the President should have a greater "degree of discretion and freedom from statutory restriction which would not be admissible *were domestic matters alone involved* ..... He, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in times of war". It would, therefore, be unwise for Congress "in this field of governmental power to lay down narrowly definite standards by which the President is governed.[25] Thus, the Court upheld a Resolution of Congress by which it empowered the President to make a proclamation making it *unlawful* to sell, except under such limitations and exceptions as the President prescribes, any arms or ammunitions of war, "if the President finds that the prohibition of the sale of arms.....may contribute to the *re-establishment of peace* between those countries ....".[25]

(B) *India.*—The above principles would be applicable in India.

III. *Social legislation.*

(A) *U.S.A.*—(a) From the earlier decisions in *Panama Refining Co.*[26] and *Schechter cases,*[27] it would seem that the Supreme Court would take a stricter view in the sphere of social and economic legislation. But in all latter cases, the Court has taken a generous view of broad standards in *regulatory* legislation, taking cognizance of the complexity of modern economic and social problems :

"The judicial approval accorded these 'broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems. The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation.

24. *Union of India* v. *Bhanamal,* A. 1960 S.C. 475 (479); *K.S.E. Bd.* v. *Indian Aluminium Co.,* A. 1976 S.C. 1031.

25. *U.S.* v. *Curtis-Wright Corpn.,* (1936) 299 U.S. 304. [In this connection, see also *Hampton* v. *U.S.,* (1928) 276 U.S. 394, which was concerned with foreign competition].

26. *Panama Refining Co.* v. *Ryan,* (1935) 293 U.S. 388.

27. *Schechter* v. *U.S.,* (1935) 295 U.S. 495.

Necessity, therefore, fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general *policy*, the public *agency* which is to apply it and the *boundaries* of this delegated authority."[28]

Thus,

(i) In supporting a law authorising an Administrator to make regulations *fixing 'fair and equitable'* prices as 'will effectuate the purposes of this Act', viz., 'to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents', the Supreme Court observed—

"Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain *whether the will of Congress has been obeyed*, would we be justified in overriding its choice of means for effecting its *declared purpose of preventing inflation*."[29]

(ii) This relaxation of the 'standard' requirement has not been confined to wartime legislation. In *Fahey* v. *Mallonee*, the validity of s. 5(d) of the Home Owners' Loan Act, 1933, was challenged on the ground that it empowered the Federal Home Loan Bank Board to prescribe by regulations the terms and conditions upon which a conservator might be appointed for a federal savings and loan association. The Supreme Court, speaking through Justice Jackson, held that no express legislative standard to guide the exercise of the delegated power by the Board had been provided by the Act. Nevertheless, the Court upheld the delegation in these words :

"The provisions are *regulatory*..... A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible ....."[30]

(iii) The same attitude has been taken towards an Act[31] authorising the regulation of radio broadcasting, the standard provided being public interest, convenience or necessity.[32] It has been held that this standard is "as concrete as the complicated factors for judgment in such a field of delegated authority permit",[33] it has to be interpreted not so as to confer an unlimited power,[34] but by its context,—by the nature of radio transmission and reception, by the scope, character and quality of services,[35] to mean the most effective use of the radio from the standpoint of the public.[32]

(b) On the other hand, the Court would exact a more definite and elaborate standard in penal provisions,[36] as distinguished from regulatory measures.

In *Fahey* v. *Mallonee*,[30] the Court observed that "a discretion to make regulations to guide supervisory action in such matters" (as banking, which is 'one of the longest regulated and most closely supervised of public callings') "may be constitutionally permissible while it might not be allowable to authorise creation of *new crimes in uncharted field*".[30]

(c) A trend towards insisting upon adequate standards where rights guaranteed by the 14th Amendment are likely to be affected by the exercise

28. *American Power Co.* v. *Securities Commn.*, (1946) 329 U.S. 90 (104-105).
29. *Yakus* v. *U.S.*, (1944) 321 U.S. 414. [See also *Bowles* v. *Willingham*, (1944) 321 U.S. 503].
30. *Fahey* v. *Mallonee*, (1947) 332 U.S. 245 (250).
31. The Federal Communications Act, 1934.
32. *National Broadcasting Corpn.* v. *U.S.*, (1943) 319 U.S. 190 (216).
33. *F.C.C.* v. *Pottsville Broadcasting Co.*, (1940) 309 U.S. 134 (138).
34. *N.Y. Securities Co.* v. *U.S.*, (1932) 287 U.S. 12 (24).
35. *F.C.C.* v. *Nelson Bros.*, (1932) 289 U.S. 266 (285).
36. *Lanzetta* v. *New Jersey*, (1939) 306 U.S. 451; *U.S.* v. *Cohen*, (1921) 255 U.S. 81.

of the delegated power is to be found in the case of *Kent* v. *Dulles*,[37] where it has been held that where a citizen's liberty to travel (whether within the country or to a foreign country) is concerned, any delegation of the power must be subject to adequate standards, and such delegated authority will be strictly construed. The Immigration and Nationality Act of 1952 provides that, after a prescribed Proclamation is made by the President it shall be "unlawful for any citizen of the United States to depart from, or enter, the United States unless he bears a valid passport", "subject to such limitations and exceptions the President may authorise and prescribe". In pursuance of this power, the President made an Order providing that—

"The Secretary of State is authorised in *his discretion* to refuse to issue a passport."

The Supreme Court held that the statute would not be so construed as to infer that Congress gave the Secretary of State *'unbridled discretion* to grant or withhold' passport to a citizen, whose liberty to travel to a foreign country was guaranteed by the 'Due Process clause'. A refusal of passport by the Secretary of State to a citizen, merely because of his 'beliefs and association' unconnected with any unlawful conduct was, accordingly, unauthorised by the statute and hence, invalid.[37]

(d) In any case, it is settled in the *U.S.A.* that the test of adequacy of the standard is whether it is 'intelligible'[38] and that no set formula can be prescribed for the purpose of testing whether the Legislature has laid down an adequate standard in any given case. The standards prescribed are to be read *in the light of the conditions* to which they are to be applied.[39] In short, the test applied by the Courts to determine the adequacy of the standard is one of 'common sense and the internal necessities of governmental co-operation'.[38]

"They derive much meaningful content from the *purpose* of the Act, its *factual background and the statutory context* in which they appear."[28]

From the test of the standard supplied in the Act itself, the Court has now shifted its inquiry to the 'purpose of the Act' and the 'context of the provision in question'.[32]

Again, though, generally, "procedural safeguards cannot validate unconstitutional delegation",[40] the Court has, in fact, taken into consideration the nature of the proceedings in determining the constitutionality of the delegation and upheld apparently scanty guides as sufficient where the statute provides for administrative decision after hearing[34] or for judicial review,[41] and the like, e.g.,

(i) "Just and reasonable" rates for sale of natural gas,[42] for the services of commission agents.[43]

(ii) "Public interest, convenience or necessity" in establishing rules and regulations under the Federal Communications Act.[32]

(iii) "Fair return" or "Fair value" of property for price-fixing measure; "fair and reasonable rent" for premises, with judicial review.[44]

37. *Kent* v *Dulles*, (1957) 357 U.S. 116.
38. *Hampton R. Co.* v. *U.S.*, (1928) 276 U.S. 394 (409); *Sunshine Anthracite Co.* v. *Adkins*, (1940) 310 U.S. 381 (398).
39. *Lichter* v. *U.S.*, (1947) 334 U.S. 742 (785).
40. *U.S.* v. *Royal Co-operative*, (1939) 307 U.S. 533 (576).
41. *Levy Leasing Co.* v. *Siegel*; (1922) 258 U.S. 242 (243).
42. *Fed. Power Commn.* v. *Hope Gas Co.*, (1943) 320 U.S. 591 (600).
43. *Tagg Bros.* v. *U.S.*, (1930) 280 U.S. 420 (431).
44. *Sunshine Anthracite Co.* v. *Adkins*, (1940) 310 U.S. 381 (398).

(iv) "Necessary for the public health or safety" for the purpose of making public health regulations by a Board of Health.[45]

The progress of delegated legislation has, in fact, been accelerated by the change in the attitude of the Supreme Court towards this necessary evil. It is difficult to overlook the fact since the three decisions[46] of the *ante*-New Deal period, the Supreme Court has not annulled any delegation of legislative power by Congress as excessive, outside the sphere of fundamental rights.[47] Having laid down that delegation could not be constitutional unless the Legislature prescribes a standard for the guidance of the rule-making authority,[46] the Court has relaxed its concept of that standard almost to a vanishing point. Thus in the *Lichter case,*[48] Justice Burston observed—

"It is not necessary that Congress supply administrative officials with a *specific* formula for their guidance in a field where flexibility and the adaptation of the Congressional policy to infinitely variable conditions constitute the essence of the program."[48]

(B) *India.*—In the sphere of social or welfare legislation[49] decisions in *India,* as in the U.S.A., show a tendency towards a relaxation[49] of the attitude of the Supreme Court towards delegated legislation, by finding out the requisite policy or standard from apparently inadequate materials. Thus,

(i) After defining the conditions of a 'ceiling area' and an 'economic holding' in ss. 5-6, the Bombay Tenancy and Agricultural Lands (Amendment) Act, 1956, provided in s. 7—

"Notwithstanding anything contained in ss. 5 and 6, it shall be lawful for the State Government, if it is satisfied that it is expedient so to do in the public interest to vary, by notification.....the acreage.....of the ceiling area or economic holding....., having regard to—

(a) the situation of the land,

(b) its productive capacity,

(c) the fact that the land is located in a backward area, and

(d) *any other factors* which may be prescribed."

It was contended that the words 'any other factors' gave uncharted discretion to the Government to prescribe factors for the benefit of particular individuals or groups on extraneous considerations. This contention was negatived by the Supreme Court, observing that the policy of the Act was to be found from the Preamble which stated that it was to amend a previous Act of 1948, and this Act of 1948 sets out the objectives to be achieved. The power to vary the ceiling area and economic holding was also governed by the factors laid down by the Legislature in Cls. (a)-(c). The words "any other factors" "would be factors *ejusdem generis* to the factors mentioned earlier in the section and could not be *any and every factor* which crossed the mind of the Executive. The power was also circumscribed by the general condition that it must be exercised "in the public interest". Of course, the determination of the public interest was left to the subjective satisfaction of the Government but if the power was abused, the notification so issued would be liable to be invalidated on that ground but the law could not be invalidated as constituting an excessive delegation of the legislative power, on the ground that the subjective power could be abused.[50]

45. *Jacobson* v. *Massachussetts,* (1905) 197 U.S. 11.

46. *Panama Refining Co.* v. *Ryan,* (1935) 293 U.S. 388; *Schechter* v. *U.S.,* (1935) 295 U.S. 495; *Carter* v. *Carter Coal Co.,* (1939) 298 U.S. 238 (311).

47. Cf. *Kent* v. *Dulles,* (1957) 357 U.S. 116.

48. *Lichter* v. *U.S.,* (1948) 334 U.S. 742 (785).

49. *Vasanlal* v. *State of Bombay,* A. 1961 S.C. 4; *Basant* v. *Eagle Rolling Mills,* (1964) 6 S.C.R. 913 (918); *Jyoti Pershad* v. *Union Territory,* A. 1961 S.C. 1602; *Registrar* v. *Kunjabinu,* A. 1980 S.C. 350 (354); *State of U.P.* v. *R.P.Co.,* A. 1988 S.C. 1737; *Parasuraman* v. *State of T.N.,* (1989) 4 S.C.C. 683.

50. *Sri Ram* v. *State of Bombay,* A. 1959 S.C. 459 (474).

(ii) Sec. 6 of the Bombay Tenancy and Agricultural Lands Act, 1948, provided as follows :—

"(1) Notwithstanding any agreement, usage, decree or order of a Court or any law, the maximum rent payable by a tenant for the lease of any land shall not in the case of an irrigated land, exceed one-fourth, and in the case of any other land, exceed one-third of the crop of such land or its value .....

(2) The Provincial Government may, by notification in the Official Gazette, fix a lower rate of the maximum rent payable by the tenants of land situate in any particular area or may fix such rate on any *other suitable basis* as he thinks fit."

Rejecting the contention that sub-sec. (2) of the above section suffered from the vice of the excessive delegation inasmuch as it conferred unfettered and uncanalised power upon the Provincial Government to prescribe a lower rate of the maximum rent in respect of particular areas to the extent of virtually amending sub-section (1), the majority of the Supreme Court *held* that the power was not uncanalised as the legislative policy was evident from the Preamble as well as the different sections of the Act. The Preamble showed that the object of the Act was to improve the economic and social conditions of peasants and the material provisions of the Act aimed at giving relief to the tenants by fixing the maximum rent payable by them and by providing for a speedy machinery to consider their complaints about the unreasonableness of the rent claimed from them by their respective landlords. Section 12 thus provided that on an application made by the tenant or the landlord, the Mamlatdar had to determine the reasonable rent under section 12(3), having regard to the factors specified in that sub-section, e.g., the rental values of the lands used for similar purposes in the locality; the profits of agriculture of similar lands in the locality; the prices of crops and commodities in the locality.

Having thus declared the policy, the Legislature realised that a large number of tenants in the State were poor and ignorant and that many of them might not be able to make individual applications for the fixation of a reasonable rent under sec. 12. That is why it was thought necessary to confer upon the Provincial Government the power to fix a lower rate of the maximum rent payable by tenants in particular areas. In a sense what could be done by the Mamlatdar in individual cases could be achieved by the Provincial Government in respect of a large number of cases covered in a particular area. Further, in fixing the lower rate, the Provincial Government was to be guided by the legislative policy and also the factors for determining the reasonable rent as specified in sec. 12(3).

As regards the contention that the words "suitable to the area" were vague, the majority observed that the relevant conditions of agriculture would not be uniform in different areas and the problem of fixing a reduced maximum rent payable in the respective areas would have to be tackled in the light of the special features and conditions of that area and that is why a certain amount of latitutde had to be left to the Government in fixing the lower rate of the maximum rent and the word 'suitable' was not vague inasmuch as it referred to suitability of the area in question.[51]

(iii) Section 3 of the United Provinces Industrial Disputes Act, 1947, provided as follows :

"If, in the opinion of the State Government, it is necessary or expedient so to do for securing the public safety or convenience, or the maintenance of public order or

51. *Vasanlal* v. *State of Bombay,* (1961) 1 S.C.R. 341 (Sinha, C.J., Kapur, Gajendragadkar and Wanchoo, JJ.).

Subba Rao, J., dissented primarily on the ground that the word 'suitable' was altogether vague and that the situation of a land in a particular area cannot in itself afford a basis for fixing a rate of lower maximum rent and also that the factors specified in sec. 12(3) which were intended to afford a guide to the Mamlatdar in fixing a reasonable rent could not be supposed to be a guide to the Provincial Government in fixing a lower rate of the maximum rent particularly when the reasonable rent determined by the Mamlatdar was expressly made subject to maximum rent fixed by the Government under sec. 6. In other words, if the reasonable rent determined by

supplies and services essential to the life of the community, or for maintaining employment, it may, by general or special order, make provision—

(c) for appointing industrial courts...."

Held, that in enacting section 3, the Legislature has laid down the *policy*, viz., the conditions under which it would be open to Government to make an order for the adjudication of industrial disputes by setting up industrial courts. After laying down the conditions on which the Government would so act, what was left to the Government was to set up the machinery by means of which the legislative policy which had been enacted in broad details in section 3 would be implemented. It was not a delegation of essentials of the legislative function, but only a delegation of the power to the Government to provide, by subordinate rules, the machinery for carrying out the purposes of the legislation. The provision of such subordinate rules relating to the powers of the industrial courts, the qualifications of persons constituting such courts, where they will sit and the like, were matters of detail and could not be said to be of the essence of the legislative function. Section 3 was not, therefore, unconstitutional on the ground of excessive delegation.[52]

(iv) S. 26(1) of the Bihar Shops and Establishments Act, 1954, provides—

"No employer shall dismiss or discharge from his employment any employee who has been in such employment continuously for a period of not less than six months except for a reasonable cause and without giving such employee at least one month's notice or one month's wages in lieu of such notice :

Provided that such notice shall not be necessary where the services of such employee are dispensed with on a charge of *such misconduct as may be prescribed by the State Government*, supported by satisfactory evidence recorded at an inquiry held for the purpose."

The Supreme Court held that there was sufficient guidance in the foregoing section, namely, that the State Government should prescribe those kinds of misconduct, which are generally known as 'major misconducts' in industrial law. The reasoning of the Court was as follows :

"The Legislature must have known that in industrial law misconduct is generally of two kinds, namely, (i) major misconduct justifying punishment of discharge or dismisal, and (ii) minor misconduct justifying lesser punishment, and that appears to be sufficient guidance to the State Government to prescribe by rule such misconduct as is major in nature and deserves punishment of discharge or dismissal."

The section was not, therefore, invalid on the ground of excessive delegation.[53]

(v) S. 4(1) of the Bhopal Reclamation and Development of Lands (Eradication of Kans) Act, 1954, provides—

"If the Government is of opinion that any area is infested with kans, it may,

---

the Mamlatdar was more than the maximum rent fixed by the Government on a suitable basis, the latter prevails over the former. In the opinion of Subha Rao, J., therefore, by sub-sec. (2) of sec. 6, the Legislature had, in effect, conferred arbitrary power on the Provincial Government without laying down any legislative standard almost in these words—

"I have fixed the maximum rent in respect of irrigated lands and other lands on the basis of a definite share of the crop of such lands but you can reduce that maximum rent on any basis you like."

52. *Swadeshi Cotton Mills* v. *State Industrial Tribunal*, A. 1961 S.C. 1381.

53. *Caltex* v. *Presiding Officer*, A. 1966 S.C. 1729 (1730-31).

[It is submitted that in order to save the impugned provision, the Court assumed what the Legislature itself might indicate, by using the words 'major misconduct' instead of 'such misconduct'. Secondly, the fact that from the rules actually framed, the Court found that only instances of major misconduct had been prescribed by the Government, and from this it was concluded that the Legislature had meant the same thing. It is submitted that if this reverse process of reasoning be adopted, in no case can a Court brand a statutory instrument as *ultra vires* nor a legislative provision as vitiated by excessive delegation. It was better to say that it was labour legislation and, therefore, the Court would not interfere.]

by notification declare such area, giving full particulars thereof, to be a kans area for the purposes of this Act."

The challenge to the above provision on the ground of excessive delegation has been repelled by the Supreme Court on the ground that the Preamble and long title of the Act made it clear that the enactment was one for the reclamation and development of lands by the eradication of *kans weed* in certain areas in the State. 'The area infested' is manifestly *not capable* of legislative definition but must obviously be left to the Executive to determine having regard to the intensity of the weed infestation and its distribution. Sufficient guidance has thus been offered by the Legislature to the Executive which is directed to carry out its mandate.[54]

IV. *Administrative organisation.*

A liberal attitude has been taken by *our* Supreme Court also with respect to legislation relating to administrative organisation, so as to save it from failure.

(i) S. 3(4) of the Bombay Commissioners of Divisions Act, 1958, provides as follows :

"The State Government may confer and impose on the Commissioner powers and duties under any other enactment for the time being in force and for that purpose may, by a notification...., add to or specify in the Schedule the necessary adaptations and modifications in that enactment by way of amendment; and thereupon—

(a) every such enactment shall accordingly be amended and have effect subject to the adaptations and modifications so made, and

(b) the Schedule to this Act shall be deemed to be amended by the inclusion therein of the said provision for amending the enactment.

There was a system of Divisional Commissioners in Bombay up to 1950 when it was abolished by the Bombay Commissioners (Abolition of Office) Act, 1950. By the impugned Act of 1958, the office of Commissioners was sought to be reintroduced. By sub-sec. (1) of s. 3 of the Act, the Commissioners were empowered, in the first instance, to exercise the powers conferred by the enactments included in the Schedule of the Act, and then sub-sec. (4) empowered the State Government to amend the Schedule to include other enactments, in order to confer power under those enactments also on the Commissioner. The validity of s. 3(4) was challenged on the ground that it constituted an abdication or excessive delegation of the functions of the Legislature in favour of the State Government. A 3 : 2 majority of the Supreme Court rejected this contention on a twofold ground :

(a) The Legislature had indicated its policy, namely, that such powers and duties should be conferred on the Commissioners as could be *appropriately discharged* by them.

(b) Since there was an office of Commissioner up to 1950, it was evident that only revenue and executive functions could be conferred upon the Commissioners.[55]

There is much force in the argument of the minority (Wanchoo & Shah, JJ.) that the power conferred by the impugned provision included the power of repealing what the Legislature itself provided, namely, to withdraw the powers conferred upon the Commissioner by the Legislature itself by a simple amendment of the Schedule by the Legislature and that this constituted an excessive delegation.[55]

(ii) Ss. 3-4 of the All India Services Act, 1954, provide as follows :

"3. (1) The Central Government may, after consultation with the Government of the States concerned, make rules for the regulation of recruitment and the conditions of service of persons appointed, to an all-India Service .....

4. All rules in force immediately before the commencement of the Act and applicable to an all-India Service shall continue to be in force and shall be deemed to be rules made under this Act."

It was urged that s. 3(1) did not lay down any legislative policy at all and

54. *State of M.P.* v. *Champalal*, A. 1965 S.C. 124 (128).

55. *Arnold Rodricks* v. *State of Maharashtra*, A. 1966 S.C. 1788 (1795, 1804).

delegated uncharted power to make any rules that the Government might choose. This contention was negatived by the Supreme Court on the ground that the legislative policy was determined by the mere adoption of the existing rules in s. 4 and that section offered the standard to the Central Government in its function of adding to, varying or amending those rules.[56]

Non-essential functions may be delegated.

Once the Legislature has discharged its essential function by declaring the legislative policy, it is permissible for it to delegate to an administrative authority *ancillary* or *subordinate* powers which are deemed to be necessary for carrying out that policy or the purpose of the Act.[57] Thus,

(i) The power to *extend* the duration of a statute may be delegated by the Legislature.[58]

(ii) There is no unconstitutional delegation where the Legislature permits the Executive, at its discretion, to *adapt* (with incidental changes, such as name, place and the like) existing statutes and to *apply* them to a new area,—*without modifying* the policy underlying the statute.[59]

(iii) Once the essential legislative function is performed by the Legislature by declaring the policy, the extent of delegation is a matter for the discretion of the Legislature and the Court is not competent to say that the Legislature should not have gone beyond a certain limit,[59] or that it should have provided a different standard.[60]

(iv) A delegation cannot be held to be unconstitutional if the rules are required to be laid before Parliament before they are to come into force and Parliament has the power to amend, modify or repeal them.[56]

Permissible delegation in taxing legislation.

1. The power to impose and assess a tax is essentially a legislative function.[59]

2. On the other hand,—

The following are not 'essential legislative functions' and may be delegated: the power to select the persons on whom the tax is to be laid; the power to amend the schedule of exemptions;[61] the determination of the rates at which it is to be charged in respect of *different* classes of goods;[61] the choice of the particular tax suited to the purposes of the Act and within the competence of the Legislature concerned.[62]

3. There has been a great controversy on the question whether the power to fix the *rate* of a tax can be delegated.

Rate of taxation.

(a) Where the Legislature fixes a *maximum* rate for the imposition (e.g., a cess) and authorises the Executive to determine the rate not exceeding the maximum prescribed by the Legislature, according to the exigencies of the public revenue,[63] there is no unconstitutional delegation because by prescribing a maximum rate, the Legislature has laid down the policy.[63]

56. *Garewal* v. *State of Punjab*, 1959 (1) S.C.R. 792.

57. *Ghulam* v. *State of Bombay*, A. 1962 S.C. 97.

58. *Inder Singh* v. *State of Rajasthan*, A. 1957 S.C. 510, dissenting from *Jatindranath* v. *State of Bihar*, (1949) F.C.R. 595 [see p. 34, *ante*].

59. *Rajnarain* v. *Chairman, Patna Administration*, A. 1954 S.C. 569; (1955) 1 S.C.R. 290.

60. *Union of India*, v. *Bhanmal*, A. 1960 S.C. 475 (481).

61. *Banarsi Das* v. *State of M.P.*, A. 1958 S.C. 909 (913).

62. *Ram Bachan* v. *State of Bihar*, A. 1967 S.C. 1404 (para 8).

63. *Western India Theatres* v. *Municipal Corpn.*, A. 1959 S.C. 586.

(b) The question is whether the Legislature can delegate the function of fixing a rate, *without* prescribing a maximum or other standard for the guidance of the Legislature.

U.S.A.

A. In the U.S.A., the fixing of the rate of taxation is regarded as a legislative function and therefore the Legislature cannot delegate it to any other authority without providing *standards* to guide that authority.[64] If, however, the Legislature provides a rule or standard for fixing the rates, it can empower an administrative authority—(a) to mathematically deduce the rate from the facts and events referred to in the law;[65] (b) to revise the rate according to changing circumstances.[66]

India.

B. In *India,* after a long line of cases, the following propositions appear to be fairly settled :

i. It is permissible for the Legislature to delegate the power of fixing the rate of taxation to a local or other administrative body, provided the Legislature offers the policy or standard for the guidance of the subordinate authority.[67] It is not necessary that the Legislature must prescribe the maximum limit of taxation.[68-69]

ii. The attitude of the Court has, however, been relaxed on the question as to what guidance by the Legislature should be regarded as sufficient for the purpose :

The needs of the delegate itself[68, 70] have been considered sufficient guidance and limit for the fixation of the rate. Thus, it has been held that in the case of a municipality or other local authority, the local body would be authorised by the statute only to spend and to raise revenue 'for the purposes of the Act'.[71-72] Hence, when the Legislature simply authorises the local body to levy a specified tax 'for the purposes of the Act', the Legislature would be exonerated from the vice of excessive delegation.[70-71]

The same argument cannot, however, be advanced where the delegate is the State Government, whose needs are practically unlimited;[73] hence, in such a case, something more than the 'purposes of the Act' would be insisted upon by the Court,[70, 73] unless the State Government has taken over the function of fixing the rate on behalf of a municipality or other local body.[71] This comes to saying that the very nature of the delegate offers sufficient safeguard.[71]

iii. Sufficient guidance has also been held to be offered by the Legislature where it has laid down procedural safeguards for ensuring that the local body fixes a reasonable rate of taxation for the local area,[70] e.g.,

(a) by providing for consultation with the people of local area for the purpose of fixing the rate;[70, 74]

64. *Sunshine Anthracite Co.* v. *Adkins,* (1940) 310 U.S. 381.
65. *Michigan R. Co.* v. *Powers,* (1906) 201 U.S. 245.
66. *Hampton & Co.* v. *U.S.,* (1928) 276 U.S. 394.
67. *Meenakshi* v. *State of Karnataka,* A. 1983 S.C. 1283 (para. 12).
68. *Corp. of Calcutta* v. *Liberty Cinema,* A. 1965 S.C. 1107 (1118).
69. *Gulabchand* v. *Ahmedabad Municipality,* A. 1971 S.C. 2100 (para. 21).
70. *Municipal Corpn.* v. *B.G.S. Mills,* A. 1968 S.C. 1232 (paras. 27-29)—a seven-Judge Bench.
71. *Avinder* v. *State of Punjab,* A. 1979 S.C. 321 (para. 23).
72. *Western India Theatres* v. *Municipal Corpn.,* A. 1959 S.C. 586.
73. *Devi Das* v. *State of Punjab,* A. 1967 S.C. 1895.
74. *Municipal Bd.* v. *Raghuvendra,* A. 1966 S.C. 693 (paras. 13-14).

(b) by subjecting the rate to be fixed by the local body to the approval or sanction of the Government.[70,72,74]

4. Of course, if the delegation relates not to a 'tax' but to a 'fee', there is an implied maximum limit inasmuch as it will not be valid unless correlated to the expenses of the services rendered for which the fee is to be levied.[68]

5. There is no delegation of legislative authority where a Legislature lays down the principles for levying a tax but authorises the Executive to set up the machinery for collection of the tax.[75]

6. In general, in a taxing statute the conferment of wide discretion on the Government to regulate economic matters is tolerated by the Court and the Court would not interfere with the wisdom of the policy of the legislation.[76]

The power to allow exemptions.

In dealing with this topic, a distinction should now be noted between the delegation of the power to make rules and regulations for the purpose of providing for exemption in certain *classes* of cases and the conferment upon the Executive of the power to make *ad hoc* exemptions in particular cases.

(A) *Subordinate legislation providing for exemptions.* (i) There is no doubt that the power to lay down in what classes of cases exemptions would be allowed from the operation of a law is a legislative[77] and not an executive power. It may not, however, be possible for the Legislature to anticipate all the circumstances in which such exemption may be necessary and it is only the authority entrusted with the administration of the law which may be competent to ascertain the circumstances from experience gathered from the working of the law or similar laws. It has, accordingly, been acknowledged that if the Legislature lays down the *policy* of the law and the *standard* to be applied in its administration, the Legislature may authorise the Executive to make subordinate rules and regulations prescribing the classes of cases in which relief might be granted in order to properly effectuate the intention and policy of the Legislature.[78-79] This function is, in fact, one of subordinate legislation of 'filling up the details'.

(ii) As to the purposes for which the power to exempt may be delegated, there is no general limitation save *public interest*.[77] Subject to this limitation, the exemption may be absolute or conditional.[77] It may thus be used for regulating the economy, or to encourage or discourage the import or export of certain goods or for securing the social objectives of the State.[77]

(iii) In another case, the question was not clearly presented to the Court because it was the validity of the notification issued by the Government and not that of the Act which was challenged. In this case, s. 37(2)(xvii) of the Central Excises and Salt Act, 1944, empowered the Central Government to make rules to

"exempt any goods from the whole or any part of the duty imposed by this Act".

In exercise of this power the Central Government made rule 8 as follows :

75. *Chaudhury* v. *State of Bihar*, A. 1957 Pat. 40.
76. *Subhash* v. *U.O.I.*, (1993) Supp. (3) S.C.C. 323 (paras. 10, 15).
77. *Union of India* v. *Jalyan*, (1994) 1 S.C.C. 318 (paras. 21-23).
78. *Dwarka Prasad* v. *State of M.P.*, A. 1954 S.C. 224; *Irani* v. *State of Madras*, A. 1961 S.C. 1731.
79. *State of Bombay* v. *Balsara*, (1951) S.C.R. 682; *Registrar* v. *Kunjabmu*, A. 1980 S.C. 350 (para. 12).

"The Central Government may, from time to time, by notification in the Official Gazette, exempt, subject to such conditions as may be specified in the notification, any excisable goods from the whole or any part of the duty leviable on such goods."

The Court held that it could not be said that the rule suffered from the vice of excessive delegation inasmuch as, under s. 38, the rules made under the Act "shall have effect as if enacted in this Act".[80]

Of course, if such an extreme view is taken, it would be open to the Legislature to preclude any challenge on the ground of excessive delegation, by simply including in its Act a barring clause, such as 'as if enacted in this Act'. It should be pointed out that the challenge to the constitutionality of the Act, on the ground of unreasonableness, cannot be precluded by such barring clause.

(B) *Power to grant ad hoc exemptions.* Somewhat different considerations arise where a law empowers the administrative authority to grant *ad hoc* exemptions in particular cases, according to its discretion.

U.S.A.

The power to grant *ad hoc* exemption from a law is in the nature of a dispensing power, and should, therefore, be viewed with particular concern. It has been pointed out (*ibid.*) that in the U.S.A. the conferment of such power has been upheld in exceptional cases subject to two conditions :

(a) that the *nature* of the subject-matter to be regulated is such that it is practically impossible to anticipate and provide in specific terms for every exceptional case which may arise,[81] e.g., regulation of the construction and location of buildings;

(b) that the Legislature lays down a definite standard for the guidance of the administrative authority in the exercise of the power conferred.[82]

India.

In *India,* several cases of this nature have been dealt with by the Supreme Court.

(i) A Coal Control Order, made under the Essential Supplies Act, provided that

"no person shall stock, sell .... coal, except under a licence granted under this Order", and then laid down—"nothing.....shall apply to any person or class of persons exempted from any provision of the above sub-clause by the State Controller, to the extent of such exemption".

The Supreme Court held that this exemption clause constituted an unreasonable restriction on the freedom of business guaranteed by Art. 19(1)(g) inasmuch as the Control Order nowhere indicated what the grounds for exemption were and gave an unrestricted power to the Controller to apply the restrictive provisions of the restrictive Control Order to any particular case or not.[78]

It would seem from the judgment that the Court would have upheld the exemption clause if definite standards had been laid down in the Control Order giving an indication as to the cases or classes of cases where the power to grant exemption should be exercised.

(ii) Apart from the foregoing constitutional ground, the Act would be liable to be invalidated in case it lays down no policy or standard to guide the exercise of the delegated power.[83]

80. *Orient Paper Mills* v. *Union of India,* (1963) 1 S.C.A. 278 (285).
81. *Goreib* v. *Fox,* (1927) 274 U.S. 603; *Intermountain Rate Cases,* (1914) 234 U.S. 476.
82. *People* v. *Klinck Packing Co.,* (1915) 214 N.Y. 121.
83. *Hamdard Dawakhana* v. *Union of India,* A. 1960 S.C. 554 (see pp. 36, 37, *ante*).

The Court would, however, always try to save the legislation by discerning its policy by applying its liberal process,[84] taking into account a provision for laying the Rules before Parliament.[85]

In finding the policy in a social legislation, the Court may even call in aid facts of which judicial notice may be taken.[86]

(iii) Somewhat greater latitude is allowed in respect of taxing legislation, on the principle that it is always open to the State to tax certain classes of goods and not to tax others.[87]

Effects of excessive delegation.

I. Where, by a statutory provision, the Legislature delegates its essential legislative function or, in other words, goes beyond the limits of permissible delegation, the offending provision, or so much of it, if it is severable,[88] must be struck down as unconstitutional.[88-89]

It follows that, on the declaration[90] of such unconstitutionality of the statute, all subordinate legislation or administrative proceedings undertaken in pursuance of the power so delegated will also fail.[88,91-92]

II. But before holding a statutory provision as invalid on account of excessive delegation, the Court would narrowly construe it, if possible, so that it may not permit a delegation of the essential legislative function or any power to modify the policy of the legislation.[93]

Sub-delegation of legislative power.

Delegated legislation takes place when the Legislature delegates its law-making power relating to a subject-matter to another body or authority. When such authority *further delegates* that power to another body, it is an instance of 'sub-delegated legislation'.

Sub-delegation of legislative power, in any form, offends against the principles of the Rule of Law and Parliamentary Sovereignty in so far as it tends "to postpone the formulation of an exact and definite law and they encourage the taking of powers meanwhile in wider terms than may be ultimately required".[94] Nevertheless, some aspects of it have come to be tolerated for the same reasons which have led to the legitimation of delegated legislation.

Sub-delegated legislation may take place in two ways :

(a) The statute itself may, expressly or by implication,[95] authorise sub-delegation of the delegated authority. Thus, in *England,* s. 1(3) of the Emergency Powers (Defence) Act, 1939, authorised the Executive to issue

84. *Edward Mills* v. *State of Ajmer,* A. 1955 S.C. 25; *Mahomedalli* v. *Union of India,* A. 1964 S.C. 980; *Jalan Trading* v. *Mill Mazdoor Union,* A. 1967 S.C. 691.
85. *Nachana* v. *Union of India,* A. 1982 S.C. 1126.
86. *Punjab Tin Supply* v. *Central Govt.,* A. 1984 S.C. 87 (para 12).
87. *Banarsi v. State of M.P.,* A. 1958 S.C. 909 (913).
88. *Hamdard Dawakhana* v. *Union of India,* A. 1960 S.C. 554 (568).
89. Cf. *Harishankar* v. *State of M.P.,* (1955) 1 S.C.R. 380 (392).
90. *Jalan Trading* v. *Mill Mazdoor Sabha,* A. 1967 S.C. 691 (paras. 45, 88).
91. *Makhan Singh* v. *State of Punjab,* A. 1964 S.C. 381 (400-01).
92. *Barium Chemicals* v. *Company Law Bd.,* A. 1967 S.C. 295 (329).
93. *Rajnarain* v. *Patna Admn.,* (1955) 1 S.C.R. 290 (301, 303-04).
94. Report of the House of Commons Select Committee on Statutory Rules and Orders, quoted in Keeton's *Jurisprudence,* p. 68.
95. *Barium Chemicals* v. *Company Law Bd.,* A. 1967 S.C. 295 (306, 309).

Defence Regulations under the Act by Order in Council and further provided that these Regulations might empower 'such authorities, persons or classes of persons as may be specified in the Regulations to make orders, rules and bye-laws for any of the purposes for which such Regulations are authorised by this Act to be made'.[96]

(b) The delegate may sub-delegate power *without* statutory authority. Prima facie, *this* offends against the maxim *'delegatus non potest delegare'*,—a delegate cannot further delegate his delegated authority.[95]

Where the Legislature delegates a duty (say, legislative) to a statutory authority, that duty must be discharged by that very authority; he cannot transfer it to other authorities.[97]

1. *Where the statute itself authorises sub-delegation.*

(A) *England.*—Sub-delegation is valid if it is authorised by the enabling Act itself.[98-99]

The Natural Products Marketing (British Columbia) Act, 1936, enabled the Lieutenant-Governor-in-Council to set up a Central Marketing Board to establish or approve schemes for the control and regulation of transportation, marketing etc., of any natural products and to constitute marketing boards to administer the schemes and to vest in those boards the power to *fix* and collect licence fees. The Privy Council *held* that the delegation by the Legislature of legislative power to the Lieutenant-Governor and the authorisation of redelegation of that power by the Lieutenant-Governor to the Marketing Boards were both valid. Once it was established that the subject-matter of the legislation was within the legislative competence of the Provincial Legislature, it was competent to authorise the delegation or sub-delegation inasmuch as the power to delegate is inherent in a Legislature within the realm of its competency. The Privy Council observed—

"The third objection is that it is not within the powers of the Provincial Legislature to delegate so-called legislative powers to the Lieutenant-Governor-in-Council, or to give him powers *subversive of the rights* which the Provincial Legislature enjoys while dealing with matters falling within the classes or subjects in relation to which the Constitution has granted legislative powers. Within its appointed sphere the Provincial Legislature is as supreme as any other Parliament; and it is necessary to try to enumerate the innumerable occasions on which the Legislatures, Provincial, Dominion and Imperial, have entrusted various persons and bodies with similar powers to those contained in this Act."[99]

(B) *India.*—The principles formulated in regard to delegated legislation have been applied to test the validity of sub-delegated legislation. Thus, it has been held that where the Legislature has performed its essential duty by laying down the policy, it cannot only delegate the function of making *subordinate and ancillary* legislation but also empower the delegate to redelegate the function to sub-delegates who are specified in the statute itself.[100-1]

S. 3 of the Essential Supplies Act, 1946, empowered the Central Government to regulate or prohibit the production etc. of essential commodities by notified order, so far as it appears to the Central Government to be necessary or expedient for maintaining or increasing supplies of any essential commodity.

96. *Allingham* v. *Minister of Agriculture,* (1949) 1 All E.R. 780.
97. *R.* v. *Benoari,* (1945) 72 I.A. 57.
98. Phillips, *Constitutional Law,* 1952, p. 315; Griffith & Street, *Administrative Law,* p. 63.
99. *Shannon* v. *Lower Mainland Dairy Products Board,* (1938) A.C. 708.
100. *Harishankar* v. *State of M.P.,* A. 1954 S.C. 465.
1. *Bhatnagar* v. *Union of India,* (1957) S.C.R. 701.

S. 4 next provided—"The Central Government may by notified order direct that the power to make orders under s. 3 shall, in relation to such matters and subject to such conditions, if any, as may be specified in the direction, be exercisable also by such officer subordinate to the Central Government or such Provincial Government or such officer subordinate to a Provincial Government, as may be specified in the direction."

Held, s. 4 was not invalid on account of authorising sub-delegation of the power to make orders under the Act, since only powers *ancillary* to legislative power had been permitted to be delegated or sub-delegated, the Act itself having laid down the legislative policy,[100] which would give ample guidance to the sub-delegate in the same way as it would have guided the delegate (i.e. the Central Government) if it had chosen to issue the orders itself instead of sub-delegating it.[2]

2. But the sub-delegate cannot exercise the function unless the delegate has sub-delegated the function specifically and in terms of the statute which authorises the sub-delegation.[3] Thus, it cannot be made with retrospective effect in the absence of a specific provision in the statute authorising such retrospective sub-delegation.[1]

3. In making the sub-delegation, the delegate may further canalise the power to be exercised by the sub-delegate, provided they are in consonance with the policy declared by the Legislature.[2]

4. In the absence of any restriction imposed by the delegate, or the statute, it is competent for the sub-delegate to issue either a specific order against an individual or a general order applicable to a class of persons generally.[4]

5. Sub-delegation will be invalid if there is no policy or standard to guide the authority empowered to exercise the sub-delegated power. If this policy is laid down in the Rule or Order made by the delegate of the first degree, such policy must be consonant with the policy laid down in the parent Act; otherwise, the delegated and sub-delegated legislation shall all be *ultra vires.*[2] If, however, no standard is prescribed by the Rule or Order made by the delegate of the first degree, the Court would find out the policy from the parent Act, and test the validity of the subordinate legislation on the touchstone of that policy.[2]

6. Subordinate legislation, of any degree, must be published, in order to be valid, because it would be against the principles of natural justice (now derived from Art. 21) to punish a man for violation of a law of which he had no means of knowledge.[5]

(a) Where the parent Act prescribes a mode of publication, the sub-delegated legislation must be published in that very manner, in order to be valid.[6]

(b) If the parent Act is silent as regards the mode of publication, the sub-delegated legislation should be published in the Official Gazette.[7]

(c) The expression *ultra vires* relates to subordinate legislation. The charge of *ultra vires* cannot be levelled against an Act made by the Legislature itself.[100] The Act may be challenged as *unconstitutional* on the ground that (a) the Legislature was not competent to make that law; or (b) that the Act violated any of the substantive limitations imposed by the Constitution, such

2. *Union of India* v. *Bhanamal,* A. 1960 S.C. 475 (480) [Cl. 11B of the Iron & Steel (Control of Production and Distribution) Order, 1941, *held* valid].
3. *Dawood Ali* v. *Commr. of Police,* A. 1958 Cal. 565 (567).
4. *Santosh Kumar* v. *State,* (1951) S.C.R. 303.
5. *Harla* v. *State of Rajasthan,* (1952) S.C.R. 110 (112-13).
6. *Narendra* v. *Union of India,* A 1960 S.C. 430 (paras. 25-27).
7. *State of Maharashtra* v. *George,* A. 1965 S.C. 722.

as the Fundamental Rights; or (c) that it involved excessive or unconstitutional delegation of its essential power or function.

But a provision of an Act cannot be challenged as *ultra vires* on the ground that it was not supported by some other provision of that Act.[100] Such a contention was curiously made and repelled by the Supreme Court in a case, as follows :

Cl. (1) of s. 68 of the Motor Vehicles Act, 1939, empowered the State Government to make the rules for the purpose of carrying out the provisions of Ch. IV. Cl. (2) thereafter provides that 'without prejudice to the generality of the foregoing power, rules under the section may be made with respect to any of the matters specifically enumerated in the various sub-clauses of that sub-section. In 1956, the Legislature inserted a new sub-cl. (ww) in s. 68(2), empowering the State Government to make rules for "the licensing of agents engaged in the business of collecting....goods carried by public carriers".

It was contended that in the absence of some substantive provision in the Act requiring the licensing of such carriers, the new cl. (ww) could not empower the State Government to introduce such licensing by making *Rules*. The Supreme Court rejected this contention with the observation that the authorisation to make such Rules had been made by the Legislature itself and

"there is no constitutional prohibition against the making of a *law* authorising the making of rules on any topic without the support of another substantive provision of law in the body of the Act".[8]

2. *Where the statute does not authorise sub-delegation.*

(A) *England.*—A distinction has been made between sub-delegation of *executive* and *legislative* powers. For what is implied by the principle against sub-delegation is that the legislative power which is entrusted to the Legislature should not again be delegated by a subordinate authority or body upon whom the Legislature has conferred the power to make subordinate legislation. The distinction between executive and 'legislative' powers is not scientifically precise, but, generally speaking, it may be said that where the subordinate instrument is *general* in its application, it is in the nature of legislation. If, however, it is 'specific' and applies only to a named person or object or to named persons and objects, it is an executive order.[9] The distinction is, as already stated, very nice,[10] and it has been held that an executive committee could not sub-delegate its authority to "give such *directions* with respect to the cultivation, management or use of land for agricultural purposes as it thinks necessary".[11] Even informal documents like circulars and instructions may assume a legislative character in the context of this principle.[10]

Where the statute itself or a valid regulation made under it does not authorise it, sub-delegation of *legislative* powers is invalid. Thus, where the delegate is empowered to issue executive or *administrative* directions, he cannot issue directions which are *legislative* in character. This would also follow from the doctrine of *ultra vires*. Whether the directions issued by the delegate are executive or legislative in character is a matter of *substance*, not of form.[12]

(i) Defence Regulation 51 empowered the Minister of Health to *take possession*

8. *Chief Commr.* v. *C.M. Transport*, A. 1968 S.C. 1199 (para. 4). [This Act has since been replaced by the Motor Vehicles Act, 1988 (Act 59 of 1988).]
9. Cf. Griffith & Street, *Administrative Law*, p. 51.
10. *Jackson Stanfield* v. *Butterworth*, (1948) 2 All E.R. 558 (565).
11. *Allingham* v. *Minister of Agriculture*, (1948) 1 All E.R. 780.
12. *Blackpool Corporation* v. *Locker*, (1948) 1 All E.R. 85 (91), Scott, L.J.

of any land and to give such directions as appeared to him to be necessary or expedient in connection with the taking of possession of that land, and also empowered the Minister to delegate *these functions*, to such extent and subject to such restrictions as he thought proper.

The Minister of Health issued certain circulars to the local authorities, empowering them to take possession of lands, subject to certain *conditions* laid down in the circulars. These conditions were changed from time to time, by issuing fresh circulars. Amidst these conditions, e.g., were—(i) that a house could not be requisitioned unless unoccupied; (ii) that furniture should not be requisitioned. *Held*, the circulars were *legislative* in character and not mere executive directions in the matter of taking possession of a land. For, they conferred powers on the corporations to take away individual rights which they would not have otherwise possessed and also imposed on them duties for the reasonable protection of the individual house-owner. They were not mere executive directions as between the Minister of Health and the Corporation. Such sub-delegation was not authorised by the Regulation.[12]

(ii) Reg. 56A of the Defence (General) Regulations, 1939, laid down that certain building operations shall be unlawful 'except under a licence' granted by the Minister of Works. The power to grant licences was delegated by the Minister of Works to local authorities and circulars were issued to them containing instructions laying down the 'policy in regard to licensing' and the conditions under which the licensing power was to be exercised. *Held*, that Reg. 56A was delegated legislation, and the circulars amounted to sub-delegated legislation without any statutory authority. The circulars containing instructions were legislative in character since they were to affect the rights of the public.[10]

It is to be noted that where a statute authorises sub-delegation and the delegate does sub-delegate that power, it would be open to the delegate to exercise the power even after such delegation.[13]

(B) *India.*—Sub-delegation of *legislative* authority will not be sustained unless the statute has specifically authorised it.

S. 40 of Regulation III of 1877 empowers the Chief Commissioner to make rules, *inter alia*, for

"the maintenance of watch and ward, and the establishment of a proper system of conservancy and sanitation at fairs and other large public assemblies".

R. 1 of the Rules made by the Chief Commissioner prohibits the holding of a fair except under a permit issued by the District Magistrate and the latter is enjoined to

"satisfy himself, before issuing any permit, that the applicant is in a position to establish a proper system of conservancy, sanitation and watch and ward at the fair".

Holding the Rule to be *ultra vires*, the Supreme Court (per Bose, J.) observed—

"The Regulation empowers the Chief Commissioner to make rules for the establishment of a system of conservancy and sanitation. He can only do this by bringing a system into existence and incorporating it in his rules so that all concerned can know what the system is.....the rules empower the District Magistrate to make his own system and see that it is observed. But the Regulation confers this power on the Chief Commissioner and not on the District Magistrate."[14]

In short, it was held that in the absence of statutory provision in that behalf it was not competent for the Chief Commissioner to sub-delegate the rule-making power vested in the Chief Commissioner by the statute.

But sub-delegation of *administrative* power may sometimes be upheld even where the statute has not expressly authorised such sub-delegation[15] (see under 'Administrative sub-delegation', *post*).

13. *Godavari* v. *State of Maharashtra*, A. 1966 S.C. 1404.

14. *Ganapati* v. *State of Ajmer*, A. 1955 S.C. 188; see also *Ajaib* v. *Gurbachan*, A. 1965 S.C. 1619.

15. *Sarkari Vikreta Sangh* v. *State of M.P.*, A. 1981 S.C. 2030 (para. 9).

The doctrine of abdication.

I. Once it is acknowledged that the Constitution has reposed its trust[16] in the Legislature that it must perform its essential legislative functions, it should follow that not only is it impermissible for the Legislature to *delegate* its essential functions to another body, it cannot surrender or *abdicate* such functions and the responsibility imposed upon it by the Constitution,[17] even though it may not constitute an act of delegation in favour of a subordinate body. Thus,—

A Legislature may not adopt a statute passed by another Legislature, *without knowing* what it was adopting.[18]

The Pondicherry Legislature adopted the Madras Sales Tax Act with effect from a future date when the Pondicherry Government would issue a notification with this provision that if by the date the Pondicherry Government made its notification the Madras Legislature would make any amendment of its Sales Tax Act, the Act as so amended would apply to Pondicherry. Since at the time of its adoption, the Pondicherry Legislature did not know what amendments the Madras Legislature might make to its Act before it could come into operation in Pondicherry, it was held that the adopting Act of Pondicherry constituted a total surrender of its legislative power with respect to sales tax in favour of the Legislature, so that it was void.[18]

Even where delegation is permissible, it cannot be allowed to the extent of self-effacement of the Legislature.[17-18]

II. On the other hand, there is no abdication by the Legislature of its functions—

(a) Where the rules are required to be laid before Parliament *before* they are to come into force and Parliament has the power to amend, modify or repeal them.[19-20]

It should be remembered in this context that though the requirement to lay before Parliament may exonerate Parliament from the challenge of abdication, it would not preclude the Court from striking down the Rule (or other statutory instrument) itself if it happens to be *ultra vires* the provisions of the statute.

(b) Abdication means that the Legislature has surrendered its legislative function or has effaced itself in whole or in part in favour of another agency,[21] in respect of its 'essential' legislative function, which consists in laying down the *policy* of the law in question.[21] There is, therefore, no abdication where the relevant Legislature *has* laid down the legislative policy, but has left it to another agency the adoption of the law made by another Legislature, *subject* to or within the limits laid down by the aforesaid legislative policy.

S. 8(2) of the Central Sales Tax Act, 1956, laid down the rate of tax payable by any dealer on his turnover relating to the sale of goods in the course of inter-State trade or commerce. Cl. (b) of this sub-section was as follows :

"(b) in the case of goods other than declared goods, shall be calculated at the

16. *In re Delhi Laws Act, 1912*, (1951) S.C.R. 747 : (1950-51) C.C. 328 (377, Kania, C.J.; 342-44, Mahajan J.; 349-50. Mukherjea J.).

17. *Tata Iron and Steel* v. *Workmen*. A. 1972 S.C. 1917 (1922); *Devi Dass* v. *State of Punjab*, A. 1967 S.C. 1895 (para. 15)

18. *Shama Rao* v. *Union Territory of Pondicherry*, A. 1967 S.C. 1480.

19. *Garewal* v. *State of Punjab*, A. 1959 S.C. 512 (518); *D.C.G.M.* v. *Union of India*, A. 1983 S.C. 937 (para 32).

20. *Kerala Education Bill, In re*, A. 1958 S.C. 956 (976).

21. *Gwalior Rayon Mills* v. *Asst. Commr.*, A. 1974 S.C. 1660 (paras. 5, 7, 15), per Khanna, J.

rate of 10% or at the rate applicable to the sale or purchase of such goods, *whichever is higher*".

It was contented that by the above clause, *Parliament* had abdicated its legislative function to fix the rate of sales taxation on *inter*-State sales, by adopting the rate fixed in *intra*-State sales by the State Legislature in each State wherever such rate exceeded 10 per cent. Repelling this contention, the majority of the Constitution Bench[21] observed that Parliament has, in fact, performed its essential legislative function, viz., the policy of inter-State sales taxation by providing that the rate of Central sales tax should in no event be less than the rate of local sales tax in the appropriate State. The object of this provison was to prevent evasion of payment of Central sales tax.[21-22]

The doctrine against abdication, thus, is not a substitute of the doctrine against excessive delegation, but is a mere another way of putting the same thing, emerging from the doctrine of 'constitutional trust', which was enunciated in the early Reference case of the *Delhi Act.*[23] As a recent Division Bench[24] has observed—

"The power to legislate carries with it the power to delegate. But *excessive delegation may amount to abdication*.....So the theory has been evolved that the Legislature cannot delegate its *essential* legislative function. Legislate it *must* by laying down policy and principle and delegate it *may* to fill in detail and carry out policy."[24]

It would, therefore, follow that even though it is open to the Legislature to repeal its own Act, it is not exempted from the requirement to lay down the legislative policy. Of course, there have been Judges who have diluted the doctrine against excessive delegation to the extreme by holding that a law cannot be condemned as involving excessive delegation or abdication so long as the Legislature retains its power to recall the delegation by *repealing* the impugned statute.

In coming to this view, Mathew, J.[25] relied upon the Privy Council decision in *Cobb* v. *Kropps.*[18] If this view[25] were to prevail, the Legislature need not lay down the legislative policy in any case, because, in the absence of any constitutional bar, a Legislature is always competent to repeal or amend its own enactment. But, as the majority in the *Gwalior case* (para. 27)[25] pointed out, the Privy Council did *not*,[26] in fact, lay down any such extreme proposition. The observations of Lord Morris[26] in that case must be read in the context of the facts of that case; the Transport Acts passed by the Queensland Legislature had delegated to the Commissioner for Transport the function of fixing the rate of the licence fee and recovering it. But the Legislature had laid down the framework and the bounds within which the Commissioner was to exercise the delegated powers as will appear from the observations of the Privy Council itself :

Untenability of the theory of power to repeal.

"The Commissioner has not been given any power to act outside the law as laid down by Parliament. Parliament has not abdicated from any of its own powers. It has laid down a *framework, a set of bounds,* within which the person holding the office created by Parliament may grant or refrain from granting licences, and fix, assess, collect or refrain from collecting fees which are taxes."[26]

22. Affirmed by *I.C. Corpn.* v. *C.T.O.,* A. 1975 S.C. 1604 (paras. 3-4); *State of T.N.* v. *Sitalakshmi Mills,* A. 1974 S.C. 1505 (para. 9) C.B.

23. *In re Delhi Laws Act, 1912,* (1951) S.C.R. 747 (793; 974, 977; 819-20, 831).

24. *Registrar* v. *Kunjabmu,* A. 1980 S.C. 350 (para. 3).

25. *Delhi Laws case,* (1951) S.C.R. 747 (828, Fazl Ali, J., 1068, Das, J.); *Gwalior Rayon* v. *Asst. Commr.* A. 1974 S.C. 1660 (paras. 56, 72; Mathew, J. & Ray, C.J.); *Papiah* v. *Excise Commr.,* A. 1975 S.C. 1007 (paras. 22-23)—Bench of 3, led by Mathew, J.

26. *Cobb* v. *Kropp,* (1967) A.C. 141.

The decision of the Privy Council in *Cobb* v. *Kropp*[26] is thus *no authority* for the proposition that even where the Legislature fails to lay down the limits subject to which or the standard according to which the delegate was to act, the impugned statute would be immune from attack on the ground of excessive delegation or abdication simply because it retains the power to repeal the statute or to recall the delegation.[27] The untenable theory of repeal and control[25] must be given a goodbye, now that the *Gwalior view*[25] has been affirmed by another Constitution Bench.[27]

In fine, our Courts should be cautious in adopting decisions of the Privy Council on delegation because English Judges are familiar with the doctrine that the Legislature (like the British Parliament) has an 'inherent' right to delegate its power—which doctrine is totally inapplicable in countries like the *U.S.A.* or *India* where the powers of the Legislature, even to delegate, are subject to constitutional limitations, express or implied.

(c) Legislation by reference would *not* constitute abdication if the Legislature resorts to it after fully considering what it was going to adopt.[28]

The concepts of unconstitutionality, excessive delegation and ultra vires.

Before we proceed to take up the conditions of validity of subordinate legislation or the exercise of the delegated power by the subordinate authority to which the power has been delegated by the Legislature, we should carefully note the distinction between some analogous concepts which are often confused even in text-books and judicial decisions.

(a) In *India,* when the Legislature delegates legislative power to an administrative authority without offering any guidelines, the validity of the relevant statute may be attacked on two grounds, viz.,

(i) That the statute offends against Arts. 14 and 19 of the Constitution, because it is unreasonable or arbitrary[29] on the part of the Legislature to confer uncontrolled discretionary power upon an administrative authority.[30]

(ii) That the statute is invalid because of excessive delegation or abdication of legislative power by the Legislature.[27]

(b) Coming to the delegate, i.e., the administrative authority to which a power has been delegated by the Legislature—even if the statute be valid because the delegation is within the constitutionally permissible limit, the rule, order, notification or other statutory instrument which is issued by the administrative authority in exercise of the delegated power may still be invalid if it is *ultra vires,* i.e., if it goes beyond the scope of the power which has been delegated by the statute,[27, 31] or if the administrative act is discriminatory.[32] This aspect will be discussed, in detail, in the next Chapter.

The foregoing principles apply also in the case of sub-delegated legislation.[33]

27. *K.S.E. Bd.* v. *Indian Aluminium,* A. 1976 S.C. 1031 (para. 29) C.B.

28. *Shiv Dutt* v. *Union of India,* A. 1984 S.C. 1194 (paras. 20-21).

29. *Union of India* v. *Annam,* A. 1985 S.C. 1013; *State of Maharashtra* v. *Kamal,* A. 1985 S.C. 199.

30. *State of Punjab* v. *Khan Chand,* A. 1974 S.C. 543 (paras. 5-7); *State of Gujarat* v. *Dharamdas,* A. 1982 S.C. 781 (para. 4); *Air India* v. *Nergesh,* A. 1981 S.C. 1829 (para. 117).

31. *State of T.N.* v. *Hind Stone,* A. 1981 S.C. 711 (para. 6); *Porwal* v. *State of Maharashtra,* A. 1981 S.C. 1127 (paras. 7-11); *Babu Ram* v. *State of Punjab,* A. 1979 S.C. 1475 (para. 30).

32. *Chandra* v. *State of Bihar,* A. 1987 S.C. 1767.

33. *Laxmi Khandsari* v. *State of U.P.,* A. 1981 S.C. 873 (paras. 50-54); *Air*

CHAPTER 4

QUASI-LEGISLATIVE FUNCTIONS OF THE ADMINISTRATION

What are quasi-legislative functions?

We have already seen (p. 6, *ante*) that administrative functions, which come within the fold of Administrative Law are of various kinds, which, however, fall under three broad heads, namely, (a) those which simulate a legislative character; (b) those which simulate a judicial character; and (c) those which are purely administrative in nature, dealing with particular situations, having no legislative or judicial tinge about them.

In the present Chapter, we are dealing with the first category of *quasi-legislative* functions of the administration, which are briefly described as the function of 'subordinate legislation', i.e, the function of making rules, regulations, bye-laws, etc., to fill in the details of legislative enactments in order to make the execution thereof possible.[1]

Subordinate Legislation, what it means.

The Legislature is the law-making organ of a State. In some written Constitutions, the legislative function is expressly vested in the Legislature.[2] Though there is no express provision in the Constitution of *India* to this effect, Arts. 107-111 and 196-201 lay down how laws are made by Parliament for the Union and by the State Legislature for a State and it has been held by *our* Supreme Court that, subject to certain exceptions specified by the Constitution itself (e.g., Arts. 123, 213),[3] it is the intention of *our* Constitution that powers of legislation shall be exercised exclusively by the Legislatures created by the Constitution, namely, the Parliament and the State Legislatures.[3]

It follows, therefore, that any authority, other than the Legislature,[4] can exercise any kind of legislative power only if authorised by the Legislature

---

1. *Jayantilal* v. *Rana*, A. 1964 S.C. 648 (655).
2. E.g., Art. 1 of the American Constitution; s. 1 of the Australian Constitution.
3. In this context, it should be noted that the Ordinance-making power of the President or the Governor is not a species of *'quasi-legislative'* power of the Executive, because this power is not derived by delegation from the Legislature but is expressly vested in the President [Art. 123] and a Governor [Art. 213]. Though of a temporary duration and though it is available only when the appropriate Legislature is not in session, an Ordinance duly promulgated "shall have the same effect as an Act" of the appropriate Legislature, so that there is no *qualitative* difference between an Ordinance and an Act passed by the corresponding Legislature. It cannot be classed as 'subordinate legislation"; it is 'legislation' by the Executive under the authority of the Constitution itself [*A.K. Roy* v. *Union of India*, A. 1982 S.C. 710 (paras. 15-16)]. In *India*, thus, there are two kinds of primary 'laws'—(a) Statutes made by the Union and State Legislatures; (b) Ordinances made by the President and Governors.

   The Ordinance-making function is excluded from the present Chapter for the aforesaid reasons.
4. *In re Delhi Laws Act, 1912*, (1951) S.C.R. 747 [*vide* Author's *Commentary on the Constitution of India*, 5th Ed., Vol. II, p. 335].

(subject, of course, to the validity of the act of such delegation itself, which has already been discussed).

When an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the Legislature, it is called 'subordinate' legislation.[5] It is subordinate in the sense that the powers of the authority which makes it are limited by the statute which conferred the power and, consequently, it is valid only in so far as it keeps within those limits, whereas a law made by the Legislature is not limited by any law made by any other body, except where there is a written Constitution imposing limitations upon the Legislature, as in *India*. The maker of a subordinate legislation, in other words, may be its immediate authority, but its ultimate authority is a superior Legislature which conferred the power to make the subordinate legislation.

Sometimes the expressions 'subordinate legislation' and 'delegated legislation' are used in an identical sense,—to refer to statutory instruments,[6] or 'administrative legislation'.[7] In the Author's opinion, however, it is convenient to use the two expressions to refer to different aspects of the same problem, thus:

(i) The expression 'delegated legislation' looks at the problem from the standpoint of the Legislature which delegates the legislative power to a subordinate body.

The Chapter on Delegated Legislation in this work (Chap. III), accordingly, deals with the extent beyond which such delegation would constitute an abdication of the legislative powers vested in the Legislature by the Constitution.

(ii) The expression 'subordinate legislation' would mean the act of making the statutory instruments by the subordinate body in exercise of power delegated by the Legislature and the statutory instruments themselves.[8]

The present Chapter on Subordinate Legislation, accordingly, deals with the conditions subject to which only the statutory instruments would be valid.

Need for subordinate legislation.

Subordinate legislation has, to a certain extent, become inevitable, owing to the increased pressure for legislation under the changed conception of the functions of the State. In almost every modern State *'laissez-faire'* has long given way to collectivism and the concept of a 'Police State' has been substituted by that of a 'Welfare State' and a 'planned society'.[9] Owing to the complexity of the subject-matter of legislation also, it is no longer possible for a legislative body consisting of ordinary people to lay down matters of detail, which has become the business of experts.[10] As the Committee on Ministers' Powers observed—

"The truth is that if Parliament were not willing to delegate law-making power Parliament would be unable to pass the *kind* and *quantity* of legislation which modern public opinion requires."[11]

5. Halsbury, 4th Ed., Vol. 44, paras. 981-82, 984.

6. E.g., Carr, Parliamentary Control of Delegated Legislation, (1955) Public Law, 200 (201-02); Report of the Committee on Ministers' Powers, (1932) Cmd. 4060, p. 15, para. 2; Halsbury, 3rd Ed., Vol. 36, para. 723, p. 476.

7. Wade, *Administrative Law*, 4th Ed., pp. 695-96.

8. Cf. Salmond, *Jurisprudence*, 9th Ed., p. 210.

9. Cf. Keeton, *Elementary Principles of Jurisprudence*, 1949, pp. 35-37, 86; Allen, *Law in the Making*, 16th Ed., p. 521; Myers, *Introduction to Public Administration* (1970), pp. 158-60.

10. *Avinder* v. *State of Punjab*, A. 1979 S.C. 321 (para. 10).

11. Rep. of the Committee on Ministers' Powers, 1932, p. 23 (also pp. 45, 51-52).

Moreover, while making a law, it is impossible to foresee all future changes[11] in circumstances as might call for modifications in the detailed working of the law, as distinguished from changes in the legislative policy itself. It would be an unnecessary burden on Parliament if it were to pass a Bill each time such changes were required. It has come to be realised that this function can be better discharged by leaving matters of detail to be regulated by statutory instruments[12] which are to be made or modified by the Department, which is in charge of administering the law,—subject, of course, to the limits laid down by the statute itself and to some sort of ultimate control over the statutory instruments by Parliament itself.

On account of fast changing scenario of economic, social order and scientific developments innumerable situations arise which the legislature cannot foresee. So the delegatee is entrusted with power to meet such exigencies within the in-built check and guidance. The delegatee will exercise power to subserve the policy and to achieve the objectives of the Act. He in a given situation may not strictly adhere to a provision of a statute or rule in order to relieve from great hardship without materially affecting the policy of the statute. But such power has to be rarely used.[12a]

England.

(A) *England.*—The English Parliament has, thus, been compelled to lay down mere outlines of *policy*, leaving it to the discretion of the administrative department to fill up the details as well as to change them according to changing conditions. Though this is legislation *under* statutory authority, it no doubt detracts from the traditional legislative sovereignty of Parliament, for, in making orders and regulations under the statute, the spirit of the legislation may, in practice, be transgressed.

So long as the Courts are free to question the validity of the regulations, the individual may seek his remedy against such abuse of governmental legislation, for it is a rule applicable to all subordinate legislation that it can be declared invalid by a court of law on the ground that it is *ultra vires* the statute under whose authority it purports to have been issued.[13]

But this salutary jurisdiction of the Judiciary has been sought to be ousted, in recent statutes, by enacting not merely that regulations may be made under the Act, but that *"they shall have effect as if enacted in this Act"*. By such a clause, Parliament seems to be "giving to the Executive a blank cheque". The English Judiciary has, however, risen to the occasion and held that the clause referred to saves only *intra vires* regulations; in other words, it does not prevent the Courts from scrutinising whether the regulation or the order conforms to the statutes[14-15] (see *post*).

The dangers of the system were first brought into public discussion by

12. 'Statutory Instruments' are thus defined in s. 1(1) of the (English) Statutory Instruments Act, 1946 (9 & 10 Geo. VI) c. 36—"Where by . . . any Act. . . . power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred on His Majesty-in-Council or on any Minister of the Crown then any document by which that power is exercised shall be known as a 'statutory instrument' . . . ." [Myers, *Public Administration*, (1970) p. 161].

12a. *Consumer Action Group* v. *State* (2000)7 SCC 425.

13. Cf. Allen, *Law in the Making*, 1947, pp. 61, 132ff.

14. *R.* v. *Electricity Commrs.*, (1924) 1 K.B. 171 (C.A.); *R.* v. *Minister of Health*, (1929) 1 K.B. 619; *In re Bowman*, (1902) 2 K.B. 621; *Minister of Health* v. *The King*, (1931) A.C. 494 (H.L.).

15. *State of Kerala* v. *Abdulla*, A. 1965 S.C. 1585 (1589).

the publication of Lord Hewart's *New Despotism* in 1929 (pp. 74 *et seq.*), which was followed by an enquiry by a Select Committee of the House of Commons,[16] known as the Committee on Ministers' Powers.

One of the recommendations of the Committee on Ministers' Powers was that each House of Parliament should have a Standing Committee to consider and report to the House on Bills conferring powers of subordinate legislation as well as on the statutory instruments eventually made in exercise of such power. Though rather late in acting upon this recommendation, the House of Commons, in 1944, appointed a Select Committee on Statutory Instruments and since then this Committee is being renewed each session.

The function of the Select Committee on Statutory Instruments is to consider every statutory instrument with a view to determine whether the attention of the House should be drawn to it on any of the following grounds—

(a) that it imposes a charge on the public revenues or contains provisions requiring payments to be made to ..... any public authority in consideration of any licence or consent, or of any services to be rendered, or prescribes the amount of any such charge or payment;

(b) that it is made in pursuance of an enactment containing specific provision excluding it from challenge in the courts .....;

(c) that it appears to make some unexpected use of powers conferred by the statute under which it is made;

(d) that it purports to have retrospective effect where the parent statute confers express authority so to provide;

(e) that there appears to have been unjustifiable delay in the publication or in the laying of it before Parliament;

(f) that there appears to have been unjustifiable delay in sending a notification to the Speaker under s. 4(1) of the Statutory Instruments Act, 1946, where instrument has come into operation before it has been laid before Parliament.

(g) that for any special reason its form or purport calls for elucidation.

Subordinate legislation: Limits and scope.

Act confers rule making power upon an authority. The authority cannot frame rules which will travel beyond the scope of the Act or inconsistent or repugnant to the Act.[16a]

A rule or law made by delegated legislation cannot supersede or overrule the power exercised or law made by the delegator of power i.e. the sovereign legislature in exercise of its constitutional right with respect to a matter or subject over which it has otherwise plenary power of legislation.[16b]

Legislature vests a general rule making power in the delegate to carry out the purpose of the Act. The delegatee has to find out the object of the Act and he is to ensure that the rules framed further the object of the Act and that the rules fall within the scope of the Act. The delegation is a general delegation which does not prescribe any guideline. The rules cannot be so framed as to provide any substantive right or obligation or disability not contemplated by the Act.[16c]

Essential legislative function cannot be delegated. Ancillary or subordinate legislative function can only be delegated.[16d]

16. Rep. of the Committee on Ministers' Powers, 1931-32 (Cmd. 4060, Vol. XII).
16a. *Delhi Adm.* v. *Siri Ram,* (2000)5 SCC 451: AIR 2000 SC 2143.
16b. *State* v. *Bal Mukund,* (2000)4 SCC 640: AIR 2000 SC 1296.
16c. *Kunj Behari* v. *State,* AIR 2000 SC 1069: (2000)3 SCC 40.
16d. *Kunj Behari* v. *State,* AIR 2000 SC 1069: (2000)3 SCC 40.

Legislature cannot delegate essential legislative function which consist of determination of legislative policy and of formally enacting that policy. Uncanalised and uncontrolled power cannot be delegated either. Legislature has to set the limits of delegated power by declaring the policy of law and laying down guidance therefor. Legislature may, however, confer discretion on the delegatee as to the execution of the policy and leave it to him to work out the details within the framework of the policy.[16e]

Delegation of essential legislation power to the delegatee amounts to abdication of legislative power. It is unsustainable in law if it is bereft of any guideline.[16f]

If arbitrariness is manifest the piece of delegated legislation can be struck down.[16g]

A subordinate or delegated legislation must be read in a meaningful manner so as to give effect to the provisions of the statute. It two constructions are possible to adopt, a meaning which would make the provision workable and in consonance with statutory scheme should be preferred.[16h]

Statutory Instruments Act, 1946.

The Statutory Instruments Act, 1946, which was enacted in pursuance of the recommendations of the Select Committee on Statutory Instruments of 1944, made various salutary provisions to secure due publicity and proper Parliamentary control over statutory instruments. The more important of these provisions are—

(a) It is a defence in proceedings for contravention of a statutory instrument to prove that it had not been issued by the Stationery Office at the date of the alleged contravention, unless it is shown by the prosecutor that reasonable steps have been taken to bring the purport of the instrument to the notice of the public or of persons likely to be affected by it or of the person charged [s. 3(2)].

(b) A statutory instrument which is required to be laid before Parliament must be laid in both Houses before it comes into operation. If this cannot be done for reasons which are essential, the Lord Chancellor and the Speaker must be notified forthwith and an explanation given to them why copies were not laid before the instrument came into operation [s. 4(1)]. Every copy of the instrument must show on the face of it the date of operation and information as to compliance with the requirement of laying before Parliament [s. 4(2)].

(c) In any case where a statute provides that an instrument issued under it shall be subject to annulment in pursuance of a resolution of either House, the instrument may be brought into force as it is made, but it must be laid before Parliament for a period of forty days (exclusive of the period during which Parliament is dissolved, prorogued or adjourned for more than 4 days), within which period a motion for its annulment may be moved by a member in either House of Parliament [s. 5(2)].

(d) If a resolution for annulment is passed in either House, the Crown shall by Order in Council revoke the statutory instrument in question and thereupon no further proceedings shall be taken under that instrument from the date of the resolution; but the validity of anything previously done under the instrument shall not be affected by the revocation [s. 5(1)].

The scope of control by the Judiciary will be explained hereafter.

U.S.A.

(B) *U.S.A.*—Even in the *United States*, notwithstanding the doctrine of Separation of Powers, the Legislature has been obliged to delegate to the Executive or independent administrative bodies the power of making rules or

16e. *Krishan Prakash* v. *Union of India* (2001)5 SCC 212: AIR 2001 SC 1493.
16f. *B.R. Enterprise* v. *State*, (1999)9 SCC 700: AIR 1999 SC 1867.
16g. *Sharma Transport* v. *Govt. of A.P.* (2002)2 SCC 188: AIR 2002 SC 322.
16h. *Ramesh Mehta* v. *Sanwal Chand*, (2004)5 SCC 409.

regulations having the force of law. And the Courts have been obliged to sanction this delegation of the power of subordinate legislation in favour of the President;[17] the heads of Departments;[18] independent bodies like the Inter-State Commerce Commission.[19]

Thus, "the United States, like every other country in the world, has found itself forced to have more and more legislative tasks to specialised and often expeditive administrative agencies."[17]

But the Federal Administrative Procedure Act, 1946 (as amended in 1966 and 1974) has sought to bring the entire system of subordinate legislation under control, by providing for greater publicity and procedural safeguards in the making of the rules and regulations.

(C) *India.*—Our Constitution visualises subordinate legislation by including 'order, rule, regulation, notification', in the definition of law in Art. 13(3).

India.

It is gratifying to note that the suggestion, given at p. 53 of the First Edition of the Author's *Commentary on the Constitution of India*, Vol. I, that the Indian Legislatures should early take into consideration the recommendation of the English Committee on Ministerial Powers, namely, that the administrative rules etc. must be laid in draft before the Legislature,—has been substantially adopted by the Indian Parliament, by adding one entire Chapter to the Rules of Procedure and Conduct of Business in Parliament. Thus, r. 317 of the Rules of Business of the House of the People[20] prescribes the constitution of a Committee on Subordinate Legislation "to scrutinise and report[21] to the House whether the powers delegated by Parliament have been properly exercised *within the framework of the statute delegating such power*". R. 319 requires publication in the Gazette of India of the 'Regulation', 'Rule', 'Sub-rule', 'Bye-laws', etc. (referred to as 'order'), which are framed in pursuance of the legislative functions delegated by Parliament to a subordinate authority and which are required to be laid before the House. As regards such 'orders', the powers of the above Committee shall be as follows :

"320. After each such order referred to in rule 222 is laid before Parliament, the Committee shall, in particular, consider—

(i) whether it is in accord with the general objects of the Act pursuant to which it is made;

(ii) whether it contains matter which, in the opinion of the Committee, should more properly be dealt with in an Act of Parliament;

(iii) whether it contains imposition of taxation;

(iv) whether it directly or indirectly bars the jurisdiction of the court;

(v) whether it gives retrospective effect to any of the provisions in respect of which the Act does not expressly give any such power;

(vi) whether it involves expenditure from the Consolidated Fund or the Public Revenues;

---

17. *Field & Co.* v. *Clark*, (1892) 143 U.S. 649; *Hirabayashi* v. *U.S.*, (1943) 320 U.S. 8.

18. *Union Bridge Co.* v. *U.S.*, (1907) 204 U.S. 364.

19. *St. Louis Ry. Co.* v. *Taylor*, (1908) 210 U.S. 281; *Yakus* v. *U.S.* (1944) 321 U.S. 414.

20. Rules of Procedure & Conduct of Business in the House of the People, 1967 [see Vol. VI of the Author's *Commentary on the Constitution of India*, 5th Ed., p. 240].

21. See Committee on Subordinate Legislation, its Working & Procedure [C.B. (II) No. 51].

(vii) whether it appears to make some unusual or unexpected use of the powers given by the Act pursuant to which it is made;

(viii) whether there appears to have been unjustifiable delay in the publication or laying of it before Parliament;

(ix) whether for any reason its form or purport calls for any elucidation.

321. (1) If the Committee is of opinion that any order should be annulled wholly or in part, or should be amended in any respect, it shall report that opinion and the grounds thereof to the House within one month of commencement of a session of Parliament after the promulgation of such orders or within such earlier or later period which a statute of Parliament may have fixed for any specified case.

(2) If the Committee is of opinion that any other matter relating to any orders should be brought to the notice of House, it may report that opinion and matter to House."

Another rule, viz., r. 70, provides—

"A bill involving proposals for the delegation of legislative power shall further be accompanied by a memorandum explaining such proposals and drawing attention to their scope and stating also whether they are of normal or exceptional character."

Besides the above safeguards which have been already prescribed, some other general safeguards against abuse of delegated legislation may be recommended to the notice of our legislator[22] :

(i) The delegation must be to some *trustworthy* authority and not to some person of inferior status who is unfit to exercise the power.

(ii) The limits of the delegated powers must be *strictly* defined by the Act.[23]

(iii) If the interests of any particular section of the community are likely to be affected, the law should provide for consultation by the authority with the affected section before the regulations are made, and the opportunity offered for such consultation must be real.[24]

(iv) There should be provision for giving sufficient publicity to the rules and regulations.[25]

(v) There should be a machinery provided for revoking or amending the rules and regulations etc.

(vi) The Legislature must lay down the *standard* or the *policy*, leaving to the subordinate authority the making of subordinate rules for the carrying out of the policy laid down in the Act and its application to particular facts according to the standards provided therein.[26-28]

It should be pointed out in this context that there are indeed Acts which provide for some of these safeguards specifically. Thus, s. 15 of the Tea Board Act, 1949, and s. 30 of the Chartered Accountants Act, 1949, require that the Rules must first be published in draft form in order to give

22. Cf. Craies, *Statute Law*, 1963, p. 293.

23. Report of the Ministers' Powers Committee (CMD 4060, Vol. XII, p. 21).

24. *Rollo* v. *Minister of Town and Country Planning*, (1948) 1 All E.R. 13.

25. Cf. *Blackpool Corpn.* v. *Lockers*, (1948) 1 All E.R. 85; *Jackson & Sons* v. *Butterworth*, (1948) 2 All E.R. 558 (565).

26. *Panama Refining Co.* v. *Ryan*, (1935) 293 U.S. 421; *Schechter Poultry Corporation* v. *U.S.*, (1935) 295 U.S. 495.

27. *In re Delhi Laws Act, 1912*, (1951) S.C.R. 747; Mukherjea, J.; 342, Mahajan, J.

28. The English practice in this respect is not commendable. Wide powers are conferred by some statutes such as the Public Health Act, 1930, upon the departmental head to make such regulations *'as he might think fit'* (e.g., for the management of the poor). The Local Government Act, 1948, even empowers the Minister to make regulations for modifying the operation of the Act.....if a change of boundaries occurs.

opportunity to the people who would be affected if the draft Rule is made final in the given form. S. 59(3) of the Mines Act, 1952, goes a step further and lays down that before publishing the draft Rules, the Central Government must *consult* the Mining Board in order to give it an opportunity of expressing its views as to the expediency of the proposed Rules. This requirement of previous consultation has been held to be *mandatory* and Rules made without such consultation would be declared invalid.[29]

What is suggested is that these safeguards should be ensured by making a *general* statute like the English Statutory Instruments Act.

Difference between subordinate legislation and statutes.

It is clear from the above that while a statute is made by the Legislature, subordinate legislation or statutory instruments are created by authorities other than the Legislature.

The one common feature between the two, however, is that a statutory instrument, if validly made, has the same force of law as a statute,[30-31] and it is the duty of the *court* to apply a statutory instrument which is relevant to the matter before it, as soon as it is brought to its notice.[32] It is not a matter for evidence.[33] In general, the rules of interpretation, as we shall see, of a statutory instrument are the same as those for interpreting a statute and its commands have the same effect.[34]

A rule or bye-law is more directly legislative in character as it professes to lay down general rules of conduct and differs from a statute only in the source of its authority. While a statute is made by Parliament itself, a rule or bye-law is made by some administrative authority upon whom a subordinate legislative authority has been conferred by a statute made by Parliament.

Because the rule-making authority is a subordinate body, it follows that nothing provided in a Rule can save the parent statute when it is challenged on the ground of unconstitutionality;[34] nor enlarge the meaning of a section in the statute[35] nor confer upon the statutory authority any powers other than which have been conferred upon him by the statute.[36] On the other hand, anything in a Rule which is repugnant to the provisions of the statute shall be invalid as *ultra vires*.[36] Such invalidity is not cured even where the Rules were laid before Parliament and received its approval.[37]

The real distinction between a statute and a statutory instrument, therefore, lies in this that in the case of a statutory instrument, there are some additional conditions for its validity, which go under the head of *'ultra vires'*, as will be explained hereafter, and that a statutory instrument is subject to judicial review on the ground that any of these conditions has not been complied with. In *England,* a statute is not open to judicial review at

29. *Banwarilal* v. *State of Bihar,* A. 1961 S.C. 849 (paras. 19-22).
30. *Institute of Patent Agents* v. *Lockwood,* (1894) A.C. 347 (360) H.L.
31. *State of U.P.* v. *Baburam,* A. 1961 S.C. 751 (para. 23).
32. *Snell* v. *Unity Finance,* (1963) 3 All E.R. 50 (56) C.A.
33. *R.* v. *Walker,* (1875) L.R. 10 Q.B. 355 (358); *Willingale* v. *Norris,* (1909) 1 K.B. 57 (64); *Wicks* v. *D.P.P.,* (1947) 1 All E.R. 205 (H.L.); *Rathbone* v. *Bundock,* (1962) 2 All E.R. 257 (260).
34. *State of Bombay* v. *United Motors,* (1953) S.C.R. 1069.
35. *Central Bank* v. *Workmen,* A. 1960 S.C. 12.
36. *Newspapers* v. *State Industrial Tribunal,* A. 1957 S.C. 532 (para. 19).
37. *K.S.E. Board* v. *Indian Aluminium,* A. 1976 S.C. 1031 (para. 25).

all owing to the sovereignty of Parliament,[38] but in *India,* a statute as well as a statutory instrument is open to be challenged in a court on the ground of violation of the Constitution. But in both countries, a statutory instrument is liable to be annulled by a court on the additional ground that it is *ultra vires*[38] the statute which authorised the making of such instrument (see pp. 31-33, *ante*).

We may, therefore, advert to these *general* conditions of validity of subordinate legislation.

General conditions for the validity of subordinate legislation.

There are different kinds of statutory instruments (see *post*) made in exercise of the power of subordinate legislation. These vary not only according to the nature of the authority which makes them but also according to the nature of the instrument so made.

Subordinate legislation is the compendious name given to that entire body of law which is made by means of rules, orders and regulations, framed and promulgated by the Government or some administrative authority, or by means of bye-laws framed by subordinate law-making bodies, such as municipalities and other statutory bodies[39] in pursuance of power conferred by an Act of the Legislature.

Legislative orders distinguished from administrative orders.

Since both rules and administrative orders are made by the same authority, the distinction between the two should be noted. While an administrative order relates to a *particular* person or object, e.g., an order granting or refusing a licence, a rule lays down as much a general rule of conduct as the statute under which it is made. If a superior administrative authority issues an order as to how his subordinate should dispose of an individual case, it is an *administrative direction.*[40-41] If, however, the order lays down the rule according to which cases of the same nature are to be disposed of, it becomes *legislative in character,*[40, 42] and such order assumes the form of subordinate legislation, if it is issued in exercise of a power conferred by statute.

The special incidents of these various kinds of statutory instruments will be explained hereafter. Under the present caption, we shall deal with the general conditions which must be complied with by any kind of statutory instrument in order to be enforceable in a court of law.

(i) We have already seen *above* that subordinate legislation, in order to be valid, must be *intra vires* the statute which authorised the making of it.[43]

(ii) Where the statutory instrument of which the validity is challenged is subordinate legislation of an inferior order, having been issued in exercise

38. Halsbury, 4th Ed., Vol. 44, paras. 1000-01.

39. E.g., a Devaswom Board [*Nambooripad* v. *Devaswom Bd.,* A. 1956 T.C. 19]; a Government Department [*Bidi Supply Co.* v. *Union of India,* (1956) S.C.R. 267]; a local authority [*Yasin* v. *Town Area Committee,* (1952) S.C.R. 572].

40. *Blackpool Corporation* v. *Locker,* (1948) 1 All E.R. 85 (91).

41. Cf. *State of Assam* v. *Ajit,* A. 1965 S.C. 1196 (1200); *Nagarajan* v. *State of Mysore,* A. 1966 S.C. 1942 (1944, 1948). [See next Chapter].

42. Cf. *Bidi Supply Co.* v. *Union of India,* (1956) S.C.R. 267 (277); *Edward Mills* v. *State of Ajmer,* (1955) 1 S.C.R. 735.

43. *U.S.* v. *La Fanca,* (1931) 282 U.S. 568. [Sec 'Doctrine of *Ultra Vires*', *post*].

of power conferred by another statutory instrument, the former will fail if the latter is *ultra vires*.[44]

(iii) Retrospective effect cannot be given to a subordinate legislation unless it is authorised by the parent statute or a validating statute.[45]

(iv) While a statute comes into force from the date of its enactment (unless a different date is specified), a subordinate legislation does not become valid or effective unless and until it is *duly published.*

(v) Apart from the requirement of publication, there is another peculiarity as regards the commencement of a particular kind of statutory instruments, namely, *anticipatory* rules, bye-laws or orders made under power conferred by an Act which does not come into operation immediately on its passing. Under such power, subordinate legislation may be *made for the purpose of bringing* the Act into operation. When a statute confers such power on a subordinate authority, the question arises as to when such rules or orders themselves would come into operation.

Commencement of subordinate legislation.

In *India,* s. 22 of the General Clauses Act, 1897, provides the answer to this question :

"Where, by any Central Act or Regulation which is not to come into force immediately on the passing thereof, a power is conferred to make rules or bye-laws, or to issue orders with respect to the application of the Act or Regulation, or with respect to the establishment of any Court or office or the appointment of any Judge or officer thereunder or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, then that power may be exercised at any time after the passing of the Act or Regulation; but rules, bye-laws or orders so made or issued shall not *take effect till* the commencement of the Act or Regulation."

This section corresponds to s. 37 of the (Eng.) Interpretation Act, 1889, but differs from the latter in an essential respect: While under the *English* Act, the postponement of the coming into operation of the subordinate legislation till the commencement of the statute may be prevented by an express provision in the statute itself[46] or by necessary implication,[47] i.e., where the immediate operation of the sub-legislation is 'necessary for bringing the Act into operation', in *India,* the provision in s. 22 of the General Clauses Act is absolute, and in no case can the sub-legislation come into effect prior to the date of commencement of the statute under which it has been made. The only advantage conferred by s. 22, thus, is to enable the subordinate authority to complete the procedure for making the subordinate legislation,[48] so that the commencement of the statute may not be rendered ineffective on account of the absence of the subordinate legislation which is required for carrying it into effect.

(vi) A statutory rule does not become void owing to repugnance to the *general law*[49] (or statutes other than its parent statute), like a bye-law.

Thus, a provision in rules, unless repugnant to the parent statute itself,

---

44. *Bisheswar* v. *University of Bihar,* A. 1965 S.C. 601 (605-06).
45. *Union of India* v. *Krishnamurthy,* (1989) 4 SCC 689 (paras. 8, 15); *Bakul Co.* v. *S.T.O.,* (1986) 2 SCC 365.
46. Cf. *Orman Bros.* v. *Graanbum,* (1954) 3 All E.R. 731 (733).
47. *R.* v. *Minister of Town & Country Planning,* (1950) 2 All E.R. 282 (285) C.A.
48. Cf. *State of Rajasthan* v. *Mewar Mills,* A. 1969 S.C. 880.
49. *Commr. of Agricultural I.T.* v. *Keshab,* (1950) S.C.R. 435; *Ravula* v. *C.I.T.,* (1956) S.C.R. 577 (586, 590).

will not be *ultra vires* for the reason that it requires personal signature while under common law, what a person can do himself, he can do through an agent.[50-51]

Rules made under a statute shall be treated, for all purposes of construction and obligations as if they were in that Act and to the same effect.[52]

Of course, a statutory instrument shall be so construed, *if possible*, as not to effect a repeal or amendment of a statute.[51]

It follows from the above that when a statute provides that a statutory instrument made under it shall have effect "notwithstanding anything inconsistent herewith contained in any other Act", the rule shall be held to be valid notwithstanding its inconsistency with *another* statute of Parliament.[53]

(vii) In *England* and in *India*, the additional requirement of 'reasonableness,' which applies to bye-laws, does not apply to statutory rules[54] and orders,[55] as such. If the rules are *intra vires*, they become a part of the statute and are governed by the same principles of interpretation as the statute itself. [See, further, under 'Reasonableness of Rules', *post*]

(viii) The doctrine of 'Severability' extends to statutory instruments including bye-laws.[56] It means that where the statutory instruments is *ultra vires* or unconstitutional in part, that part only may be rejected, if it is severable from the rest.

(ix) With the repeal of a statute, all bye-laws and statutory instruments made under it cease to be valid, unless there is a saving clause in the repealing statute, preserving the old bye-laws or other instruments[57] [S. 24, General Clauses Act[58]].

(x) The power to make subordinate legislation includes the power to amend or revoke without reference to Parliament.[59]

This is provided by s. 21 of *our* General Clauses Act, 1897, which corresponds to s. 32(3), (Eng) Interpretation Act, 1889, with a wider application, because it extends to all forms of subordinate legislation, including orders—

"Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notification, orders, rules or bye-laws so issued."

(xi) When a statutory order is revoked by another order, no liability incurred under the old order is affected, in the absence of express provision in the revoking order.[60]

(xii) If the power to make a rule[61] or bye-law[62] is otherwise established, the fact that the source of that power has been incorrectly or inaccurately indicated in such rule or bye-law would not invalidate it.

50. *Hall* v. *Nixon*, (1875) 10 Q.B. 152.
51. *Perry* v. *London Omnibus Co.*, (1916) 2 K.B. 335 (C.A.).
52. *Peerless* v. *R.B.I.*, (1992) 2 S.C.C. 343 (para. 53).
53. *R.* v. *Industrial Disputes Tribunal*, (1954) 2 All E.R. 730.
54. *Taylor* v. *Brighton Borough Council*, (1947) 1 All E.R. 864 (870); *Sparks* v. *Edward Ash Ltd.*, (1943) 1 K.B. 223: (1943) 1 All E.R. 1; *Morris* v. *Minister of Pensions*, (1948) 1 All E.R. 748.
55. *Fawcett Properties* v. *Buckingham C.C.*, (1959) 2 All E.R. 321 (C.A.).
56. *Strickland* v. *Hayes*, (1896) 1 Q.B. 290.
57. *Watson* v. *Winch*, (1916) 1 K.B. 688.
58. *Harish* v. *State of M.P.*, A. 1965 S.C. 932 (938); *Chief Inspector* v. *Thapar*, A. 1961 S.C. 838 (843-45); *Bhilai Steel* v. *Steel Workers' Union*, A. 1964 S.C. 1333 (1336).
59. *Kavita* v. *State of Maharashtra*, A. 1981 S.C. 1641 (para. 3).
60. *Bennett* v. *Tatton*, (1918) L.J. K.B. 313.
61. *Balakotiah* v. *Union of India*, A. 1958 S.C. 232 (236).
62. *Afzal* v. *State of U.P.*, A. 1964 S.C. 264 (268).

Constitutional grounds of invalidity of subordinate legislation. Apart from the above general conditions for the validity of statutory instruments, there are certain other conditions which must be complied with for the validity of subordinate legislation in countries like the *U.S.A.* and *India* where there are constitutional provisions limiting the powers of the Legislature itself, not to speak of the agencies created by the Legislature. Thus,—

(a) The statutory instrument must not violate any provision of the Constitution.[63-64]

The rule-making power is subject to all the constitutional provisions which limit the powers of the Legislature itself. Hence, if a subordinate legislation offends against any of the mandatory provisions of the Constitution, it is liable to be annulled by the Court.

Under *our* Constitution, this is ensured by the specific provision in Art. 13(3)(a).[64] Thus, a rule which imposes an 'unreasonable restriction' (whether substantively or procedurally) upon a fundamental right guaranteed by Art. 19, will be void.[65] The reason is that subordinate legislation is 'law' within the meaning of Art. 13. Similarly, a Rule may be invalid for contravention of Arts. 14[66], 16.[66]

The net effect of Art. 13(3)(a) of the Constitution is that a statutory instrument is directly and independently brought under the control of Part III of the Constitution, apart from the constitutionality of the parent statute under which the instrument has been made.[67] Hence, even where the parent Act itself has been shielded from attack on the ground of violation of fundamental rights, by reason of its inclusion in the 9th Sch. (read with Art. 31B of the Constitution), the Rules and Orders made under the parent Act not being themselves specifically included in that Schedule,[68] shall be open to challenge on the ground of contravention of a fundamental right, say, Arts. 14[69], 19.[67]

In short, a subordinate legislation is open to a double attack on the grounds of *ultra vires* and unconstitutionality. Hence, even where the statutory instrument is *intra vires* and does not exceed the power conferred upon it by the Legislature, it may still be void if it has contravened a fundamental right, though the parent Act itself is not violative of the fundamental right or its violation is immunised by inclusion in the 9th Sch. of the Constitution.[67]

(b) Apart from the contravention of fundamental rights, rules have been annulled by *our* Courts for contravention of other mandatory provisions of the Constitution, e.g. Art. 311(1); Art. 311(2).[70]

63. *Ex parte Hull,* (1941) 312 U.S. 546 (549).

64. See Author's *Shorter Constitution,* 10th Ed. (pp. 28-30), for a list of some Rules and Orders which have been invalidated for contravention of Fundamental Rights.

65. *Rashid Ahmad* v. *Municipal Board,* (1950) S.C.R. 566; cf. *Peerless* v. *R.B.I.,* (1992) 2 SCC 343 (paras. 59, 67, 71, 73).

66. *Bal Ram* v. *State of U.P.,* A. 1981 S.C. 1575; *State of U.P.* v. *Ram Gopal,* A. 1981 S.C. 1041 (para. 12); *Bhandari* v. *I.T.D.C.,* A 1987 S.C. 111 (para. 4); *CIWTC* v. *Brojo,* A 1986 SC 1571; *W.B.S.E.B.* v. *Ghosh,* A 1985 SC 722.

67. *Prag Mills* v. *Union of India,* A. 1978 S.C. 1296 (paras. 44-46) — 5 : 2 of 7-Judge Bench, overruling *Vasantlal* v. *State of Bombay,* A. 1961 S.C. 4, on this point.

68. *Godavari Mills* v. *Kamble,* A. 1975 S.C. 1193.

69. *State of Rajasthan* v. *Ashok,* A. 1989 S.C. 177; *Municipal Corpn.* v. *Deokumar,* (1989) 2 SCC 249; *Bhagwanti* v. *Union of India,* (1989) 4 S.C.C. 397 (para. 13).

70. *Moti Ram* v. *General Manager,* A. 1964 S.C. 600; *Jagannath* v. *State of U.P.,* A. 1961 S.C. 1245 (1252).

(c) The statute under which the statutory instrument is made must not itself be unconstitutional,[59] either because it violates a constitutional mandate or limitation or because the power it delegates to the subordinate authority exceeds the limits of *subordinate* legislation.[71-72]

Publication of statutory instruments.

(A) *England.*—In *England,* in an earlier case[73] it was held that where a statute provided that the Secretary of State could make Orders 'of which notice shall be given in such manner as he may direct', the requirement of notice or publication was merely directory and that the Order came into force on the day it was made. But in *Johnson* v *Sargent,*[74] it was held that no statutory instrument could take effect until it was published.

Then came the Statutory Instruments Act, 1946, s. 3(2) of which provides for the due publication of statutory instruments and also provides that in any proceeding for contravention of a statutory instrument, it should be a defence to prove that *reasonable steps* were not taken for notifying the instrument to the public or to the person charged. The onus to prove such notification is on the Crown, and in case of a failure to discharge the onus, the prosecution must fail.[75]

But the definition of 'statutory instruments' in the Statutory Instruments Act is confined to instruments which are made in exercise of powers delegated by Parliament. Ere long, it was found that all kinds of subordinate legislation were not covered by the Act even though the need for publicity was not less urgent in such cases. In *Blackpool Corporaton* v *Locker,*[76] the Court of Appeal had to deal with a species of *sub-delegated legislation,* e.g., circulars issued by a Minister in exercise of powers conferred by Regulations made under a statute and not by the statute itself. Such circulars were found not to be covered by the Statutory Instruments Act, but the circulars were *legislative* in character, and the Court of Appeal laid down the general proposition that the condition of publication should attach to all kinds of subordinate legislation, whether it was made in exercise of a primary or secondary delegation of legislative power. The Court of Appeal[76] observed that the public who are affected by a law are entitled to know what it is and that the justification for the maxim 'Ignorance of law is no excuse' is this very right to know the law and the accessibility of the public to it, and held that the circulars issued by the Ministry of Health under the Defence (General) Regulations, 1939, had no validity unless they were published.

Sub-delegated legislation.

Similarly, in *Jackson Stansfield & Sons* v *Butterworth,*[77] the same Court observed—

"The truth is that, while in our modern constitutional practice delegated legislation is both necessary, convenient and desirable safeguards are essential, especially that its content should always be within public knowledge. Compulsory publicity is the only preventive of many of those evils which most people have in mind when they speak of

71. *Schechter Poultry Corpn.* v. *U.S.,* (1935) 295 U.S. 495.
72. *In re Delhi Laws Act, 1912,* (1951) S.C.R. 747.
73. *Jones* v. *Robson,* (1901) 1 K.B. 673.
74. *Johnson* v. *Sargent,* (1918) 1 K.B. 101.
75. *Defiant Cycle Co.* v. *Newell,* (1953) 2 All E.R. 38; *R.* v. *Sheer Metalcraft,* (1954) 1 All E.R. 542.
76. *Blackpool Corpn.* v. *Locker,* (1948) 1 All E.R. 85 (87) C.A.
77. *Jackson Stanfield* v. *Butterworth,* (1948) 2 All E.R. 558 (564) C.A.

'bureaucracy' with an accent of censure. And where....administration is mixed up with sub-delegated legislation and none of the mixture is made public, it is really unfair and indeed, unjust to the public."[77]

In a case from Singapore, the Privy Council[78] has reiterated the *Blackpool*[76] *doctrine* that in the absence of a requirement for publication, it could not be contended that a delegated legislation, such as a statutory order, took effect from the date when it was made and that, accordingly, there could not be a conviction for the offence of contravention of such order, so long as it was not brought to his knowledge, or there was impracticable means of his ascertaining whether such an order had been made.

Sub-delegation is a new menace to the Rule of Law not only because of its inaccessibility to those who are affected by such instruments but also because of the inartistic language in which they are framed so that they become unintelligible even to the Courts.[79]

(B) *Canada*—The requirement of publication and the consequences of non-publication of statutory instruments are codified in s. 6 of the Regulations Act, 1952, which says—

"(1) Every regulation shall be published in English and in French in the Canada Gazette within thirty days after it is made.

* * * *

(3) No regulation is invalid by reason only that it was not published in the Canada Gazette, but no person shall be convicted for an offence consisting of a contravention of any regulation that was not published in the Canada Gazette unless,

(a) the regulation was, pursuant to section 9, exempted from the operation of sub-section (1), or the regulation expressly provides to its terms prior to publication in the Canada Gazette, and

(b) it is proved that at the date of the alleged contravention reasonable steps had been taken for the purpose of bringing the purport of the regulation to the notice of the public, or the persons likely to be affected by it, or of the person charged."

(C) *Australia*.—In Australia, too, the condition of publication is now statutory. S. 48(1) of the Acts Interpretation Act, 1901-50 says—

"(1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—

(a) shall be notified in the Gazette;

(b) shall, subject to this section, take effect from the date of notification, or, where another date is specified in the regulations from the date specified;....."

(D) *U.S.A.*—I. Prior to the enactment of the Administrative Procedure Act, 1946, there was no general statutory requirement of publication for subordinate legislation, though a machinery for registration of statutory instruments had been set up by the Federal Register Act, 1935. The 'Due Process' clause of the Constitution was never applied to this field inasmuch as it was regarded as 'purely a legislative function',[80] so that, in the absence of any statutory provision, no notice or hearing was necessary for the making or enforcement of rules concerning the public generally,[81] as distinguished from those which affected particular individuals or interests.[82]

II. S. 3(a) of the Administrative Procedure Act, 1946, now requires that *all rules*, made by any Federal agency, save those which are excepted

78. *Lim Chin Aik* v. *R.*, (1963) 1 All E.R. 223 (226-27) P.C.
79. Cf. *Patchett* v. *Leathem*, (1949) 65 T.L.R. 69 (70).
80. *Prentis* v. *Atlantic Coast Line*, (1908) 211 U.S. 210.
81. *Bowles* v. *Willingham*, (1944) 321 U.S. 503.
82. *Bi-Metallic Investment Co.* v. *Colorado*, (1915) 239 U.S. 441.

from the operation of the Act, must be published in the Federal Register at least 30 days before they become effective.

The only two exceptions specified by the Act are—(a) Rules relating to federal functions requiring *secrecy* in the public interest; (b) Rules relating solely to the *internal management* of the agency itself.

The definition of 'Rule' in s. 2(c) of the Act practically covers all species of subordinate legislation :

"Rule means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy ....."

In the result, in the *U.S.A.*, no subordinate legislation made by a federal department or authority is enforceable until it has been published in the Federal Register, and 30 days have passed since such publication.[83]

This has been assured by an amendment of the Administrative Procedure Act in 1966.

(E) *India.*—I. In *India,* the Supreme Court has avoided the uncertainty of the English common law[75] by laying down[84] that while Acts of the Legislature have the publicity made by the accredited representatives of the people and, accordingly, become enforceable from the day they receive the assent of the President or the Governor, as the case may be, in the case of all subordinate legislations, there is no safeguard for such publicity nor are they made by the representatives of the nation. The principle of natural justice requires that a person should not be affected by a rule of conduct which he does not know. Hence, *no* subordinate legislation can be operative *unless* it is reasonably published in some manner.[85]

Most of our Acts[86] require a publication of the rules made thereunder, in the Official Gazette and the rules become effective only upon such publication.[87] Needless to say, in such cases where the statute itself prescribes a particular mode of publication, the rule or notification shall have no legal effect until and unless it is published in the same manner.[88-89] Conversely, there is no obligation to publish a statutory instrument outside India, in order to make a foreigner liable under it. Publication in the Official Gazette is sufficient to give notice to everybody concerned.[90]

II. But there are some existing Acts which do not contain any such provision even though breach of the rules is met with penal consequences, e.g. s. 4, Livestock Importation Act, 1898. It would follow from the Supreme Court decision in *Harla's case*[84] that the penalty under such an Act can no longer be imposed unless the rule has been reasonably published. In order to save from invalidity proceedings taken under rules made under such Acts, it would, therefore, be advisable to incorporate a general requirement of publication in the General Clauses Act.

Requirement as to publication in Official Gazette.

83. *U.S.* v. *Morelock,* (1954) 124 F. Supp. 932 (947).

84. *Harla* v. *State of Rajasthan,* (1952) S.C.R. 110.

85. *State of Kerala* v. *Joseph,* A. 1958 S.C. 296 (300).

86. E.g., s. 4(3), Local Authorities Protection Act, 1914; s. 17, Legal Practitioners Act, 1879; s. 55(3), Land Acquisition (Mines) Act, 1879; s. 133, Motor Vehicles Act, 1939.

87. *Mahendra* v. *State of U.P.,* A. 1963 S.C. 1019 (1035). As to the effects of an 'immunity clause' on such requirement, see *Bangalore Mills v. Bangalore Corpn.,* A. 1962 S.C. 562 (564); *Raja Buland Sugar Co.* v. *Rampur Municipality,* A. 1965 S.C. 895 (900, 902).

III. The subordinate legislation would not take effect until it is made public.[91]

IV. In this connection, we should note the procedure as to *'previous* publication' of draft rules laid down in s. 23 of the General Clauses Act, 1897. This section simply lays down the procedure for previous publication or 'antecedent publicity', and the section applies only where the statute which confers the rule-making power itself requires that rules can be made under the Act only after they have been published in a draft form. As instances of Acts which require such previous publication may be mentioned—Central Tea Board Act, 1949 (s. 15); Chartered Accountants Act, 1949 [s. 30(3)]; Co-operative Societies Act, 1912 [s. 43(4)]. It will be noticed that all the Acts just mentioned affect *particular* interests.

Requirement as to previous publication of draft.

Where an Act thus requires previous publication, the procedure under s. 23 of the General Clauses Act must be followed. This provision specifically requires not only previous publication of the draft rule but also the consideration of all objections and suggestions received on the draft rules by a notified date. The procedure laid down in this section is thus akin to that laid down in s. 4 of the American Administrative Procedure Act, 1946. While publication of the final rules merely gives information to those who are to be affected by it, pre-publication gives them an opportunity to have their say.

That any aperture for 'constructive notice' has been sealed in India would appear from the Supreme Court decisions which hold that even where a statute prescribes the procedure for the publication of a statutory instrument at two stages (i.e., pre-publication and post-publication) or through two media (e.g., the Official Gazette as well as some local newspaper or the like), *each* of these reequirements must be held to be mandatory[89] and a condition precedent to the subordinate legislation[89] and in default of publication in *any* of these modes will render the statutory instrument invalid.[89]

Non-compliance with the requirement as to laying before Parliament.

I. The law on this point is not yet definitely settled.

(A) *England.*—In earlier cases,[92] the condition of laying before Parliament was held to be merely directory. That the position was nevertheless uncertain is evident from the fact that many of the Emergency Regulations made during World War II were actually made without complying with this requirement and Parliament had to pass the National Fire Service Regulations (Indemnity) Act to indemnify the Secretary of State from any consequence of such failure.

U.K.

But in view of s. 4(2) of the Statutory Instruments Act, 1946, since enacted, it would now seem that the instrument is validly made only after it has been laid before Parliament where so required by the statute under

88. *State of U.P.* v. *Kishori,* A. 1980 S.C. 680 (para. 3).

89. *State of M.P.* v. *Ram,* A. 1979 S.C. 888; *Govindlal* v. *Agricultural Market Committee,* A. 1976 S.C. 263.

90. *State of Maharashtra* v. *George,* A. 1965 S.C. 722 (743).

91. *Raju* v. *Kantharaj,* (1990) 4 S.C.C. 178 (para. 13); *Srinivasan* v. *State of Karnataka,* (1987) 1 SCC 658; *Fatma* v. *State of Bombay,* (1951) S.C.R. 266 (275).

92. *Bailey* v. *Williamson,* (1873) L.R. 8 Q.B. 118; *Starey* v. *Graham,* (1899) 1 Q.B. 406 (412).

which it has been made,[93] unless the requirement has been obviated by following the procedure prescribed by s. 4(1).

(B) *Australia.*—In Australia, it has been laid down by s. 48(3) of the Acts Interpretation Act, 1901-50, that the failure to lay the regulations made under a statute before Parliament makes them void. The section provides—

"(1) Where an Act confers power to make regulations, then, unless the contrary intention appears all regulations made accordingly—

* * * * * *

Australia.

(c) shall be laid before each House of the Parliament within fifteen sitting days of that House after the making of the regulations.

(3) If any regulations are not laid before each House of the Parliament in accordance with the provisions of sub-section (1) of this section, they shall be *void* and of no effect.

(4) If either House of the Parliament passes a resolution (of which notice has been given at any time within fifteen sitting days after any regulations have been laid before that House) disallowing any of those regulations, the regulation so disallowed shall thereupon cease to have effect.

(5) If, at the expiration of fifteen sitting days after notice of a resolution to disallow any regulation has been given in either House of the Parliament in accordance with the last preceding sub-section the resolution has not been withdrawn or otherwise disposed of, the regulation specified in the resolution shall thereupon be deemed to have been disallowed.

(6) Where a regulation is disallowed, or is deemed to have been disallowed, under this section, the disallowance of the regulation shall have the same effect as a repeal of the regulation."

(C) *India.*—I. In *India,* it would be advisable to hold that the statutory safeguard against the dangers of delegated legislation is mandatory and should not be disregarded by the Courts where any rule which ignores the statutory requirement is sought to be enforced.

India.

This view was taken by the Supreme Court in *Narinder* v. *Union of India.*[90] In this case, the facts were as follows :

S. 3(1) of the Essential Commodities Act, 1955, empowers the Central Government to regulate the production, supply and distribution of essential commodities by making an Order which, according to sub-sec. (5), must be notified in the Official Gazette, and, according to sub-sec. (6), must be "laid before both Houses of Parliament as soon as may be, after it is made". Cl. 4 of the Non-Ferrous Metal Control Order, 1958, made under the Act, provided that "no person shall acquire....any non-ferrous metal except under and in accordnace with a permit issued....by the Controller *in accordance with such principles as the Central Government* may from time to time specify".

Held, that the principles referred to in Cl. 4 should have to be notified in the Official Gazette and laid before Parliament in the same way as the Order itself (because the principles were enforceable as a part of the Order) and that so long as they were not so notified and laid, enforcement of the Order and refusal of a permit under it would be *ultra vires* s. 3 of the Essential Commodities Act and also void for contravention of Art. 19(1)(*f*)-(*g*) of the Constitution, not being a valid law within the meaning of Cl. (6) of Art. 19.[94]

93. The opinion of jurists is not unanimous on this point. Allen, for instance, thinks that the requirement is directory [*Law in the Making,* 16th Ed., p. 543; *Law and Orders,* 3rd Ed., 1965, p. 146]. But in *R.* v. *Sheer Metalcraft,* (1954) 1 All E.R. 542, the Court proceeded on the view that the statutory instrument got its validity only after it was laid before Parliament.

94. *Narinder* v. *Union of India,* A. 1960 S.C. 430.

A different situation appears to have been dealt with in *Jan Mohd.* v. *State of Gujarat.*[95]

S. 26(5) of the Bombay Agricultural Produce Markets Act, 1939, provides that the rules made under s. 26 "shall be laid before each of the Houses of the Provincial Legislature *at the session thereof next following* and shall be liable to be modified or rescinded by a resolution in which both Houses concur and such rules shall, after notification in the Official Gazette, be deemed to have been modified or rescinded accordingly".

The Rules were framed in 1941, but at that time there was no Legislature in session owing to the Emergency arising out of the World War. Nor were the Rules placed before the Legislature at the first session thereafter, which was held in May, 1946. They were, however, placed at the second session, in September, 1946. The Supreme Court held that though the Rules were not placed before the first session, they became valid from *the date when they were made,* because the Act did not say that the Rules would be invalid in case of failure to place them before the Legislature.[95]

The preceding decision[95] may be supported on the footing that once the Rules had been placed before the Legislature, in accordance with the statute, the validity of the Rules related back to the time they were made by the Rule-making authority inasmuch as the statute did not provide that the Rules would come into operation only after they were placed before the Legislature.

The question is what would happen where the Rules are not placed before the Legislature at all, and whether the rules can be enforced so long as this is not done. Since *Narinder's case*[94] was not even noticed in *Jan Mohd.'s case,*[95] the authority of that decision has not been overruled by the latter. In this context, we should also recall the observations in *Garewal* v. *State of Punjab*[96] to the effect that the charge of unconstitutional delegation or abdication of functions cannot be brought against a Legislature which has provided that the rules made by the subordinate authority must be laid before the Legislature for approval, modification or repeal and also that after the Rules have been so laid, they become a part of the Act itself.[97] Such a reasoning can hardly stand if the requriement of laying is held to be directory and the Rules are held to be enforceable even before they have been laid before the Legislature.[98]

In some later cases,[99] however, the Court has reverted to the directory theory. Consequently, we have launched into an arena of uncertainty, where the result would depend upon whether, in the particular circumstances of each case, the Court would construe the requirement as directory or mandatory. Absence of any penal provision in the Act itself may indicate that it is directory.[99]

II. The foregoing issue should not also be confused with that of the *time* from which the invalidity takes place where Parliament disaffirms or annuls a sub-legislation in exercise of its power under a 'condition of defeasance'. Whether the statutory obligation to lay before Parliament is of the nature of a condition precedent, namely, that it will take effect only after it is laid

95. *Jan Mohd.* v. *State of Gujarat,* A. 1966 S.C. 385 (394-95).
96. *Garewal* v. *State of Punjab,* A. 1959 S.C. 512 (518).
97. *Express Newspapers* v. *Union of India,* A. 1958 S.C. 578 (635); *Kerala Education Bill, In re.,* A. 1958 S.C. 956 (975).
98. *Hukam Chand* v. *Union of India,* (1972) 2 S.C.C. 601.
99. *Atlas Cycle Industries* v. *State of Haryana,* (1979) 2 S.C.C. 196; *Ganesh* v. *Lakshmi* A. 1985 S.C. 964 (paras. 7-8).

before Parliament[100] or only on confirmation by Parliament, or, in the form of a condition subsequent, e.g., that the sub-legislation shall take effect on its promulgation, subject to annulment or revocation by Parliament within a specified time,[1] the failure of the Executive to present the sub-legislation before Parliament within the prescribed time should be visited with the *same* consequences, if the sovereignty of Parliament is not to be defeated by departmental default. Of course, where the Parliamentary power of annulment is a condition subsequent, it is obvious that, unless Parliament otherwise provides in its motion of annulment, the annulment should take effect from the date of such motion, without prejudice to acts done under the subordinate legislation prior to such annulment.

III. It should be noted, in this context, that whatever be the effects of non-compliance with the statutory requirement of 'laying' a statutory instrument before Parliament, a compliance with such requirement cannot immunise the statutory instrument from judicial control on the ground of *ultra vires*.[2] In other words, it cannot be argued that because Parliament has approved of the subordinate legislation by its resolution, it should have the same validity as an Act of Parliament to which the doctrine of *ultra vires* is not applicable, for, the subordinate legislation remains subordinate and does not attain the status of legislation by a sovereign Legislature which can be made only by a Bill enacted by both Houses of Parliament, as distinguished from mere 'resolutions'.

Hearing, if required for subordinate legislation.

(A) *U.S.A.*— I. The 'Due Process' requirement of hearing has not been applied to the making of rules which concern the *public generally*,[3] because it is considered as a legislative function and also because it is impracticable to give a hearing where the persons interested are numerous.[4]

But 'Due Process' requires a hearing when the rule-making affects a *particular* specified interest, e.g., the rates of a particular utility company[5] or the assessment of a tax on dwellers abutting a street for special benefits received from the paying of that street,[5] and thus simulates the process of adjudication relating to the right of business or property.[6] A hearing is sometimes required by the governing statute.[7]

Even when a hearing is required either by 'Due Process' or by a statute, in the absence of a specific requirement, the hearing need not be of a *quasi-judicial* type; it is of the legislative type of the nature of a committee hearing.[7] And a hearing given before making a provisional order final is not necessarily bad.[8]

II. Notice and opportunity to participate in the making of every rule is now prescribed by the Administrative Procedure Act, 1946, except in certian specified cases, viz., those

100. Cf. s. 4(1), Statutory Instruments Act, 1946.
1. Cf. s. 5(2), *ibid.*
2. *Hoffman* v. *Secy. of State*, (1975) A.C. 195.
3. *State Railroad Tax Cases*, (1876) 92 U.S. 575.
4. *Bowles* v. *Willingham*, (1944) 321 U.S. 503; *Bi-Metallic Investment Co.* v. *Colorado*, (1915) 239 U.S. 441; *U.S.* v. *Florida Ry.*, (1973) 410 U.S. 224.
5. *Londoner* v. *Denver*, (1908) 210 U.S. 373.
6. *Phillips* v. *S.E.C.*, (1946) 328 U.S. 860, denying *cert.* from 153 F. 2nd. 27 (32).
7. *Norwegian Nitrogen Products Co.* v. *U.S.*, (1933) 288 U.S. 294.
8. *U.S.* v. *Illinois Central Ry. Co.*, (1934) 291 U.S. 457.

(a) relating to military, naval or foreign affairs;

(b) relating to public property, loans, grants, benefits or contracts;

(c) interpretative rules and general statements or policy;

(d) situations in which the rule-making authority for *good cause* finds that noticed and public procedure thereon are impracticable, unnecessary or *contrary to public interest.*

What is required under this general statute is a consultation with the persons interested or to be affected. A *quasi-judicial* hearing is not required unless the particular statute which authorises the rule-making requires it.[9]

(B) *India.*—There being no general statute of the nature of the American Administrative Procedure Act, 1946, the question whether a consultation of the persons affected is required for the making of rules, regulations or bye-laws must depend upon the governing statute. Many Indian statutes require a 'previous publication' at the draft stage, and whenever this condition is imposed by the governing statute, s. 23 of the General Clauses Act, 1897, would be attracted and then the rule-making authority must consider the objections and suggestions received from 'any person' during the period.[10]

Hearing is usually required by statutes in the matter of schemes affecting the public, e.g., a Transport Service Scheme under s. 68D of the Motor Vehicles Act, 1939. In such cases, the hearing must be done *quasi-judicially.*[11]

In the absence of such statutory requirement,[12] however, hearing of the affected party would not be insisted upon, because the principle of natural justice does not extend to a legislative or *quasi-legislative* function,[13] e.g., price fixing.[14]

But even where natural justice is not applicable, such *quasi-legislative* action must not violate the requirement of *non-arbitrariness* or fair play.[15]

Omission to exercise rule-making power, how far affects exercise of other powers under a statute.

When a statute confers a power upon an authority and makes it exercisable in the manner prescribed by rules to be framed by that very authority or some other authority, the question arises whether the failure to make such subordinate legislation would defeat the statutory power itself.

(A) *U.S.A.*—In the *U.S.A.* it has been held that the statute is not rendered otiose by default in making the rules or regulations; on the other hand, the duties imposed by it are taken as absolute, so long as the regulations are not framed.[16] Of course, after the regulations are made, the statutory duty is limited by the requirements of the regulations and have to be carried in conformity therewith.[16]

9. *Willapoint Oysters* v. *Ewing,* (1949) 338 U.S. 860, denying *cert.* from 174 F..2d. 676.

10. *Raza Sugar Co.* v. *Rampur Municipality,* A. 1965 S.C. 895; *Banwari* v. *State of Bihar,* A. 1961 S.C. 849.

11. *Nageswara Rao* v. *A.P.S.R.T.C.,* A. 1959 S.C. 308; *Malik Ram* v. *State of Rajasthan,* A. 1961 S.C. 1575.

12. *Sundarjas* v. *Collector,* (1989) 3 S.C.C. 396 (para. 28).

13. *Tulsipur Sugar Co.* v. *N.A.C.,* A. 1980 S.C. 883; *Porwal* v. *State of Maharashtra,* A. 1981 S.C. 1127; *International Tourist Corpn.* v. *State of Haryana,* A. 1981 S.C. 774.

14. *Union of India* v. *Cyanamide,* A. 1987 SC 1802; *Ashok S.F.* v. *M.C.B.,* (1993)2 SCC 37 (para 29)—3 Judges; *S.M.&S.P.* v. *U.O.I.;* (1994)1 SCC 648 (paras. 67-68)—3 Judges.

15. *Sitaram Sugar Co.* v. *Union of India,* A 1990 S.C. 1276 (para. 45); *State of U.P.* v. *Ranusagar Co.,* A. 1988 S.C. 1737 (1763-64); *Niyami* v. *Union of India,* A. 1990 S.C. 2128 (para. 12).

16. *Atchison* v. *Scarlett,* (1937) 300 U.S. 471.

(B) *India.*—In *India,* the Supreme Court has made a distinction between an absolute power and a power to be exercised under circumstances to be prescribed by rules or other subordinate legislation.[17]

A. *When the power is absolute.*

When an absolute administrative power is vested in an authority, but the statute empowers that or some other authority to prescribe the manner of exercise of that power, failure to make such rules cannot defeat the exercise of that administrative power, even though as soon as such rules are made, the power can be exercised only in conformity with such rules.[18]

Para. 2(4) of the Sixth Schedule to the Constitution of India provides—

"Subject to the provisions of this Schedule, the administration of an autonomous district shall....be vested in the District Council...."

Para. 3(1) then says—

"....the District Council for an autonomous district....shall have *power to make laws* with respect to—

(g) the appointment.....of Chiefs or Headmen."

The Supreme Court held that the District Council would at all times have the power to appoint or remove administrative personnel in exercise of the general power of administration vested in it by para. 2(4) and it could not be contended that there could be no appointment or dismissal until laws were made by the Council under para. 3(1), to regulate the exercise of that administrative power. Of course, once such laws were made, the Council would be bound to follow the laws in the matter of such appointment or removal.[18]

B. Where, however, a statue vests a power in an authority to be exercised *only* in the cases or under the circumstances as are to be prescribed by subordinate legislation, such statutory power cannot be exercised so long as such subordinate legislation is not made.[17]

Thus, in *Narendra* v. *Union of India,*[19] it was held that cl. 4 of the Non-Ferrous Metal Control Order, 1958, could not be enforced so long as the Central Government did not specify the principles, "in accordance with which" only a permit could be issued for acquiring non-ferrous metal, under the clause.[19]

C. In this context, it should also be noted that in cases where Government has the power to do a thing in the exercise of its general executive power, the absence of the making of a statutory rule cannot invalidate an act so done in the exercise of its executive power,[20] unless, of course a statute has said that the act can be done only after appropriate rules have been made.

Though the foregoing proposition is unquestionable, the facts in *Nagarajan's case*[20] raise the question whether the Government, having framed statutory rules limiting its power, can still act otherwise than in accordance with the provisions of those rules, relying on its general executive power. In this case, the Governor of Mysore had framed the Mysore State Civil Services (General Recruitment) Rules, 1957, in exercise of the powers conferred by Art. 309 of the Constitution and r. 3 of these Rules provided—

"Method of recruitment. Recruitment to the State Civil Services shall be made by the competitive examination or by promotion. The method of

17. *Narayan* v. *Bhagwandas,* A. 1965 S.C. 1818.
18. *Cajee* v. *Siem,* A. 1961 S.C. 276 (281).
19. *Narendra* v. *Union of India,* A. 1960 S.C. 430 (432, 437).
20. *Nagarajan* v. *State of Mysore,* A. 1966 S.C. 1942.

recruitment and qualifications for each State Civil Service shall be *as set forth in the rules of recruitment of such service specially made in that behalf.*"

The State Government made no rules as required by the latter part of r. 3. The contention that no recruitment could be made until such rules were framed was rejected by the Supreme Court, with this observation :

".....the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in *Ram Jawaya Kapur* v. *The State of Punjab* that it is not necessary that there must be a law already in existence before the Executive is enabled to function and that the powers of the Executive are limited merely to the carrying out of these laws. We see nothing in the terms of Article 309 of the Constitution which abridges the power of the Executive to act under Article 162 of the Constitution without a law. It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the Executive must abide by that act or rule and it cannot in exercise of the executive power under Article 162 of the Constitution ignore or act contrary to that rule or act."[20]

It is submitted, with respect, that the conclusion[20] ultimately reached by the Court is contrary to the last sentence in the foregoing passage. It is true that the President or the Governor cannot be compelled to exercise his power under the Proviso to Art. 309 to make rules. But in the instant case, the Governor had, in fact, exercised that power and r. 3, so made, laid down how the power of recruitment was to be exercised by the State Government since the promulgation of this rule. One of the conditions for the exercise of the power of recruitment under r. 3 was that the Government must make further rules laying down the procedure and that the recruitment must be made in conformity with the procedure laid down therein. Can the Government, after the promulgation of r. 3, fall back upon its executive power and act contrary to the requirements of r. 3 which is binding on the Government? The answer seems to be in the negative, according to the last sentence of the foregoing observation of the Supreme Court which embodies a well-established proposition. The reason given by the Court in support of the contrary conclusion is merely collateral, namely, that the Government has the power to act under Art. 162, without exercising its power under the Proviso to Art. 309. If the rules in question could not be framed for want of time, the Government should have withheld the promulgation of r. 3 itself, instead of violating it on the strength of its power under Art. 162. It is submitted that the power under Art. 162 gives way, *pro tanto,* as soon as rules are framed in exercise of the power conferred by Art. 309.

It is well-settled in *England* and the *U.S.A.* that an *intra vires* subordinate legislation, validly made, has the same force of law as the statute itself,[21-22] so that the Executive shall have no more dispensing power in the case of Rules made by itself than in the case of statutes made by the Legislature, and the consequences of violation of either shall be the same.[21-22] [See next caption.]

Binding nature of subordinate legislation.

(A) *U.S.A.*—An *intra vires* rule or regulation has the force of law.[23] It

21. *Rathbone* v. *Bundock,* (1962) 2 All E.R. 257; *United Dairies* v. *Beckenham Corpn.*, (1961) 1 All E. R. 579 (584); *William* v. *Flaxton R.D.C.,* (1929) 1 K.B. 450.

22. *U.S.* v. *Nixon,* (1974) 418 U.S. 683; *U.S.* v. *Mersky,* (1960) 361 U.S. 431; *U.S.* v. *Howard,* (1957) 352 U.S. 212; *Paul* v. *U.S.,* (1963) 371 U.S. 245 (255).

23. *Maryland Casualty Co.* v. *U.S.,* (1920) 251 U.S. 342 (349).

follows that statutory regulations, validly prescribed by an administrative authority, are as much binding upon himself[24] as upon the citizen and that this principle holds even when the administrative action in question is discretionary in nature.[25] In other words, as soon as the regulations are framed, the discretionary power vested by the statute is limited by the regulations and the decisions of the authority can thereafter be valid only if made in the manner prescribed by the regulations.[25]

Even where an administrative authority has the power to withdraw existing regulations and promulgate new ones, it would be highly arbitrary for the authority to exercise this power only to affect the merits of a *particular case* pending before the authority.[26]

(B) *England.*—It has already been pointed out that when a rule or regulation is validly made under an Act, it has the same effect as if it was contained in the Act itself. No question, therefore, that the administrative authority must be bound by the rules as by the Act itself. Thus, a local authority has no power to dispense with the operation of its own bye-laws which have the force of law, if properly made.[27]

(C) *India.*—The question, viz., whether an administrative or *quasi-judicial* authority, having a rule-making power, may—(a) refuse to follow them in particular cases or further; (b) change the existing rules themselves, for the purpose of a particular case, may be discussed under two heads :

(a) So far as the first question is concerned, there is little doubt that *mandamus* will be available to enforce the observance of a rule which has statutory force.[28]

(i) In *Guruswami* v. *State of Mysore*,[29] the Supreme Court held that after the Government has framed certain rules under a statutory power laying down a procedure for the doing of a thing (e.g., the holding of a public auction), Government is no longer free to depart from those rules in any particular case[30] and to follow an *ad hoc* procedure.

(ii) The question has been thoroughly examined by the Supreme Court in two decisions[31-32] relating to the Rules made under the Assam Land and Land Revenue Regulation, 1886.

S. 16 of the Regulation provides—

"*Section 16. Right to fishery.* The Deputy Commissioner, with the previous sanction of the Provincial Government, may, by proclamation published in the prescribed manner, declare any collection of water, running or still, to be a fishery; and no right in any fishery so declared shall be deemed to have been acquired by the public or any person, either before or after the commencement of this Regulation, except as provided in the Rules made under Section 155 ....."

---

24. *Chapman* v. *Sheridan-Wyoming Coal Co.*, (1950) 338 U.S. 621 (629); *Vitarelli* v. *Seaton*, (1959) U.S. 535.
25. *Accardi* v. *Shaughnessy*, (1953) 347 U.S. 260; *Service* v. *Dulles*, (1956) 354 U.S. 363.
26. *Colyer* v. *Skeffington*, (1920) 265 F. 17 (48).
27. *Yabbicom* v. *King*, (1899) 1 Q.B. 444; *William* v. *Flaxton Rural Council*, (1929) 1 K.B. 450.
28. *State of U.P.* v. *Baburam*, A. 1961 S.C. 751 (761, 763, 766).
29. *Guruswami* v. *State of Mysore*, A. 1954 S.C. 592.
30. Also see *Nagarajan* v. *State of Mysore*, A. 1966 S.C. 1942.
31. *State of Assam* v. *Keshab*, (1953) S.C.R. 865.
32. *Ganga Ram* v. *Tezpur Fishery Society*, (1957) S.C.R. 479 (485).

S. 155 confers the rule-making power—

"*Section 155. Additional power to make rules.* The Provincial Government may, in addition to the other matters for which it is empowered by this Regulation to make rules, consistent with this regulation, relating to the following matters:—

(f) the granting of licences or the framing of the right.....to fish in fisheries proclaimed under section 16 ....."

Rule 12 was the rule in question in the two decisions :

"*Rule 12.* No fishery shall be settled otherwise than by sale except by the State Government. The order of settlement passed by the State Government shall be final :

Provided that the State Government may introduce the tender system of settlement of fisheries in place of sale by auction system whenever it is considered necessary."

R. 190A says—

"*Rule 190A.* No fishery shall be settled otherwise than by sale as provided in the preceding instructions except with the previous sanction of the Provincial Government."

1. In *State of Assam* v. *Keshab*,[31] the facts were as follows :

When the previous lease in respect of a certain fishery was about to expire, the State Government decided to settle the fishery direct and wrote to the Deputy Commissioner to put the fishery to auction and submit the bid list to Government with his recommendations for direct settlement. The Deputy Commissioner held the auction and forwarded the bid list with his recommendations in favour of the highest bidder. However, before sanction, the Government received some more applications asking for a settlement in their favour. The Government decided in favour of the person recommended by the Deputy Commissioner and wrote to him accordingly. In the meanwhile, the Government, however, decided to review its previous order and cancelled the previous settlement and make it in favour of a different party.

Held, that as the Deputy Commissioner alone was competent under the Regulation to effect a "settlement" of a fishery, it was illegal for the Government to settle the fishery direct by executive action. But it was proper for it to sanction the settlement under R. 190A which was made otherwise than under the Rules. When, therefore, the Government first accepted the recommendations made by the Deputy Commissioner, the settlement was an act of the Deputy Commissioner and fell within the four corners of the Rules.

As to the power of the Government of Assam to cancel a settlement which had been accepted and communicated to the party by the Deputy Commissioner, it was held that the Rules did not give such discretionary power to the Government and that after the Rules had been duly promulgated, the Government had not left to themselves any inherent or discretionary power to depart from the provisions thereof :[31-32]

"....prescribed fisheries in Assam were lifted out of the realm of matters which could be disposed of at the executive discretion of either Government or officials and were placed under statutory regulation and control by Secs. 16 and 155 of the Assam Land and Revenue Regulation of 1886; and elaborate set of Rules which were drawn up in pursuance of that Regulation. It follows that *no fishery can be 'settled' except in accordance with those Rules.*"

"The words 'except with the previous sanction of the Provincial Government' in R. 190A framed under Sec. 155 of the Assam Land and Revenue Regulation, 1886, do not permit the Provincial Government, when it so wishes, to lift the sale completely out of the statutory protection afforded by the Regulation and proceed to dispose them by executive action. Such a construction would make R. 190A run counter to Sec. 16 of the Regulation which requires these sales to be made in accordance with Rules framed under Sec. 155 and of course a rule-making authority cannot override the statute. The law requires the sale to be made under and in accordance with the Rules. It follows that the departure contemplated by R. 190A is also a departure within the four corners of the Rules read as a whole and as a part of the Rules. It is true, the

departure need not conform to the 'preceding instructions' contained in the earlier portion of the rules but the departure once sanctioned itself becomes part and parcel of the Rules....

If the intention was to authorise the Government to lift the matter out of the Rules altogether and proceed in an executive capacity, the word 'sanction' used in R. 190A would be out of place, for the Government would hardly require its own sanction to something which it is itself authorised to do. The sanction must, therefore, refer to something which some other person or body is authorised to do and, in the context, it can only mean sanction to Deputy Commissioner to proceed in a manner which is not quite in accordance with the instructions contained in the Rules."[31]

2. The later case of *Ganga Ram* v. *Tezpur Fishery Society*[32] adds a rider to the proposition laid down in the previous decision, namely, that though statutory rules are binding upon the Government, the Rules themselves may leave certain matters to the discretion of the Government and that whether any particular Rule thus confers discretionary power is a question of construction.

In *Ganga Ram's case*,[32-33] the question arose whether the Rules conferred any power upon the State Government to settle fisheries otherwise than by sale, e.g., by individual settlements without a settlement thereof by auction system or by tender system.

The Court held that under Rule 12 (see p. 87, *ante*), the Government had this discretionary power :

"Even though this power is *not vested* in the State Government *by express provision* made in that behalf, *the context of r. 12 sufficiently indicates the intention of the rule-making authority.* After having prescribed the procedure by way of auction sales in rr. 1 to 11 of s. 1, a prohibition against the settlement of fishery rights otherwise than by sale is enacted in r. 12 except in the case of the State Government. No fishery is to be settled otherwise than by sale and that prohibition is general in terms but an exception is carved out in favour of the State Government in terms which are only capable of the construction that the State Government shall have the power of settling fishery rights *otherwise than by sale.* No limitation is placed on this power which is thus vested in the State Government and if the State Government is empowered to settle fishery rights otherwise than by sale it can do so by adopting the tender system if it thought it desirable to do so or even by entering into individual settlements if the circumstances of the case so warranted. Apart from the adoption of the tender system in place of the auction system, circumstances may conceivably arise where either by reason of the cancellation or relinquishment of fishery lease before the expiration of the period thereof and having regard to the situation then obtaining, it may not be feasible or desirable to sell fishery rights for the unexpired portion of such a lease either by public auction or by inviting tenders and the State Government may, under these circumstances, consider it desirable to enter into individual settlement of the fishery rights so as to earn for the State as much of revenue as possible. No fetter can be placed on the discretion of the State Government in this behalf and the State Government would be the best judge of the situation and would be in a position to determine what procedure to adopt in the matter of the settlement of fishery rights otherwise than by sale. There is nothing in the provisions of s. IV containing rules for settlement of fisheries by tender system which militates against the above position."

(iii) Though the Proviso to Art. 320(3) of the Constitution empowers the President to make regulations specifying the matters or classes of cases in respect of which consultation with the Public Service Commission, in connection with the Services, shall *not* be necessary,—once the regulations have been made, they must be followed and the Executive cannot pick and choose particular cases in which it may or may not consult the Commission.[34]

33. See also *Fatma Haji* v. *State of Bombay*, (1951) S.C.R. 266 (274-75).
34. *State of U.P.* v. *Srivastava*, A. 1957 S.C. 912.

(b) As regards the second question, *our* Supreme Court has held[35] that if the Legislature does the same thing, viz., to change the law for the purpose of a single case so as to deny the party the rights which other individuals similarly situated possess, the law would be invalid for violation of equal protection. There is no reason why the same principle should not be applicable in the case of subordinate legislation having statutory effect.

It is now settled that the exercise of all administrative power is subject to the limitations imposed by Art. 14, so that even when the Executive has a discretionary power, it cannot pick and choose between individuals on other than objective considerations.[36] It follows that the Government cannot achieve the same result by the relaxation or *ad hoc* amendment of the Rules to justify discrimination between individuals similarly situated, without any *objective* ground for differentiation, even where the Rule is directory and relaxation is permissible.[37]

This principle against arbitrariness has been extended to a case where the administrative authority has laid down a definite procedure for doing a thing, by making a rule, regulation or bye-law which may *not* have any statutory authority behind it and is in the nature of an *administrative practice.*[38]

Administrative interpretation of rules.

(A) *U.S.A.*—Though, as has been just seen, it is not competent for an administrative authority to assume the power to dispense with the rules made by itself, it is possible for the authority to modify the scope of a rule by its interpretation. When the constitutionality of a statute or a regulation made thereunder is in question, the Court cannot be guided by the administrative interpretation but apart from any question of constitutional validity, the Court usually *respects* the administrative interpretation if it is a 'possible and reasonable interpretation of the regulation, even if not the only possible one',[39] particularly when it has been adhered to for a considerable period of time,[40] or made contemporaneously with the statute by those familiar with the legislative intent,[41] or after hearing both sides, in course of an administrative adjudication.[42] In *Skidmore* v. *Swift & Co.*,[43] the Supreme Court observed—

> ".....The rulings, interpretations and opinions of the Administrator under this Act, while *not controlling* upon the courts by reason of their authority, do constitute a body of experienced and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the *thoroughness* evident in its consideration, the validity of its *reasoning*, its *consistency* with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[43]

35. *Ram Prasad* v. *State of Bihar*, A. 1953 S.C. 215.
36. *Suman* v. *State of J. & K.*, (1983) U.J.S.C. 897 (paras. 6, 9, 11); *Sangara* v. *State of Punjab*, (1983) U.J.S.C. 821 (paras. 7, 9, 12).
37. *Principal* v. *Vishan*, (1984) U.J.S.C. 7 (para. 15); *Verma* v. *Union of India*, A. 1980 S.C. 1461 (para. 4); *State of U.P.* v. *Baburam*, A. 1961 S.C. 751 (761, 766); *Gangaram* v. *Tejpur Fishery*, (1957) S.C.R. 479 (485).
38. *Minhas* v. *Indian Statistical Institute*, (1984) U.J.S.C. 77 (paras. 23, 24); *Ahluwalia* v. *State of Punjab*, (1975) 3 S.C.R. 81; *Sukhdev* v. *Bhagatram*, (1975) 3 S.C.R. 619.
39. *Bowles* v. *Seminole Rock Co.*, (1945) 325 U.S. 410.
40. *Commr.* v. *Flowers*, (1946) 326 U.S. 465.
41. *White* v. *Winchester County Club*, (1942) 315 U.S. 32.
42. *Fishgold* v. *Sullivan Corp.*, (1946) 328 U.S. 275.
43. *Skidmore* v. *Swift & Co.*, (1944) 323 U.S. 134.

Ss. 4(a) and 5(d) of the Administrative Procedure Act, 1946, assume the power of an administrative agency to issue interpretative regulations or declaratory regulations. They are equally subject to judicial review as other regulations,[44] though they are exempted from the procedural requirements of the Act.

But the administrative interpretation lacks its persuasive force—

(a) Where it would make the rule or regulation *ultra vires*.[45]

(b) Where the interpretations given on the subject are not consistent or uniform.[46]

(c) Where the interpretation relates to the *jurisdiction* of the authority, for "an agency cannot finally decide the limits of its statutory power".[45]

(B) *India*.—The American precedent has *not* been followed on this point. Statutory rules are to be interpreted by the Courts like other statutory instruments, regardless of the interpretation given in executive instructions.[47]

An exception to this general rule arises where a contract (say, relating to service) expressly provides that a specified authority shall have the power to interpret the Rules, in which case, the administrative interpretation becomes binding upon the parties by the terms of the contract, and the Courts would be bound to give effect, unless of course, it violates any provisions of the Constitution itself.[48]

Defect in statutory instrument, how far affects operation of the statute.

In the case of conditional legislation where the commencement or operation of a statute depends upon a notification or order of the Executive in the manner provided by the statute, a question naturally arises as to how far the operation of the statute would be arrested by any defect in the notification.

In such a case, a distinction must be made as between a defect going to the root of the validity of the notification which makes it *ultra vires* and a curable irregularity :

(a) *Where the defect makes it ultra vires.* Where the notification is *ultra vires*, it is obvious that it will be void *ab initio*, just as a statute enacted by a Legislature having no legislative power to enact it; hence, no subsequent notification may cure the invalidity.

The principle has been applied to the making of rules and regulations.[49]

(b) *Where the defect is curable.* Where the notification does not go beyond the purposes of the statute or transgress the power conferred by it, but omits any of the requirements of the statute, the defect would, generally speaking, be curable, and it is open to the Executive to issue a fresh notification or amend the original notification, in which case the notification would become operative from the date of the fresh notification or amendment.[50]

But so long as no such fresh notification is issued, the statute cannot be operative on the basis of the defective notification.[51]

44. *Frozen Food Express* v. *U.S.*, (1956) 351 U.S. 40.
45. *Social Security Board* v. *Nierotko*, (1946) 327 U.S. 358.
46. *Breswick* v. *U.S.*, (1956) 138 F. Supp. 123 (128).
47. *Babaji* v. *Nasik Co-op. Bank*, A. 1984 S.C. 192 (para. 15).
48. *Basanta* v. *C.E. Engineer*, A. 1958 Cal. 657 (660).
49. *Banwari Lal* v. *State of Bihar*, A. 1961 S.C. 849.
50. *Ramakrishna* v. *Tendolkar*, A. 1958 S.C. 538 (553-54).
51. *Narayandass* v. *Neeladri*, A. 1959 A.P. 148 (153). [The view taken to the

S. 3(1) of the Commissions of Inquiry Act, 1952, empowers the appropriate Government to issue a notification appointing a Commission "for the purposes of making an inquiry.....and *within such time as may be specified in the notification*".

Where a notification omits to specify the time for completion of the inquiry, the Commission appointed by the notification cannot function until a fresh notification is issued, fixing the time; but once such fresh notification issues, the notification appointing the Commission becomes operative from the date of the later notification.[50]

Forms of judicial review of subordinate legislation.

As in the case of statutes, the forms of judicial review of subordinate legislation are twofold: (a) those under the ordinary law; and (b) those under the Constitution.

I. *Under the ordinary law.*

(a) *Declaratory action.* Subject to the general conditions relating to declaratory relief, a suit lies for a declaration that a statutory instrument is *ultra vires*[52-53] (apart from unconstitutionality).

In *India,* there have not been noticeable cases of declaratory actions in respect of subordinate legislation inasmuch as until the Supreme Court decision in *Dwarkadas* v. *Sholapur Co.,*[53] it was generally supposed that in India a suit was not maintainable for a declaration as to the invalidity of a law. But since it is established by the Supreme Court decision[53] that a person whose legal interests are threatened by a statute may obtain a declaration as to its unconstitutionality, there is no reason why a like declaration cannot be obtained when his legal interests are threatened to be affected by a statutory instrument which is alleged to be *ultra vires.*

Once it is conceded that a suit may be brought for a declaration that "an act or order of a statutory body in excess of its jurisdiction"[54] there is no reason why the relief should be confined to statutory orders[55] and will not extend to rules and other kinds of instruments issued in the purported exercise of a statutory power. Such relief has been given against a Rule which contravened s. 240(3) of the Government of India Act, 1935.[56]

(b) *By way of defence.* The plea will also be available to a defendant in the same way as in the case of unconstitutionality.

(c) *Injunction.* In *England,* since *no* injunction will issue against the Crown or anybody representing the Crown (s. 21, Crown Proceedings Act, 1947), an injunction cannot be had to restrain the Government or any administrative authority from making a subordinate legislation which is plainly *ultra vires.*[57]

---

contrary, in *Ramjilal* v. *Piparia Municipality,* A. 1959 M.P. 82, that s. 67(7) of the C.P. & Berar Municipality Act, 1922, did not *require* the Government to specify the date of operation of the notification, it is submitted, does not appear to be sound].

52. *Ealing B.C.* v. *Minister of Housing,* (1952) 2 All E.R. 639.

53. *Dwarkadas* v. *Sholapur Co.,* (1954) S.C.R. 674.

54. *Ramachandra* v. *Berru,* A. 1936 Mad. 531 (539).

55. *Secy. of State* v. *Mask,* A. 1940 P.C. 105; *State of Bihar* v. *Abdul Majid,* (1954) S.C.R. 786; *Bhagwan* v. *Secy. of State,* A. 1937 All. 569 [see, further, under Judicial Review of Administrative Action, *post*].

56. *Union of India* v. *Someswar,* (1951) 58 C.W.N. 107 (110); see also *Ajudhia* v. *Amar,* A. 1961 Punj. 352.

57. *Merricks* v. *Heathcoat Amory,* (1955) 2 All E.R. 453; cf. *Harper* v. *Secy. of State,* (1955) 1 All E.R. 331 (339).

In *India,* too, such an order against the administration was barred by s. 56(d) of the Specific Relief Act, 1877, for, obviously, the making of subordinate legislation is a 'public duty' of the Central Government or the State Government in whom the statute has vested that duty.

But this bar has been lifted by s. 41 of the Specific Relief Act, 1963, which has omitted Cl. (d), as mentioned above.

Where statutory powers are vested in a corporation, injunction is a most appropriate remedy to restrain the commission of *ultra vires* acts.[58] In *India,* thus, injunction has been issued restraining a municipal corporation from demanding taxes under the authority of an *ultra vires*[59] rule or bye-law.

II. *Writs under the Constitution.*

(i) *Habeas Corpus. Habeas corpus* may be issued in a case where the detention of a person is without the authority of a law, or is made under a statutory order which is *ultra vires.*[60]

A case is conceivable where the detention is sought to be supported under a Rule which is alleged to be *ultra vires.* Such order will equally offend Art. 21 and the relief of *habeas corpus* should be available.

(ii) *Mandamus* has been issued in numerous cases, under Art. 226, where a person has been affected by an *ultra vires* statutory order[61] as also where a Rule framed under s. 96(2) of the Government of India Act, 1919, offended against the provisions of the Constitution.[62]

On principle, the same relief should be available if a rule is *ultra vires* the statute under which it is purported to have been made.[63]

(iii) Since prohibition is not an appropriate remedy in respect of legislative acts, it would follow that prohibition will not issue to restrain the making of a subordinate legislation, however illegal or unconstitutional that may be. But it may issue to restrain a *quasi-judicial* body from proceeding on the basis of an unconstitutional or *ultra vires* rule[64] or order and where the tribunal has already given its decision, *certiorari* will lie to quash it.[64]

Scope of judicial review of subordinate legislation.

(A) *England.*—In a country, such as *England,* where the powers of the Legislature are not limited by any written Constitution, the Legislature is legally omnipotent, so that no question of its *vires* or the legal validity of a statute passed by such Legislature can be raised and no Court can strike down an Act of the British Parliament on the ground that Parliament had no power to enact it.[65]

---

58. *Dundee Harbour Trustees* v. *Nicol,* (1915) A.C. 550 (H.L.).

59. Cf. *Lokamanya Mills* v. *Barsi Borough Municipality,* A. 1961 S.C. 1358 (1361).

60. *Makhan Singh* v. *State of Punjab,* (1952) S.C.R. 368.

61. *Irani* v. *State of Madras,* A. 1961 S.C. 1731 (1738); *Kamala* v. *Calcutta University,* A. 1955 Assam 84.

62. *Krishna* v. *Chief Suptd.,* (1954) 58 C.W.N. 1026 (1035).

63. *State of Mysore* v. *Basappa,* (1980) U.J.S.C. 506.

64. *S.T.O.* v. *Budh Prakash,* (1955) 1 S.C.R. 243; *Carl Still* v. *State of Bihar,* A. 1961 S.C. 1615 (1621); *Bidi Supply Co.* v. *Union of India,* (1956) S.C.R. 267 (277-78).

65. Halsbury, 4th Ed., Vol. 44, paras. 1000-01; Vol. 1, para 18; Vol. 8, para 811; *Manuel* v. *A.G.,* (1982) 3 All E.R. 786 (793, 795), (827) C.A.; *Institute of Patent Agents* v. *Lockwood,* (1894) A.C. 347 (360-61) H.L.; *Edinburgh Ry. Co.,* v. *Wauchope,* (1842) 8 C & F. 710 (725) H.L.; *Lee* v. *Bude Ry. Co.,* (1871) L.R.C.P. 576; *Cheney* v. *Conn,* (1968) 1 All E.R. 779; *Br. Rys. Bd.* v. *Pickin,* (1974) 1 All E.R. 609 (619) H.L.

On the other hand, a statutory instrument made in exercise of power delegated by an Act of Parliament is limited by the power so conferred by that Act, which is the source of the authority to make such subordinate legislation. In other words, the validity of an instrument of subordinate legislation can be challenged in a court of law on the ground that it was *ultra vires*, i.e., it exceeded the power conferred upon the administrative authority by the law of Parliament.[65]

In short, the distinction between an Act of Parliament and a rule or regulation made by an administrative authority under power delegated by Parliament is that the latter is subject to the doctrine of *ultra vires*, while the former is not.[65]

(B) *India.*—Before turning to judicial review of subordinate legislation in the U.S.A. and India, we should note that these countries have a written Constitution which limits the powers of all the organs set up by it—legislative, executive or judicial. In the result, any legislative enactment or administrative act which violates any of the limitations imposed by the Constitution shall be unconstitutional and, hence, invalid. This leads to the following conclusions:

Unconstitutionality and *ultra vires*.

I. Even a statute enacted by the Legislature is liable to be declared unconstitutional by the Courts,—contrary to the position in the U.K.

II. An administrative act, including subordinate legislation[66] also is similarly liable to be struck down by the Courts as unconstitutional and void, if it transgresses any of the mandatory provisions of the Constitution.[66]

III. In the case of an administrative act, which includes a *quasi-legislative* act, i.e., subordinate legislation, there is an additional limitation or ground of invalidity, viz., that it will be *ultra vires* if it exceeds the powers conferred upon the administrative authority by the relevant statute, to make such subordinate legislation.[67]

In fact, unconstitutionality is also a species or extension of the doctrine of *ultra vires* (i.e., beyond its powers). In the case of a Legislature, its powers are limited by the written Constitution and, therefore, a law made by it will be invalid if it exceeds the powers conferred by that Constitution.[67] In the case of an administrative statutory authority, its immediate limitation comes from the law made by the Legislature which empowered it to make subordinate legislation or statutory instruments; hence, if it exceeds the powers so conferred by the Legislature, the statutory instrument becomes *ultra vires*, and, therefore, invalid. But, at the same time, the administrative authority is also bound by the limitations imposed by the Constitution which, as stated earlier, binds all the organs under the Constitution.[67]

This is how subordinate legislation or statutory instruments are subject to judicial control on twofold grounds, the distinction between which should be borne in mind—(a) Unconstitutionality, and (b) *Ultra vires*. We shall deal with *ultra vires* in the first instance.

Apart from the fact that in *India*,[66] the constitutionality of a statutory instrument is open to challenge, both on substantive and procedural grounds there is no difference between the law in England and India where only the

66. Cf. *Prem Chand* v. *Excise Commr.*, A. 1963 S.C. 996 (1001).

67. *Vide* Author's *Commentary on the Constitution of India*, 6th Ed., Vol. A, p. 350; *Shorter Constitution of India*, 11th Ed., p. 504.

vires of a statutory instrument is challenged. The different facets of the doctrine of *ultra vires* will be presently discussed.

The doctrine of *Ultra Vires*.

'Ultra vires' means beyond powers.

Whenever any person or body of persons, exercising statutory authority, acts beyond the powers conferred upon him or them by statute, such act becomes *ultra vires* and, accordingly, void. The doctrine, originally applied to statutory corporation,[68] has been extended to all bodies having powers delegated to them by the Legislature, including subordinate legislative bodies.

Dicey's brilliant exposition demonstrates how, in the public sphere, the doctrine was applied to invalidate Acts made by non-sovereign Legislatures in the British Colonies and in India. In *R.* v. *Burah,*[69] the Privy Council thus described the powers of the Indian Legislature set up under the Indian Council Act, 1861—

> "The Indian Legislature has powers expressly limited by the Act of Imperial Parliament which created it; and it can, of course, do nothing beyond the limits which circumscribe those powers."[69]

In case an Act of the Indian Legislature violated a restriction imposed by the Imperial Parliament or transgressed the powers conferred by it, the Courts would declare such Act *ultra vires* and inoperative.[69]

From non-sovereign Legislatures, the doctrine easily extended itself to administrative authorities empowered by a Legislature to make subordinate legislation, such as rules and regulations, because the powers of such authorities were also limited by the terms of the statute which authorised the making of the subordinate legislation.[70] It is with that aspect of the doctrine that we are concerned in the present context.

Whether in *England,*[71] in the *U.S.A.,*[72] or in *India,*[73] it is settled that the function of making a *law* can be exercised only by the Legislature. No authority other than the Legislature can make rules having a legislative character unless authorised by the Legislature itself[72] (within a permissible degree of delegation) or by the Constitution.[74]

The question as to how far it is permissible for the Legislature to delegate its legislative power raises another problem. In the present context, it is enough to state that it is acknowledged on all hands that it is permissible for the Legislature to delegate the function of *'subordinate* legislation', i.e., to make bye-laws, rules, regulations and orders, to effectuate the policy laid down in the statute made by the Legislature and to carry out, in detail, the scheme and policy of the statute[75] (as distinguished from the power to amend the statute itself).[75] These different kinds of subordinate legislation (see *post*), do not profess to lay down or to modify the legislative policy but only implement the law made by the Legislature.

---

68. Cf. *A.G.* v. *Great Eastern Ry. Co.,* 5 App. Cas. 473; *Ashbury Ry. Co.* v. *Riche,* 7 H.L. 653.
69. *R.* v. *Burah,* (1878) 3 A.C. 889.
70. Cf. *Emp.* v. *Nistar,* (1914) 6 Cal. 163.
71. Case of Proclamations, (1610) 12 Co. Rep. 74; *A.G.* v. *Wilts United Dairies,* (1921) 37 T.L.R. 884; Halsbury, 4th Ed., Vol. 44, para 981.
72. *U.S.* v. *Eaton,* (1892) 144 U.S. 677; *U.S.* v. *Grimand,* (1911) 220 U.S. 506.
73. *Secy. of State* v. *Moment,* (1912) I.L.R. 4 Cal. 391 (P.C.).
74. *Re Delhi Laws Act, 1912,* (1951) S.C.R. 747.
75. *Miller* v. *U.S.,* (1935) 294 U.S. 435.

It follows that no administrative or non-legislative body has any inherent power to make rules[72] or any other kind of subordinate legislation, and that if it makes any instrument of subordinate legislation without statutory authority or in excess of the authority conferred upon it by the Legislature, the instrument is bound to be pronounced to be *ultra vires* and (hence) invalid by the Court.[76]

The doctrine of *ultra vires* is the major weapon for judicial control of administrative authorities; since it has its ramifications throughout the length and breadth of administrative law, it has been called "the central principle of administrative law".[77]

The question now arises,—in what ways may an instrument of subordinate legislation become *ultra vires.*

I. A subordinate legislation may become *ultra vires* in various ways: The excess of the statutory authority may be either (a) as to the *extent and contents* of the subordinate legislation, or (b) as to the *mode* in which it has been made.[78]

A. *Substantive*[79] *Ultra Vires.*

Broadly speaking, substantive *ultra vires* may take place in either of several ways :

Grounds of substantive *ultra vires.*

I. The rule-making authority may transgress the limits of that provision in the statute by which the rule-making power was conferred.

II. The Rule may be repugnant to the *other* substantive provisions of the statute or its general purposes.

III. The Rule may be repugnant to *another* statute which is binding upon the rule-making authority.

I. *Transgressing the power to make rules.*

1. The basis of the power conferred by the enabling statute cannot be transgressed by the rule-making authority.[80] Where it is so done, the Rule becomes without the authority of law, and *ultra vires*. The statutory authority must act within the limits of the power granted to it by the Legislature.[81]

2. In order to determine whether the subordinate legislation exceeds the power granted by the Legislature, the Court has to interpret the enabling statute,[82] as well as the Rule in question.[83] Thus, where the authority to make a Rule is conferred for exercising a particular power, the Court would not construe the Rule in such manner as to include a separate and independent power.[83]

76. *R.* v. *Halliday,* (1917) A.C. 260 (287).
77. Wade, *Administrative Law* (1977), p. 40.
78. *Morrill* v. *Jones,* (1883) 106 U.S. 466.
79. Griffith & Street *(Principles of Administrative Law)* and S.A. de Smith *(Judicial Review of Administrative Action)* make this distinction under the 'substantive' and 'procedural',—expressions which recall the 'Due Process' concept.
80. Halsbury, 4th Ed., Vol. I, paras. 20-21; Vol. 44, para 1001; *Daya* v. *Controller,* A. 1962 S.C. 1796.
81. *Dwarka* v. *Municipal Corpn.,* (1971) 2 S.C.C. 314; *Ibrahim* v. *R.T.A.,* A. 1953 S.C. 79; *S.T.O.* v. *Abraham,* A. 1967 S.C. 1823; *Hukam Chand* v. *Union of India,* A. 1972 S.C. 2427 (para. 6).
82. *Daymond* v. *S.W. Water Authority,* (1976) 1 All E.R. 1039 (H.L.); *Hotel Industry Board* v. *Automobile Ltd.,* (1969) 2 All E.R. 582 (585) H.L.; *McEldowney* v. *Forde,* (1969) 2 All E.R. 1039 (1058, 1061) H.L.
83. *Durga Prasad* v. *Suptd.,* A. 1966 S.C. 1209 (para. 4).

3. Of course, the powers expressly granted include incidental or consequential powers,[84] which are necessary to give effect to the provisions the Act.[85]

II. *Inconsistency with the parent statute, in general.*

(a) The subordinate law-making body cannot go beyond the policy laid down in the statute, so as to alter or amend the law.[72] The purpose of subordinate legislation is to carry into effect the existing law and not to change it.[86]

1. The statute provided : "Animals, alive, specially imported for breeding purposes . . . . shall be admitted free upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he may prescribe." A regulation made under the statute prescribed that before admitting such animals duty free, the official concerned was to be "satisfied that the animals are a *superior stock*, adapted to improving the breed in the United States".

Held, the regulation was *ultra vires* inasmuch as while the statute included *all* animals, the regulation sought to confine its operaton to animals of 'superior stock'. The Secretary of the Treasury, in making the regulation, supposed that the policy of the Legislature was to confine the privilege to such animals as were adapted to the improvement of breeds already in the United States, which it was not.[86]

2. The Act of annexation of certain African territories provided that the territories "shall be subject to such laws, statutes and ordinances . . . as the Governor shall from time to time declare to be in force in such territories". The Governor, by a Proclamation made in the purported exercise of this power, condemned the respondent, a native chief, to imprisonment without a hearing. The Privy Council set the respondent free, holding that the Proclamation was *ultra vires* on the ground that the statute did not authorise the Governor to make a law of a novel kind apart from the application of the existing laws to the territories.[87]

But the question whether the rules are *inconsistent* with the statute is to be determined with reference to the provisions of the statute itself and not any extraneous matter.[88]

S. 26(1) of the Coir Industry Act, 1953, empowered the Central Government to make rules for carrying out the purposes of the Act and sub-section (2)(k) of the section specifically conferred the power to make rules relating to the registration of manufacturers of coir products. The rule-making authority made rules prescribing a 'quantitative test' for the registration of exporters. It was contended that the rules were *ultra vires* inasmuch as they had prescribed a quantitative instead of a qualitative test which had been suggested by the Coir Board Committee. Negativing this contention, it was *held* that the validity of the rules was to be tested with reference to the provisions of the Act and that there was no provision in the Act which excluded or prohibited the application of a quantitative test for the purpose; on the other hand, the Act had deliberately left to the rule-making authority to frame such rules as it deemed appropriate for the regulation of the trade.[88]

(b) No statutory instrument may go beyond the *purposes* of the statute under which it is made, the test applied being one of a 'fair and reasonable relation' between the two.[89]

84. *Khargram P.S.* v. *State of W.B.,* (1987) 3 S.C.C. 82 (87).

85. *Khanzode* v. *R.B.I.,* A. 1982 SC 917 (para. 16).

86. *U.S.* v. *Two Hundred Barrels of Whiskey,* (1877) 95 U.S. 571; *Venkateswara* v. *Govt. of A.P.,* A. 1966 S.C. 629.

87. *Sprigg* v. *Sigcau,* (1897) A.C. 238 (248).

88. *Sivarajan* v. *Union of India,* A. 1959 S.C. 556 (558).

89. *Fawcett Properties* v. *Buckingham County Council,* (1960) 3 All E.R. 503 (515) H.L. approving *Pyx Granite Co.* v. *Min. of Housing,* (1958) 1 All E.R. 625 (633) C.A.; Halsbury, 4th Ed., Vol. I, para. 21.

(i) The Sydney Municipal Council was empowered to compulsorily acquire land required for "carying out improvements in or remodelling any portion of the city". The Council decided to extend a particular street to another and at the same time sought to acquire a considerable area of land adjacent to the proposed extension. The resolution to acquire that land was passed without considering any plan or scheme for improvement of the area in question and the only object of the proposal to acquire was 'financial', namely, to secure to the Council the 'betterment' value which would result from the extension of the street. *Held,* the order of acquisition was *ultra vires* because the Council had never considered whether the land was required for the improvement or remodelling of any part of the city, for which purpose the statute had conferred upon the Council the power to compulsorily purchase land.[90]

(ii) Where an Act authorises a local authority to take land for actual works, the Court has the power to restrain that authority from taking more land than is actually necessary for such work,[91-92] except where it is necessary to recoup a part of its expenses by reselling at a profit the excess land.[93]

(iii) The (Eng) Industrial Training Act, 1964, empowered the Minister of Labour to establish training boards for persons, employed 'in any *activities of industry or commerce*' and further empowered each training board to impose a levy on employers in the industry. In exercise of this power, the Minister made the Industrial Training (Hotel and Catering Board) Order, 1966, and defined the 'activities' of the hotel and catering industry to include the supply of food and drink to persons for immediate consumption, and included within that definition the activities of persons in the management of a *club*. *Held,* by the House of Lords,[94] a levy upon a private members' club in exercise of the above power was *ultra vires,* and so was the Order made by the Minister which authorised such levy, for,—

(a) The Order went beyond the *purpose* of the Act which was to suply skilled labour to employers engaged in 'industry and commerce', and not to those who were *not* engaged in any industry and commerce.

(b) The ordinary and natural meaning of 'activities of industry or commerce' could not extend to a non-commercial private members' club.[94]

In other words, the doctrine that powers conferred by a statute for a particular purpose cannot be used for a different purpose can be applied only if such different purpose is outside the scope of the statute, as properly interpreted.[95]

But extraneous evidence is admissible to show that the inpugned statutory instrument *would* serve the purposes of the statute.[96]

The Essential Commodities Act, 1955, was passed for the control of the production, supply and distribution of certain commodities, including sugar which were regarded as essential to the community. In exercise of the power conferred by this Act, the Central Government made the Sugar (Control) Order, 1955, empowering the Central Government, by notification, to fix the price or the maximum price at which sugar might be sold or delivered. The impugned notification, issued in exercise of this latter power, fixed the "ex-factory prices of sugar produced in the factories in Punjab, Uttar Pradesh, and North Bihar".

It was contended that the notification was *ultra vires* as it could not serve the purposes of the Act, namely, to ensure the equitable distribution of the commodity to the consumer, at a fair price. In their affidavit, the Government stated that the areas in question were the surplus sugar-producing areas in the territory of India and that as a result of the impugned notification, "prices *have come down* to normal levels".

90. *Municipal Council of Sydney* v. *Campbell,* (1925) A.C. 338 (P.C.).
91. *Calcutta Improvement Trustees* v. *Chandra Kanta,* (1919) 47 I.A. 45.
92. *Donaldson* v. *South Shield Corpn.,* 68 L.J. Ch. 162.
93. *Khanderao* v. *Municipal Corpn.,* A. 1924 P.C. 3.
94. *Hotel & Catering* v. *Auto. Proprietary,* (1969) 2 All E.R. 582 (585-586) H.L.
95. *Abdul Rahim* v. *Municipal Commrs.,* (1918) 45 I.A. 125.
96. *D.S. Mills* v. *Union of India,* A. 1959 S.C. 626 (630).

Held, the affidavit furnished *"demonstrable proof"* that the impugned notification subserves the purposes of the Act.[96]

(c) A subordinate legislation, such as a rule, may implement, provide machinery and lay down procedure for carrying out a statute. But it cannot contradict the statute.[97]

(i) S. 18 of the Andhra Pradesh Panchayat Samithis & Zilla Parishads Act, 1959, vested "the administration of the Block" including the power to establish and maintain a Primary Health Centre, in the Panchayat Samithi. S. 69 of the Act conferred power upon the State Government to make rules "for carrrying out the purposes of the Act".

But r. 2 of the Rules so made by the Government provided that the Panchayat Samithi would make *recommendations* to the Government for locating a Health Centre and r. 3(11) provided that in case of conflict between the relevant authorities in regard to the location of a Health Centre, the *Government's order shall be final.* These rules were struck down by the Supreme Court as *ultra vires* with the following observations:

"It is manifest that under the Act the statutory power to establish and maintain Primary Health Centres is vested in the Panchayat Samithi. There is no provision vesting the said power in the Government. Under s. 69 of the Act, the Government can only make rules for carrying out the purposes of the Act; it *cannot under the guise of the said rules, convert an authority with power to establish* a Primary Health Centre into only a *recommendatory body. It cannot, by any rule, vest in itself power which the Act vests in another body."*[98]

(ii) S. 95(1) of the Delhi Road Transport Act, 1950, provides that Regulations may be made by the Corporation as to the authority by which municipal employees shall be punished. But the Proviso to that section provided that no employee shall be dismissed by any authority subordinate to that by which he was appointed. *Held,* that by making a Regulation prescribing the Assistant General Manager as the punishing authority, a Regulation could not take away the protection given by the statute to employees who had been appointed by the General Manager. It was further held that the statutory protection could not be taken away by the General Manager delegating his power of dismissal to the Assistant General Manager.[99]

(iii) Where a statute creates a *quasi-judicial* authority, e.g., with powers to hear appeal, the rules cannot provide that the authority may dispense with *any hearing* altogether.[100]

On the other hand,—

There is no contradiction or inconsistency where the impugned Rule merely amplifies the requirements of the provisions of the parent statute.[100a]

(d) Apart from the general scope or purpose of the statute, the substantive provisions of the statute,[1] other than the rule-making section,[2] also operate as a limitation upon the rule-making authority, because by making a rule, a subordinate authority cannot violate the statute. In case of repugnancy between the substantive provisions of the Act and the Rule, it is the Rule which must give way to the Act.[1]

S. 5A(8) of the Income-tax Act, 1922, empowered the Appellate Tribunal to make Rules 'regulating its own procedure'. In exercise of this power, the Tribunal made R. 24 which empowered itself to dismiss an appeal for default in case of non-appearance of the appellant when the appeal is called on for hearing, without making any provision

97. *Hodge* v. *Hodge,* (1963) 1 All E.R. 359 (366) C.A.
98. *Venkateswara* v. *Govt. of A.P.,* A. 1966 S.C. 829 (834).
99. *D.T.U.* v. *Hajelay,* (1972) 2 S.C.C. 744 (paras. 12-14)
100. *R.* v. *Housing Appeal Tribunal,* (1920) 3 K.B. 334.
100a. *Bar Council* v. *Aparna,* (1994) 1 U.J.S.C. 257 (para. 10).
1. *I.T. Commr.* v. *Chenniappa,* A. 1969 S.C. 1068 (paras. 5, 6-7); *Venkateswara* v. *Govt. of A.P.,* A. 1966 S.C. 828.
2. Cf. *Price* v. *W.L. Building Soc.,* (1964) 2 All E.R. 318 (322-23) C.A.

for restoring an appeal so dismissed for default. The Supreme Court held that though R. 24 related to procedure and was within the ambit of s. 3A(8), it was invalid owing to repugnance with s. 33(4) of the Act which indicated that an appeal could be disposed of by the Tribunal *only on the merits*, whether the appellant appeared or not. This obligation could not be short-circuited by the Tribunal by dismissing it for default of appearance.[1]

(e) A Rule may be lacking in substantive power if the statutory authority is not available at the time of making the Rule, for instance, the statute being temporary has expired, or the period or the circumstances with reference to which the rule-making power was conferred are different or the power was conferred upon a person other than the person who made the Rule.[3]

(f) There are also certain powers which a subordinate body cannot exercise unless it is *expressly* conferred by the enabling statute. Thus,—

Creating on offence.

(i) A statutory instrument cannot create any offence or make its violation criminally punishable,[4] in the absence of statutory authority.[5]

Even when the statute provides for the penalty for violating the rules or regulations made under it, the rules or regulations must be framed with a reasonable certainty,[6] or, they will fail to sustain a conviction.[7]

Barring access to Courts.

(ii) An individual's right to access to the Courts cannot be barred by a statutory instrument, unless the statute expressly bars it.[8-9, 10]

In *Pyx Granite Co.* v. *Ministry of Housing*,[9] Viscount Simonds emphatically said—

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is.....a 'fundamental rule' from which I would not for my part sanction any departure."[9]

Thus, a power to bar access to the courts cannot be inferred from general words, such as the power to make regulations for 'giving effect to the provisions' of the Act or to enable the administrative authority 'to discharge their functions thereunder'.[10]

Even when a statute deprives a person of this right,—

"the language of any such statute should be jealously watched by the Courts, and should not be extended beyond *its least onerous meaning* unless clear words are used to justify such extension".[8]

Thus, in the absence of express statutory authorisation, a rule or regulation cannot be made to provide that no suit for recovery of possession of houses occupied by defence personnel shall lie without the permission of the Minister.[8]

Even an indirect provision to this effect in a statutory instrument would be *ultra vires*.[11]

The principle has been extended to a provision in a statutory instrument which would defeat proceedings in a court of law.[10]

3. Halsbury, 4th Ed., Vol. 44, para. 1001.
4. *U.S.* v. *Eaton*, (1892) 144 U.S. 677.
5. Cf. *Kharak Singh* v. *State of U.P.*, A. 1963 S.C. 1295 (1299).
6. *Boyce Motor Lines* v. *U.S.*, (1952) 342 U.S. 337.
7. *Krans & Bros.* v. *U.S.*, (1946) 327 U.S. 614.
8. *Chester* v. *Bateson*, (1920) 1 K.B. 829.
9. *Pyx Granite Co.* v. *Ministry of Housing*, (1959) 3 All E.R. 1 H.L.
10. *Commrs. of Customs* v. *Cure & Deeley*, (1961) 3 All E.R. 641 (651).
11. *Re Kellner's Will Trusts*, (1949) 2 All E.R. 43 (47).

(iii) Unless the statute specifically authorises it,[12] a statutory instrument, such as a notification, a rule, a bye-law, or an order, cannot be given retrospective effect.[13]

Retrospectivity.

What is meant by this rule is that, in the absence of specific authorisation by the statute, the administrative authority cannot give retrospective *operation* to the rule or other statutory instrument made by it.[14] It does not prevent the subordinate law-making body from relying on past activities or events for the purpose of formulating or enforcing a prospective rule.[15]

R. 3 of the Railway Services (Safeguarding of National Security) Rules, 1949, which came into force on 14-5-1949, provided—

"A member of the Railway Service who, in the opinion of the competent authority, is engaged in or is reasonably suspected to be engaged in subversive activities or is associated with others in subversive activities.....may be compulsorily retired....."

In an order terminating the services of the Appellant, issued under the above rule, the competent authority relied on the acts and conduct of the Appellant prior to 14-4-1949. It was contended that to rely on the activities of the Appellant was to give retrospective operation. Rejecting this contention, the Supreme Court observed that where an authority has to form an opinion that an employee is likely to be engaged in subversive activities, it can only be as a matter of inference from the course of conduct of the employee, including his antecedents. The Rule is clearly prospective in that action under it is to be taken in respect of subversive activities which either now exist or are likely to be indulged in, in future. That the materials for taking action in the latter case are drawn from the conduct of the employee prior to the promulgation of the Rule does not render its operation retrospective.[15]

In *India*, it has been held that s. 21 of the General Clauses Act which provides that when an Act confers power to make statutory instruments, it includes the power to add, amend, vary or rescind the instruments made under that power, does not, of itself, confer any power to give retrospective effect to such instruments or amendments thereto.[16] The power to give retrospective operation to a subordinate legislation is to be found from the parent statute which confers the power to make subordinate legislation.[14]

Of course, the power to give retrospective effect to a rule or other statutory instrument may be conferred by the relevant statute either *expressly* or by *necessary implication*.[13,16] No such implication, however, arises where the statute merely gives the power to the Government to make rules for giving effect to the Act,[16] or from the mere fact that the statute requires Rules made under the Act to be laid before the Legislature, so that the Legislature has the opportunity of cancelling or modifying such retrospective Rules.[16-17]

In short, the provision for laying the Rules before the Legislature would not, by itself, confer validity on the Rules if it is otherwise *ultra vires*.[17]

The word 'substituted', by itself, in an amending Act or Order, shall raise no implication of retrospectivity, but a deeming clause, such as 'shall always be deemed to have been substituted' would.[18]

12. *Cananore Mills* v. *Collector*, A. 1970 S.C. 1950; *Dayalbagh Co-operative Society* v. *Sultan Singh*, (1966) S.C. [C.A. 654/65]; *Indramani* v. *Natu*, A. 1963 S.C. 274 (290-91).
13. *Alleppy* v. *Ponnoose*, A. 1970 S.C. 385.
14. *Strawboard Mfg. Co.* v. *Gutta Mill Workers' Union*, (1953) S.C.R. 439 (447-48).
15. *Balakotiah* v. *Union of India*, A. 1958 S.C. 232 (239).
16. *R.T.O.* v. *Associated Transport*, A. 1980 S.C. 1872 (para. 4).
17. *Hukam Chand* v. *Union of India*, A. 1972 S.C. 2427 (paras. 6-9).
18. *V.R. Mills* v. *State of A.P.*, A. 1976 S.C. 1471 (para. 5).

Whether a statute should be construed (by necessary implication) to be prospective[19] or retrospective,[20] is itself governed by certain general principles, e.g.,—

(a) In general, a statute should not be presumed to take away an existing substantive right.[19-21]

(b) When the law is altered during the pendency of a litigation the rights of the parties are to be decided according to the law as it existed when the action began, unless the new statute shows a clear intention to vary such existing rights.[22]

In this context, a distinction is to be made between statutory Rules and Rules made under Art. 309 of the Constitution, which are not made in exercise of any power conferred by a statute made by the Legislature but by the Constitution itself. Secondly, the proviso to Art. 309 confers the same status as that of the Legislature itself upon the President or the Governor, while making such Rules. Hence, there is no bar to a Rule under Art. 309 from being given retrospective operation without any legislative sanction to that effect,[23] provided, of course, no independent constitutional provision, such as a fundamental right, is violated thereby.[24]

Taxation.

(iv) No tax can be imposed by any rule, bye-law or regulation unless the statute under which the subordinate legislation is made specifically authorises the imposition.[25]

Limitation.

(v) Unless specifically authorised by the statute, expressly or by necessary implication, the rule-making authority, empowered to prescribe the manner of doing a thing, cannot prescribe a *limitation* or fixed time-limit for the doing of that thing.[26-27]

Finality.

(vi) Where the enabling statute creates a right to judicial review from the orders or decisions of authorities set up by the statute, the grounds of review cannot be restricted by Rules or the decision on particular matters cannot be made *final* and *conclusive*.[28]

(g) It should be noted that while in the case of subordinate legislation, such as a statutory rule or order, *ultra vires* hits it only if it transgresses the limitations imposed by the statute, in the case of sub-delegation, there is a double test of *ultra vires*, namely, that instrument of sub-delegated legislation, say, an order, would be invalid not only where it transgresses the power conferred by the statute but also the terms and conditions imposed by the Rule or other statutory instrument which authorised the sub-delegation.[29]

---

19. *Calton* v. *Director*, A. 1983 S.C. 1143 (para. 5).
20. *Meerut College* v. *Vice-Chancellor*, A. 1983 S.C. 1146 (para. 7).
21. *Punjab Tin Supply* v. *Central Govt.*, A. 1984 S.C. 87 (para. 17).
22. Maxwell, 10th Ed., p. 221; *Garikapati* v. *Subbiah*, A. 1957 S.C. 540.
23. *Vadera* v. *Union of India*, A. 1969 S.C. 118 (125).
24. *Govt. of India* v. *Balakrishnan*, A. 1975 S.C. 1498 (para. 6); *Roshan Lal* v. *Union of India*, A. 1967 S.C. 1889 (1894); *State of Mysore* v. *Padmanabhacharya*, A. 1966 S.C. 602; *Kumar* v. *Union of India*, A. 1981 S.C. 1066 (para. 34).
25. *Banerjee* v. *State of M.P.*, A. 1971 S.C. 517 (para. 18).
26. *S.T.O.* v. *Abraham*, A. 1967 S.C. 1823.
27. *Rajasthan Trading* v. *Registrar*, A. 1975 A.P. 232; *Basta Colliery* v. *State of Bihar*, A. 1969 Pat. 42; *Solar Works* v. *E.S.I.C.*, A. 1964 Mad. 376.
28. *Dattatraya* v. *Prabhakar*, A. 1975 Bom. 205 (paras. 11-12, 14-15) F.B.
29. *Bennett Coleman* v. *Union of India*, A. 1973 S.C. 106 (paras. 37, 40).

III. *Repugnance to other statute.*

Even where the Rule does not exceed the power granted by the enabling statute, it may be invalid if it is inconsistent with the substantive provisions of another statute which is binding on the rule-making authority or if the Rule seeks to amend or affect the operation of such other statute.[30]

Of course, the situation would be different if the Legislature confers an omnibus power upon the rule-making authority by using expressions such as 'notwithstanding anything contained in any other law'.[31]

But such a result would not be arrived at by implication. In other words—

Where a later Act does not repeal an earlier Act either expressly or by its implied terms, the repeal of the earlier Act cannot be implied from the regulations or other instruments made under the later Act. In short, a statute cannot be repealed by implication merely by subordinate legislation made under another statute.[32]

***Ultra vires* in relation to taxing power.**

Neither in *England*,[33] nor in *India*[34] can a tax be imposed without the authority of law. A 'tax', in this context, includes any compulsory levy, such as a fee.[35]

The corollaries which follow from the above proposition are—

No tax, fee or other pecuniary imposition may be levied by an instrument of subordinate legislation unless the statute specifically[36] authorises its imposition.[25] Even the omnibus power conferred by the 'carrying out of the purposes of the Act' does not include taxation.[33, 37]

(i) Ss. 293 and 298 of the U.P. Municipalities Act, 1916, empowered the Town Area Committee to make bye-laws to charge fees for the 'use and occupation of any property *vested in* or entrusted to the management of the Town Area Committee'.

Bye-law 1, framed under the above power provided that no person shall sell or purchase any vegetable or fruit within the limits of the Town Area Committee, without paying the fee prescribed. Bye-law 4(b) provided that any person can sell wholesale *at any place* in the Town Area *provided he paid the prescribed fee. Held*, the bye-laws were *ultra vires;* for, the Act did not empower the Committee to charge any fees otherwise than for the use or occupation of any property vested in or entrusted to the Committee. But the bye-laws in effect forbid a person to use *any land or place* within the limits of the Committee, without payment of the prescribed fee.[35]

(ii) Where a statute confers power upon the Executive to *alter the rates* prescribed in the Tariff the Executive has no power to add to the list of taxable commodities enumerated in the Tariff.[38]

(iii) Where the Act imposed a duty on excisable articles and empowered the State Government to make rules for carrying out the provisions of the Act, the State Government could not, by making Rules, impose a duty on liquor which contractors failed to lift, and which was not an excisable article.[36]

30. Halsbury, 4th Ed., Vol. 44, paras. 965, 1001; *State of U.P.* v. *Hindusthan Aluminium*, A. 1979 S.C. 1459 (para. 41).

31. *Harishankar* v. *State of M.P.*, A. 1954 S.C. 465 (469); *Nachane* v. *Union of India*, A. 1982 S.C. 1126 (para. 10).

32. *Ridge* v. *Baldwin*, (1962) 1 All E.R. 834 (841) C.A.

33. Cf. *Commrs.* v. *Cure & Deeley*, (1961) 3 All E.R. 641 (661).

34. *Muhammadbhai* v. *State of Gujarat*, A. 1962 S.C. 1517 (1530). [See Art. 265 of the Constitution of India]

35. *Yasin* v. *Town Area Committee*, (1952) S.C.R. 572.

36. *Bimal* v. *State of M.P.*, A. 1971 S.C. 517 (para. 18).

37. *King* v. *National Fish Co.*, (1931) Ex. C.R. 75 (*Can.*); *King* v. *Wright*, (1927) 59 N.S.R. 443 (*Can.*).

38. *Bhulam* v. *State of Rajasthan*, (1963) II S.C.A. 234 (237).

It would be well worth to remember that the foundation of the above principle is *constitutional.*

U.K.

In *England,* the principle that the Crown has no power to tax save by grant of Parliament had its origin in the demand of the Magna Carta (1215)—

"No scutage or aid is to be levied without the consent of the commune concilium excepting the three customary feudal aids."

which was affirmed and finally established by the Bill of Rights, 1689—

"Levying money for the use of the Crown by pretence of prerogative without grant of Parliament is illegal."

It was this principle which established Parliamentary government in England, for, the King was obliged to summon Parliament annually in order to obtain supplies, as Parliament would not grant more than what was sufficient to meet the requirements of one year. The authority for taxation is an Act of Parliament and a resolution of the House of Commons is not sufficient,[39] except for a limited purpose under the Provisional Collection of Taxes Act, 1913.

The above principle of 'no taxation without the authority of law' is so jealously guarded by the Courts that they would not infer the grant of a power to tax from any legislation in the absence of a clear expression.[40] Thus, a tax on the purchase of milk could not be imposed, under a power 'to regulate the sale of milk'.[40] In this case, it was observed—

"If an officer of the Executive seeks to justify a charge upon the subject, ... he must show, in clear terms, that Parliament has authorised that particular charge."[40]

In this case,[40] Lord Wrenbury observed—

"The Crown, in my opinion, cannot succeed except by maintaining the proposition that when statutory authority has been given to the Executive to make regulations controlling acts to be done by His Majesty's subjects, or some of them, the Minister may without *express* authority so to do, demand and receive money as the price of exercising his power of control in a particular way, such money to be applied to some public purposes to be determined by the Executive. It is impossible to maintain the proposition. At any rate, in the absence of *express* words giving the Executive power to make such a demand, this is the assertion of a right in the Executive to impose taxation."[40]

So, when a statute authorised the Executive to make 'regulations' the Executive cannot, without express authority in the statute, demand payment for exercising his power of control in a particular way, notwithstanding that the money was to be applied for a public purpose. Even if services are rendered, no *fee* can be charged for the services by any *public* authority without sanction of Parliament.[41] This principle, however, assumes that the public authority is under a duty to render that service by reason of his office.[42] Where the Crown or his servants have no absolute duty to do any act or to render any service, a demand for payment as a condition for doing that act is not contrary to public policy.[42-43]

39. *Bowles* v. *Bank of England,* (1913) 1 Ch. 57.

40. *Att.-General* v. *Wilt's United Dairy Co.,* (1922) 91 L.J. (K.B.) 897 (H.L.): 127 L.T. 822.

41. *Wathen* v. *Sandys,* (1811) 2 Camp. 640; *Morgan* v. *Palmer,* (1824) 2 B.C. 729; *Brocklebank* v. *King,* (1925) 1 K.B. 52.

42. *China Navigation* v. *Att.-General,* (1932) 2 K.B. 197 (245) C.A.

43. *Glasbrook Bros.* v. *Glamorgan C.C.,* (1925) A.C. 270 (279). [Charge for special services rendered by the police.]

But where Parliamentary sanction is required for the imposition of a charge, it canot be avoided even by an *agreement* with the party charged and such agreement, being contrary to law, cannot be enforced.[40]

The (Eng.) Defence of the Realm Regulations, 1920, gave the Food Controller power to make regulations to control the *sale* etc. of food and to control prices. The Controller gave a dairy a licence to sell milk, but on condition that they paid to Government a charge of two pence per gallon of milk sold. The company expressly agreed to pay the charge but subsequently refused. *Held*, that the governing statute, i.e., the Defence of the Realm Act, had not expressly conferred any power to tax or to make any compulsory imposition by regulations. The charge imposed by the Controller was, therefore, *ultra vires* and even the consent of the dairy company could not legalise the levy.[40]

In *India*, the same principle has been embodied in Art. 265 of the Constitution, which is as follows :

"No tax shall be levied or collected except by authority of law."

India.

The result is that any attempt to impose any tax or compulsory levy by any authority other than Parliament will not only be *ultra vires* in the ordinary sense but also unconstitutional.[44] About the invalidity of a subordinate legislation which attempts to do this, thus, there is no difference as between England and India. From the above general principle, the following corollaries emerge :

(i) Where the statute prescribes that the tax is to be assessed according to a particular *basis*, it cannot be assessed on a different basis.[44] Thus,

Where the statute authorises a local authority to levy tax on buildings on the basis of the "annual rental which a hypothetical tenant may pay in respect of the building", the authority cannot make a rule authorising levy of the tax at a uniform rate according to the floor area of the premises, irrespective of its letting value to a hypothetical tenant in regard to buildings of different kinds,[44] unless the statute itself envisages such valuation.[45] For the same reason, where the statute empowers the levy of a rate on the 'annual value' the authority cannot fix it at a percentage of the 'capital value'.[46]

(ii) When a law authorises the imposition of a tax, the imposition will be 'by authority of law' within the meaning of this Article only if the imposition is made in the *manner* prescribed by the law.[47] Thus, where a statute provides that a duty could be imposed by framing rules under the Act, no duty can be imposed by an executive order without making rules under the Act,[48] subject to the limitations laid down in the statute[49] and complying with the procedure prescribed, e.g., publication in the Official Gazette.[48]

(iii) Where the statute provides that the subordinate authority can levy an imposition only with the sanction of a specified authority, an imposition made without such sanction is invalid.[47]

(iv) Where the statute authorises the imposition of a fee for certain services to be rendered, the subordinate legislation cannot provide for the imposition of a tax, unrelated to the services, in the name of a fee.[50]

44. *Lokmanya Mills* v. *Barsi Borough Municipality*, A. 1961 S.C. 1358 (1360-61).
45. *M.& S. Ry.* v. *Bezwada Municipality*, 1944 P.C. 71.
46. *Gordhandas* v. *Municipal Commr.*, A. 1964 S.C. 1742 (1751).
47. *Ghulam* v. *State of Rajasthan*, A. 1963 S.C. 379 (382).
48. *Jackson Statefield & Sons* v. *Butterworth*, (1948) 2 All E.R. 558 (654-55).
49. *Narayana* v. *State of T.C.*, A. 1954 T.C. 504 (506).
50. Cf. *Bajranglal* v. *Commr. of Taxes*, A. 1959 Assam 216 (220).

(v) Where the statute specifies the taxable commodities, the subordinate authority has no power to add to that list, and the power conferred by the statute must be strictly construed.[47]

Limits of the rule of Substantive *Ultra Vires*.

(i) The doctrine of *ultra vires* must be reasonably applied.

A. Whatever may fairly be regarded as incidental to, or consequential upon, those things, which the Legislature has authorised, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.[51-52] Thus,—

1. The Electricity Act, 1910, was enacted to provide for and regulate the supply of electrical energy by granting licences. S. 28(1) says—

"No person, other than a licensee, shall engage in the business of supplying energy except with the previous sanction of the State Government and in accordance with *such conditions* as the State Government may *fix in this behalf*...."

Cl. 11 of the notification issued under this Act granting a licence to the Petitioners imposed the condition that the Government shall have the option to acquire the undertaking of the Petitioners at any time after a specified date. It was contended that the words 'in this behalf' in s. 28(1) indicated that the conditions which could be legitimately imposed in granting sanctions must be relevant to the business of supplying energy and could not, accordingly, include a condition as to compulsory acquisition of the property of the person to whom the sanction was given. Cl. 11 was thus challenged as *ultra vires* s. 28(1).

Negativing the contention, the Supreme Court *held* that the words 'in this behalf' were to be intepreted in a liberal sense in view of the nature of the sanction referred to in s. 28(1). Such sanction cannot be permanent and must necessarily be on a temporary basis, for a specified number of years, according to the requirements of each case. If so, it was to the interest of the grantee himself that some provision should be made for the disposal of his assets after the termination of the period of a sanction and also in the public interests that the constructions and works should be made available to the public, without dismantling them. Hence, the condition for compulsory acquisition could not be held to be *ultra vires* even though it was not specifically provided for in s. 28(1).[53]

2. The power of an University to make regulations for the 'maintenance of standards in the course of studies' has been held to include not only the power to prescribe minimum qualifications for admission courses of study, and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree or other academic distinction to students who fail to satisfy the examiners, and to direct that a student who is proved not to have the ability or the aptitude to complete the course within a reasonable time should discontinue the course.[54] Similarly, the power to make regulations to prescribe "the conditions on which a student may be admitted to the examinations" has been held to include the power to refuse to admit a student in certain contingencies; the power to weed out students who have on the application of a reasonable test proved themselves to be unfit to continue the course or prosecute training in the course.[54]

3. S. 68C of the Motor Vehicles Act, 1939, provides—

"68C. Where any State transport undertaking is of the opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport services in general or any particular class of such services in relation to any area or route or portion thereof should be run and operated by the State transport

51. *A.G.* v. *Great Eastern Ry.*, (1880) 5 App. Cas. 473.
52. *Asst. Collector* v. *N.T. Co.*, A. 1972 S.C. 2563 (paras. 30-31).
53. *Okara E.S.C.* v. *State of Punjab*, A. 1960 S.C. 284 (289).
54. *Mysore University* v. *Gopala*, A. 1965 S.C. 1933 (1935).

undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State transport undertaking may prepare a scheme giving *particulars of the nature of the service* proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the Official Gazette and also in such other manner as the Government may direct."

The object of requiring the scheme to give particulars of the nature of the services proposed to be rendered is to enable the objectors to make their objections to the scheme,[55] e.g., that the scheme does not offer an adequate service.[55]

It has, however, been held that the requirement of the provision may be complied with not only by specifying in the scheme the precise number of vehicles and trips but also by fixing the maximum number of vehicles and trips on each route.[56]

4. Where a statutory corporation is empowered to construct works and to levy rates to pay for the construction, it has the implied power, in the absence of anything to the contrary in the statute itself, to levy a rate to provide for a liability incurred through the negligence of its servants in doing the work.[57]

B. The expression 'incidental to' is not, however, identical with 'in connection with'. It has a narrower meaning, namely,

"what might be derived by *reasonable implication* from the language of the Act".[58]

Hence, if, upon a *reasonable construction,* the power relied upon cannot be held to be incidental or consequential to the power expressly granted, the acts of the non-sovereign body must fail.[59-64]

1. A Municipal Corporation had the statutory power to establish 'baths, wash-houses and open bathing places'. It started a laundry to wash its consumers' clothes. *Held,* that the act of the Corporation was *ultra vires* since the object of the statute was to provide facilities to the rate-payers to do their own washing and did not authorise the Corporation to undertake a completely different enterprise, namely, to wash their clothes itself.[59]

2. A power to dismiss a teacher on educational grounds cannot be used to effect retrenchment.[61]

3. An authority, empowered to hear appeals from orders in respect of grant of traffic licences, cannot, in exercise of that power, lay down conditions as to the future holding of the licence.[62]

4. The East Punjab Public Safety Act, 1949, was passed to provide for special measures to ensure public safety and maintenance of public order. S. 20 of the Act authorised the Provincial Government by notification to declare that the whole or any part of the Province as may be specified in the notification to be a 'dangerously disturbed area'. The special provisions of the Act for the trial of offences were applicable to a dangerously disturbed area.

By the first notification of 8-7-1949, the Provincial Government declared the whole of the Province of Delhi to be a dangerously disturbed area. On 28-9-1950, a second notification was issued cancelling the first notification with effect from 1-10-1950. This was followed by the *third* notification on 6-10-1950, which purported to modify it by inserting the words "except as respects things done or omitted to be done before

55. *Rowjee* v. *State of A.P.,* A. 1964 S.C. 962 (974-75).
56. *Aswathanarayana* v. *State of Mysore,* A. 1966 S.C. 1848 (1855-56).
57. *Galsworthy* v. *Selby Dam Commrs.,* (1892) 1 Q.B. 348 (C.A.).
58. *Amalgamated Society* v. *Osborne,* (1910) A.C. 87 (97).
59. *Att.-Gen.* v. *Fulham Corpn.,* (1921) 1 Ch. 440.
60. See also *Fawcett Properties* v. *Buckingham C.C.,* (1958) 3 All E.R. 521.
61. *Sadler* v. *Sheffield Corpn.,* (1924) 1 Ch. 483.
62. *R.* v. *Minister of Transport,* (1934) 1 K.B. 277.
63. *Gopi Chand* v. *Delhi Administration,* A. 1959 S.C. 609.
64. *Bisheswar* v. *University of Bihar,* A. 1965 S.C. 601 (606).

the date of this notification", at the end of the second notification. The effect of the third notification, in short, was that Delhi became a dangerously disturbed area in respect of things done or omitted to be done before 1-10-1950, but not in respect of things done or omitted to be done thereafter.

Held, that the third notification was *ultra vires* s. 20. S. 20 empowered the Government to declare the whole or any part of the Province as a dangerously disturbed area but it did not confer the power to declare any area as being dangerously disturbed in respect of certain things and not dangerously disturbed in regard to others.[59] The contention that the power to make a notification included the power to modify it was also rejected with the observation that a notification declaring an area to be a dangerously disturbed area could be cancelled *in toto* or modified, by restricting the notification to a part only of the area; but the power to modify cannot include the power to treat the same area as dangerously disturbed for persons accused of crimes committed in the past and not disturbed for others accused of the same or similar offences committed after the specified date.[63]

5. S. 30(d) of the Bihar State Universities Act, 1960, provides—

"Subject to the provisions of the Act, the Statutes may provide for the admission of educational institutions as colleges and the withdrawal of privileges from colleges so admitted."

In exercise of this power, the University made the Statute in question.

(a) Cl. 2(4) of the Statute conferred on the Vice-Chancellor the power "to amend or revise the constitution of the affiliated colleges".

(b) Cl. 3(1) provided, "The Syndicate may.....dissolve and order constitution of Governing Body in admitted colleges or cancel its grant-in-aid to the college concerned for any one or more of the following reasons ....."

The Supreme Court *held* both these clauses to be *ultra vires,* because s. 30(d) conferred only the power to lay down conditions and regulations which must be satisfied before the Governing Bodies are constituted but what Cl. 2(4) of the impugned Statute purported to authorise the Vice-Chancellor was to amend or revise the constitution wherever necessary. Non-compliance with the general conditions laid down by the Statute might entail the liability to be disaffiliated, but that is very different from giving power to the Vice-Chancellor to make the necessary changes in the Governing Bodies of the affiliated colleges themselves.

For the same reason, Cl. 3(1) which provided that the Syndicate can itself dissolve the Governing Body of an affiliated college was *ultra vires.*[64]

6. S. 23(1)(d) of the Prevention of Food Adulteration Act, 1954, empowered the Central Government to make rules—

"restricting the packing and labelling of any article of food.....with a view to preventing the public or the purchaser being deceived or misled as to the character, quality or quantity of the article".

R. 32 framed by the Central Government required, *inter alia,* that on the label of every article, the following particulars shall be specified :

"(b) the name and business address of the manufacturer.....;

(e) a batch number or code number....."

The Supreme Court *held* that rule (b) was *not ultra vires* inasmuch as it is well-known that in many cases the name and address of the manufacturer.....has become associated with the character, quality or quantity of the article; but rule (e) was *ultra vires* because the Court was unable to find from the materials before the Court "any rational or even remote connection between the batch or code number artificially given by a packer and the public being prevented from being deceived or misled as to the character, quality or quantity of the article contained in a sealed tin.[65]

65. *Dwarka* v. *Delhi Municipality,* A. 1971 S.C. 1844 (para. 23).

7. (i) Where by one section of the Act, the rule-making power to lay down *qualifications* for being a voter or a candidate at an election is conferred upon *A*, and by another section, *B* is empowered to *prepare* and *revise* the electoral rolls, it *cannot* be held that the authority *B*, while preparing or revising electoral rolls, has a concurrent power to prescribe qualifications or disqualifications, which power has been vested by the Legislature in another authority (*A*).[66]

(ii) It is a question of proper construction of the statute to determine whether the statutory authority has done what has been prohibited by the statute.[67] The act which is impugned as *ultra vires* should also be taken on its face and *not on its 'substance' or 'effect'*.[68]

(iii) In most modern statutes, the practice is to confer rule-making power by one general provision empowering the rule-making authority to make rules 'for carrying out the purposes of the Act', followed by the enumeration of certain particular matters regarding which rules may be made 'without prejudice to the generality of the foregoing power'. In such a case, it has been held that the specific enumeration *does not circumscribe* the general power conferred to make any rules provided they are required for carrying out the purposes of the Act and they are consistent with the provisions of the Act.[69,70] Hence, any rule which comes within the scope of the general power would be valid.[71-73] Thus, in *Emp.* v. *Sibnath*,[73] the Privy Council observed—

"The function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and the 'rules' which are referred to in the opening sentence of sub-section (2) are not restrictive of sub-section (1) as indeed is expressly stated by the words 'without prejudice to the generality of powers conferred by sub-section (1)'."[73]

Similar construction would be made where the general power is conferred by a 'residuary' clause[74] such as the following—

"The Board may make regulations, not inconsistent with this Act, ... to provide for .....

any other matter arising out of the Board's functions under this Act for which it is necessary or expedient to make regulations."

It was held that the foregoing clause empowered the Board to make regulations for taking disciplinary action against the employees appointed by the Board, though there was no specific provision relating to disciplinary action.[74]

The principle is applicable to all statutory instruments made under statutes which are similarly worded, giving a general as well as particular powers. Even though a rule purports to have been issued under the particular power, it cannot be held to be *ultra vires* unless it is not only beyond the general power[70,75] but also the general purposes of the Act,[76] or, in other

66. *Bar Council* v. *Surjeet*, A. 1980 S.C. 1612 (para. 8).
67. *Laceby* v *Lacon & Co.*, (1899) A.C. 222 (228-30).
68. *R.* v. *National Arbitral Tribunal*, (1943) 2 All E.R. 162.
69. *Ross-Clunis* v. *Papadopoullos*, (1958) 2 All E.R. 23 P.C.
70. *Khanzode* v *R.B.I.*, A. 1982 S.C. 917 (para. 16).
71. *R.* v. *Comptroller of Patents*, (1941) 2 K.B. 306; *Yoxford & Darsham Farmers* v. *Llellin*, (1946) 2 All E.R. 38.
72. *Santosh* v. *State*, (1951) S.C.R. 303 (310); *State of Kerala* v. *Appakutty*, A. 1963 S.C. 796 (798).
73. *Emp.* v. *Sibnath*, A. 1945 P.C. 156.
74. *U.P. State Electricity Bd.* v. *Abdul*, A. 1981 S.C. 1708 (paras. 2-3).
75. *Afzal* v. *State of U.P.*, (1964) 4 S.C.R. 991 (1000).
76. *Chandrakant* v. *Jasjit*, A. 1962 S.C. 204 (207).

words, unless it is incompatible with the purpose for which the body is created or unless it is contraindicated by any specified provision of the enactment.[77]

For the foregoing reasons, a delegation of the general power includes a delegation of the specific powers as well.[72]

(iv) Even apart from a provision conferring such general power, it has been held that a rule need not specify the particular section under which it has been made; it will be upheld as valid if it may be referred to *any* power available to the statutory authority, even though a wrong provision may have been cited,[75, 78] provided the requirements of the proper provision have been complied with.[78-79]

(v) In determining whether a particular power is comprehended by the terms of a particular statutory provision, the Court must read all the provisions of the statute, together with its object,[80] before striking down a subordinate legislation as *ultra vires*.[81]

Thus, in various contexts, the word 'regulation', in a statute, has been interpreted to include 'prohibition'.[81-82]

In short, whenever a question of *ultra vires* is raised, the Court must start with a liberal interpretation of the parent statute, in so far as its language and object permits.

(vi) In particular, in the matter of social legislation,[83] the Court should give a liberal construction to the statutory provision, before holding a Rule to be *ultra vires,* so that the object of the legislation may not be defeated.[83]

Similar principle has been applied in construing a statute creating an adjudicatory or *quasi-judicial* tribunal.[80]

(vii) Applying the doctrine of progressive interpretation, the words of a statute conferring a power should be liberally interpreted, to include within its ambit the changes in the concept subsequently brought about in social, economic, political, scientific and other fields.[84]

(viii) A rule may be made in the exercise of two powers together.[76]

(ix) When a statutory instrument has been made for two purposes, one of which is *intra vires* and the other *ultra vires,* the Court, in determining the validity of such instrument, looks into its 'dominating purpose'.[85] Thus,—

An omnibus power to make such rules 'as may be necessary or expedient', 'for the purpose of giving effect to the provisions of the Act' or 'to carry out the purposes of the Act' will not, *per se,* be construed as conferring a power—[86-87]

(i) To impose a tax or other pecuniary liability.

77. Cf. *Indramani* v. *Natu,* A. 1963 S.C. 274.
78. *Hazari Mal* v. *I.T.O.,* A. 1961 S.C. 200 (202); *Hukam Chand* v. *State of M.P.,* A. 1964 S.C. 1329.
79. *Balakotiah* v. *Union of India,* A. 1958 S.C. 232 (236).
80. *Prabhakara* v. *Panala,* A. 1976 S.C. 1803 (para. 10).
81. *State of T.N.* v. *Stone,* A. 1981 S.C. 711 (paras. 6, 7, 10).
82. *Krishnan* v. *State of T.N.,* A. 1975 S.C. 583; *Municipal Corpn.* v. *Virgo,* (1896) A.C. 88 [see contra *State of U.P.* v. *Hindusthan Aluminium,* A. 1979 S.C. 1459 (para. 34)].
83. Cf. *D.C.G.M.* v. *Union of India,* A. 1983 S.C. 937 (para. 30); *Commonwealth of Australia* v. *Bank of N.S.W.,* (1950) A.C. 235.
84. *Senior E.I.* v *Laxminarayan,* A. 1962 S.C. 159 (163).
85. *Sadler* v. *Sheffield Corpn.,* (1924) 1 Ch. 483.
86. *King* v. *National Fish Co.,* (1931) Ex. C.R. 75 (*Can*).
87. *Commrs.* v. *Cure & Deeley,* (1961) 3 W.L.R. 798.

(ii) To oust the jurisdiction of courts to try *legal* disputes, even by indirect devices, e.g., by a 'deeming provision'.[88]

(iii) To impair the liberty of the subject.[88]

(iv) To make any rule or regulation unless a *particular provision* in the statute or the particular purpose thereof is sought to be carried into effect by the impugned rule or regulation.[89]

Thus, a regulation which imposed *absolute liability* upon a person engaged in tunnelling operations to ensure the safety of 'persons employed' in such work has been held to be *ultra vires* and not authorised by the following provisions in the statute—

(a) Empowering an inspector to ensure compliance with a regulation made regulating "the manner of carrying out any excavation";

(b) Empowering the making of regulations "relating to the safeguards.....to be taken for securing the safety of persons engaged in....excavation work". As to this latter provision, the Judicial Committee observed that this provision only enables the making of regulation stating *specific means* which persons bound by the regulations were required to adopt but "did not authorise a regulation prescribing that a tunnel *must be safe*".[89]

In short, the omnibus power referred to above—

"does not enable the authority by regulations to *extend* the scope or general operation of the enactment but is *strictly ancillary*. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is *incidental* to the execution of its specified provisions. But such a power will not support attempts to *widen the purposes of the Act*, to add new and different means of carrying them out or to depart from or vary its ends".[89]

The observations of the Judicial Committee in *Emp.* v. *Sibnath*[90] must, therefore, be read in the light of this later decision.[89]

(x) Where a Rule is *intra vires*, it cannot be invalidated on the ground that by making the Rule, the State Government has created a monopoly in its favour or otherwise benefitted itself.[91] In other words, the motive of the Rule-making authority is not a relevant consideration in determining whether the Rule has exceeded the statutory power.[91]

B. Procedural Ultra Vires.

Mandatory or directory.

(i) The procedure prescribed by the statute for the issue and publication of the subordinate legislation must be complied with, *in so far as they are mandatory*. For,

"It is a well-settled general rule that an absolute enactment must be obeyed or fulfilled *exactly*, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."[90]

Procedure for publication.

It has, therefore, to be determined in each case whether a procedural requirement laid down by a statute, in this context, is mandatory or merely directory.[92]

Violation of a mandatory procedural provision of the statute would invalidate the act of the statutory authority,[93] unless the deviation is only trivial.[94]

88. *Chester* v. *Bateson*, (1920) 1 K.B. 829.
89. *Utah Construction* v. *Pataky*, (1965) 3 All E.R. 650 (653) (P.C.).
90. *Emp.* v. *Sibnath*, A. 1945 P.C. 156 (see p. 157, *ante*).
91. *State of T.N.* v. *Hind Stone*, A. 1981 S.C. 711 (paras. 6-7).
92. *Punjab Co-operative Bank* v. *I.T.O.*, (1940) I.A. 464 (476).
93. *Municipal Council* v. *Kamal*, A. 1965 S.C. 1321; *Dharangadhara Chemical Works* v. *State of Gujarat*, (1973) 2 S.C.C. 345 (para. 13).
94. *Raza Sugar Co.* v. *Municipal Bd.*, A. 1965 S.C. 895.

Though the general principle applicable for this determination is well-settled, there has not been much consistency or certainty in the matter of application of that principle, and only certain broad propositions may be formulated.

In *India,* it has been held that where a statute requires the subordinate legislation to be published in a specified manner, e.g., by publication in the Official Gazette, it cannot have the force of law unless it is so published.[95]

But there is a presumption that an official act has been duly performed, so that when a printed copy of the Rules is produced, the Court can presume due publication and need not launch into any further investigation into the matter.[96]

When a statute prescribes a mode of publication (say, publication in the Official Gazette) for rules made under it, a rule may be modified by an executive order only if it is published in the same manner as a rule.[95] Similarly, where a statute prescribes that orders made under it must be published in the Official Gazette and also laid before Parliament, and an order made under the statute authorises the Government to lay down certain principles for the administration of the order, the principles (if they are issued separately from an order) must be similarly issued if the order cannot be administered without reading the principles as part of the order.[97]

In general, a provision in the statute requiring *pre*-publication of Rules made under it, is construed as mandatory and its breach renders the Rule invalid.[98] But *substantial* compliance would suffice.[99]

On the other hand—

A requirement that certain steps must be taken within a reasonable time, 'forthwith' or 'as soon as may be' is usually taken as merely *directory*.[100-1]

Requirement of Consultation.

(ii) In *England,* it has been held[2] that when a statute requires that a statutory order may be made only after consultation with another body, the order may be *ultra vires,* if there is no consultation at all,[2] even though the order will not be *ultra vires* if the authority does not act according to the opinion or advice of the consultative body. Whether there has been consultation is a question for determination by the Court, according to the circumstances of the case.[2-3]

But, as the Privy Council has observed—

> "The requirement of consultation is never to be treated perfunctorily or as a mere formality."[3]

U.K.

This case[3] related to s. 73(1) of the Local Government Ordinance, 1962, of Mauritius, which provides—

> "The Governor-in-Council may by Proclamation alter the boundaries of any town....., after consultation with the local authority concerned."

95. *State of Kerala* v. *Joseph,* A. 1958 S.C. 296 (300).
96. *Sodhi* v. *Union of India,* (1991) 2 S.C.C. 382.
97. *Narendra* v. *Union of India,* A. 1960 S.C. 430 (438).
98. *Tulsipur Sugar* v. *Notified Area,* A. 1980 S.C. 882.
99. *Vallabhdas* v. *Municipal Committee* A. 1967 S.C. 133.
100. Cf. *Roberts* v. *Brett,* (1865) 11 H.L.C. 337; *Hydraulic Engineering Co.* v *McHaffie,* (1879) 4 Q.B.D. 670 (676).
1. Maxwell on *Statutes,* 11th Ed., p. 369.
2. *Fletcher* v. *Minister of Town Planning,* (1947) 2 All E.R. 496.
3. *Port Louis Corpn.* v. *A.G. of Mauritius,* (1965) 3 W.L.R. 67 (72) P.C.

The following propositions were deduced by the Judicial Committee from the above provision—

(a) No proposal for alteration should be made until after consultation with the local authority concerned.

(b) The local authority must be told what alterations were proposed.

(c) The local authority must be given a reasonable opportunity to state their views.

(d) They must be free to say what they think and cannot be forced or compelled to advance any views.

On the other hand,—

(i) The local authority must be ready and willing to avail themselves of a reasonable opportunity to state their views.

(ii) If they do not avail themselves of such opportunity, the Governor-in-Council would be free to act without their views.[3]

India.

A. In *India,* it was held, in some earlier cases, that a provision as to *consultation* with another authority is generally directory.[4-6]

Some of these decisions relied upon the observations of the Judicial Committee in *Montreal Street Ry. Co.* v. *Normandin*[7] as follows :

"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 provisions to be directory only, the neglect of them, *though punishable,* not affecting the validity of the acts done."[7]

A close reading of the judgment in that case[7] will reveal, however, that the rationale of that decision was that where the Legislature provides a penalty for non-compliance with a procedural provision, the act done in non-compliance thereof should not be invalidated, if that would cause public inconvenience, because the penalty for non-compliance has already been provided by the Legislature. It is to be noted that no such penalty is provided in Art. 320(3) of the Constitution which has been held by *our* Supreme Court to be directory.[5]

In *Hazari Mal's case,*[6] the provision in question was s. 5(5) of the Patiala Income Tax Act, which was as follows—

"Income-tax Officers shall perform their functions in respect of such persons or classes of persons or of such incomes or classes of income or in respect of such areas as the Commissioner of Income-tax may in *consultation* with the Minister-in-charge direct ....."

The Commissioner made an order of transfer of a case without consulting the Minister. On receipt of a notice issued by the transferee Income-tax Officer calling upon the Petitioner to file a return, the Petitioner sought a writ of prohibition, *inter alia,* to prohibit the Income-tax Officer from proceeding with the case, on the ground that the order of transfer by the Commissioner was *ultra vires* because he had not consulted the Minister. The Supreme Court held that the failure to consult the Minister did not render the order of transfer a nullity inasmuch as the provision as to consultation was merely directory.[6]

4. *Khemka* v. *Emp.,* A. 1945 F.C. 67.

5. *State of U.P.* v. *Manbodhan,* A. 1957 S.C. 912.

6. *Srinivasan* v. *Union of India,* A. 1958 S.C. 419 (430); *Hazari Mal* v. *I.T.O.,* A. 1961 S.C. 200.

7. *Montreal Street Ry. Co.* v. *Normandin,* (1917) A.C. 170.

It is to be noted that the English decisions in *Rollo* v. *Minister of Town Planning*[8] or *Port Louis Corporation* v. *A.G. of Mauritius*[3] were not brought to the notice of the Supreme Court in any of these cases.[5-6] In the former case,[8] s. 1(1) of the New Towns Act, 1946, provided—

"If the Minister is satisfied, *after consultation* with any local authorities who appear to him to be concerned, that it is expedient in the national interest that any area of land should be developed ....., he may make an order designating that area as the site of the proposed new town."

It was held that consultation with the local authority was obligatory, though it need not be formal; it was enough if the local authority was given an opportunity to put forward any criticism or suggestion it wished, before the Minister issued his order.[8]

B. In subsequent decisions,[9-10] however, it has been held by *our* Supreme Court that the condition of previous consultation would be construed as mandatory, so that an order made without such consultation shall be void.[95]

In *Jyoti Prakash* v. *Chief Justice*[10] the Supreme Court has held that consultation with the Chief Justice was obligatory before the President makes an order under Art. 217(3) of the Constitution of India which says—

"If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final."

Without referring to the previous decisions on the effect of non-consultation, the Supreme Court held that—

"Before the President reaches the decision, he has to consult the Chief Justice of India; consultation with the Chief Justice of India is clearly a mandatory requirement ....."

The question of public inconvenience caused by an annulment of the determination of the President on the ground of omission to consult the Chief Justice in any cause was not considered at all and the only reason given for construing the provision as mandatory was "the gravity of the problem covered by the said provision".[10] It is true that the dismissal or otherwise of a civil servant, coming under Art. 320(3), differs *in degree*, as regards the 'gravity of the problem', but the language in Art. 320(3), it should be noted, is not much different from that in Art. 217(3). Art. 320(3) says—

"The Union Public Service Commission or the State Public Service Commission ..... *shall be consulted* ..."

It is one thing to say that the advice tendered by the Commission, when consulted, is not binding upon the Government[11] and another thing to say that nothing happens on the Earth if the Commission, which is supposed to be an expert on matters relating to service, is not consulted at all.[97a] It is submitted that the doctrine as to the requirement of consultation being directory should not be extended beyond the sphere to which *Srivastava's case*[12] relates.

Of course, the earlier decisions[5-6] have not yet been overruled; on the other hand, in *Narayana's case*,[13] they were distinguished, holding that it is

8. *Rollo* v. *Minister of Town Planning*, (1948) 1 All E.R. 13 (17) C.A.
9. *Banwarilal* v. *State of Bihar*, A. 1961 S.C. 848 (paras. 19, 22).
10. *Jyoti Prakash* v. *Chief Justice*, A. 1965 S.C. 961 (966).
11. *D'Silva* v. *Union of India*, A. 1962 S.C. 1130 (1133-34).
12. *State of U.P.* v. *Srivastava*, A. 1957 S.C. 922.
13. *Narayana* v. *State of Kerala*, A. 1974 S.C. 175 (para. 21).

the object of the statutory provision and its context which will determine whether the condition of consultation is to be construed as *mandatory* or *merely directory;* in the former case, failure to consult will render the order or decision void;[13] in the latter, no question of *ultra vires* will arise.[13]

It may, however, be observed that the trend, so far as the administrative sphere is concerned, is to treat a condition of prior consultation as mandatory.[14-15] Hence, a Rule framed without consulting the person or body specified in the statute shall be void.[13] Of course, this does not mean that the view expressed by the consulted person or body shall be binding on the statutory authority.[15] But a requirement to consult affected interests would not be implied by the Courts, in the area of rule-making, in the absence of an *express* provision in the parent statute, requiring consultation, because the doctrine of natural justice cannot be imported into the sphere of legislation, or *quasi-legislation.*[16-17]

Condition precedent.

(iii) A *condition precedent* is construed as mandatory. Thus, where a statute provides that the *previous sanction* or prior approval[18] of a prescribed authority must be obtained before making a rule or order,[19] a notice,[20-21] rule or order made without such previous sanction is a nullity.[21]

The principle applies even where the condition precedent is the subjective satisfaction or opinion of the authority making the statutory instrument itself.[22-23]

Where a statute provides that the statutory authority may take a specified action after being satisfied or having a reasonable belief that a certain situation or contingency exists, the formation of such subjective satisfaction is construed as a condition precedent, so that if it is established that he took the action or decision without *applying his mind* or without forming an *honest* opinion[24] as to whether the specified situation or contingency did exist, his order will be struck down.[24-25] While the formation of the opinion,[24] belief or satisfaction is a *subjective* condition, the existence of the situation specified in the statute is an *objective* condition, so that it must be established by the statutory authority, objectively, that such situation did

14. *Naraindas* v. *State of M.P.,* A. 1974 S.C. 1232 (para. 16) C.B. [It is to be noted that, in this case, the Constitution Bench unanimously struck down the impugned notification as void, without even referring to the earlier decisions, such as the case of *Srivastava* (A. 1957 S.C. 922)].

15. *Gupta* v. *Union of India,* A. 1982 S.C. 149 (paras. 28-29, 107); *Union of India* v. *Sankalchand,* A. 1977 S.C. 2328 (para. 35); *Municipal Corpn.* v *N.S.E.,* (1991)1 S.C.C. 611 (paras. 11, 14).

16. *Tulsipur Sugar* v. *Notified Area Committee,* A. 1980 S.C. 883 (paras. 6-8); *Lakshmi Khandsari* v. *State of U.P.,* A. 1981 S.C. 873 (para. 76); *Saraswati Industrial* v. *Union of India,* A 1975 S.C. 460 (para. 13).

17. *Bates* v. *Lord Hailsham,* (1972) 3 All E.R. 1019.

18. *Bar Council* v. *Surjeet,* A. 1980 S.C. 1612 (para. 8).

19. E.g., a tax [*Jeo Raj* v. *State of Rajasthan,* A. 1959 Raj. 73; *Bhikam Chand* v. *State,* A. 1966 Raj. 142 (151)].

20. *I.T. Commr.* v. *Pratap Singh,* A. 1961 S.C. 1026 (1028); *Nageswararao* v. *State of A.P.,* A. 1959 S.C. 1376 (1383).

21. *Secy. of State* v. *Ananta,* A. 1934 P.C. 9.

22. *Emp.* v. *Sibnath,* (1944) F.C.R. 1 (P.C.).

23. *Hamdard Dawakhana* v. *Union of India,* (1965) 2 S.C.R. 192 (200-01).

24. *Narayana* v. *State of Kerala,* A. 1974 S.C. 175 (para. 20).

25. *State of Gujarat* v. *Jamnadas,* A. 1974 S.C. 2233.

actually exist, at the time of taking the impugned action, failing which the statutory order will be struck down.[25]

But—

(a) Compliance with the condition precedent may be proved by extraneous evidence where it is not recited in the statutory instrument itself.[22, 26]

(b) Where the impugned statutory order, notification, etc., *recite* that the condition precedent has been satisfied, the burden is shifted to the petitioner who challenges it, to prove the contrary, by producing proper materials.[27]

(c) Even after the Rules are made with the prior approval of the prescribed authority, as required by the statute, the Rules are not immunised from challenge of *ultra vires* on other grounds.[18]

(d) Where a statute requires something to be done in a prescribed form, the general rule is that the instrument or contract[28] would not be invalid if all the terms and conditions set out in the form were contained in the instrument even though it was not strictly in the form prescribed.[29-30]

The foregoing principle will apply where the statutory provision is construed as directory, according to the canons of construction. But the result will be otherwise where the provision cannot but be held to be mandatory,[31] e.g. where a Rule provides that a ballot paper shall be rejected if it "bears any mark or writing by which the elector can be identified", for, the object of the Rule is to maintain the secrecy of the election by ballot, which would be impaired if the Rule were construed as directory.[31]

Requirement to lay before Parliament.

(iv) Where the statute requires that Rules made by the rule-making authority must be laid before Parliament, the question whether a failure to do so would invalidate the Rule would depend upon the statutory requirement being interpreted as mandatory or directory. There are different types of provisions used by the Legislature in this behalf, and the Supreme Court has differentiated between them from this standpoint :

i. Where the requirement to lay is *not* a condition precedent for making the Rule, but is a formality to be observed after it is made, and the statute does not indicate the consequences of default, the requirement would be construed as *directory* so that it cannot be struck down merely because it has not been placed before the Houses of the Legislature.[32-33]

Anything said to the contrary in *Narendra* v. *Union of India*[34] is not good law because the issue was not fully considered.[32]

---

26. *Barium Chemicals* v. *Company Law Board*, A. 1967 SC 295.
27. *Naraindas* v. *State of M.P.*, A. 1974 S.C. 1232 (para. 16) C.B.; *Swadeshi Cotton Mills* v. *State of U.P.*, A. 1961 S.C. 1381.
28. *Banarsi* v. *Cane Commr.*, (1963) Supp. 2 S.C.R. 760 (783) [re s. 18(2) of the U.P. Sugar Factories Control Act, 1938].
29. *Radhakisson* v *Balmukund*, (1932) 60 I.A. 63.
30. *Kamaraja* v *Kunju*, (1959) S.C.R. 583 (606) [re s. 117, Representation of the People Act, 1951]; *Jagannath* v *Jaswant*, (1954) S.C.R. 892.
31. *Hari Vishnu* v. *Syed Ahmed*, (1955) 1 S.C.R. 1104 (1126) [re r. 47 (1) of the Representation of the People (Conduct of Elections & Election Petition) Rules, 1951].
32. *Atlas Cycle Industries* v. *State of Haryana*, A 1979 S.C. 1149 (paras. 22, 36)
33. *Jan Md.* v. *Noor Md.*, A. 1966 S.C. 385 (394-95).
34. *Narendra* v. *Union of India*, A. 1960 S.C. 430 (para. 28).

ii. The statute may provide that a Rule, so laid before the Legislature, shall be valid only if it is not annulled or modified by the Legislature by a *negative* resolution. In such a case, the requirement to lay before Parliament would be considered as mandatory.[32, 35]

A clause to this effect has now been inserted in many Central Acts, by enacting the Delegated Legislation Provisions (Amendment) Act, 1984. The condition has been made applicable not only to Rules but also to regulations, bye-laws and orders under the specified Acts, such as the Opium Act, 1857, Indian Reserve Forces Act, 1888, Indian Ports Act, 1908, Indian Electricity Act, 1910, Indian Museums Act, 1910, Electricity (Supply) Act, 1948, Special Marriage Act, 1954.

iii. The statute may require that the Rule will be valid or come into operation only if it is approved by the Legislature by an affirmative resolution. This is also a clear case where the requirement has to be construed as *mandatory*.[35]

iv. It must be noted in this context that where a Rule is *ultra vires*, having transgressed the substantive or procedural provisions of the statute, its validity cannot be cured by the fact of laying it before the Legislature.[35] The reason is that even though the Legislature passively or by an affirmative *resolution* approves of the Rule, the limits set forth by the statute *enacted* by the Legislature cannot be transgressed by the subordinate law-making body.[35]

Statutory duty must be performed in manner prescribed by the statute.

v. When a power of subordinate legislation is conferred by a statute to be exercised in a particular way, it cannot be exercised in any other way.[36]

1. Where a Minister was empowered by the Defence Regulations to confer power upon himself or his representatives by Orders made under the regulations in the prescribed manner, *held*, that having made an Order conferring certain powers upon a subordinate officer, the Minsiter could not limit the duties or discretions or interfere with the exercise of the discretion under such Order, by issuing 'instructions' which were not 'Orders'.[36]

2. S. 19(5) of the Town and Country Planning Act, 1947, provided that "before confirming a purchase notice or taking any other action in lieu thereof, the Minister shall give notice of his proposed action to the person.....on whom the notice was served...."

At the time of confirmation, the Minister changed his 'proposed action', by substituting the second defendant for the plaintiff council as the acquiring authority, without a fresh notice upon the parties as required by s. 19(5). Held, the order of confirmation was *ultra vires*.[37]

The rule is of general application and extends to administrative power conferred by a statute or rules made under it.[38] "Where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all."[39]

Thus, if a statute says that an act may be done or a decision taken only after giving the person affected a notice[38] or an opportunity of offering

35. *Hukam Chand* v. *Union of India*, A. 1972 S.C. 2427 (para. 11).
36. *Simms Motor Units* v. *Minister of Labour*, (1946) 2 All E.R. 201; *Jackson Stanfield & Sois* v. *Butterworth*, (1948) 2 All E.R. 558 (564-65).
37. *Ealing B.C.* v. *Minister of Housing*, (1952) 2 All E.R. 639.
38. *Nageswararao* v. *State of A.P.*, A. 1959 S.C. 1376 (1383).
39. *Nazir Ahmad* v. *K.E.*, 63 I.A. 372 (381).

an explanation,[40] or after hearing objection,[41] the act done without complying with the requirement will be invalid.

(i) Rr. 11 and 68F(2) of the Andhra Pradesh Motor Vehicles Rules provide that the Transport Authority *"shall before* ... modifying the conditions of the existing permit ..... give due notice to the persons likely to be affected in the manner prescribed in the rules". On 24-12-1958, the Authority issued an order directing the Petitioners to stop plying their buses on their respective routes from 25-12-1958 and the order was served on the Petitioners on the same day, i.e., 24-12-1958.

Though relief under Art. 226 was refused on other grounds, it was observed: "(i) While the rule enjoins on the Authority to issue notice to the persons affected *before* making it the Authority made the order and communicated the same to the persons affected; and (ii) while the rule requires *due* notice, i.e., reasonable notice, to be given to the persons affected to enable them to make representations against the order proposed to be passed the Regional Transport Authority gave them *only a day* for complying with that order, which in the circumstances could not be considered to be due notice within the meaning of the rule".[38]

(ii) When a statutory authority is required to exercise a power after serving a notice upon the party to be affected, the notice as well as the subsequent exercise of the power will be *ultra vires,* if the particulars required by the statute are not given in the notice;[42] or no such notice is served at all.

The preceding rule is strictly enforced when a violation of the statutory provision involves final consequences.[43]

The foregoing principle shall, however, be attracted only where the statute specifies a *particular* procedure for the performance of a duty. Where, on the other hand, the statute confers power upon the Government to make rules 'to carry into effect the purposes of this Act', and on specific procedure is either laid down or prohibited by the statute, it is competent for the Government to make rules empowering the administrative authority to apply such procedure as would effectuate the purposes of the statute.[44] This is known as the doctrine of 'implied power'.[44]

vi. Where the statute vests the rule-making power in a specified authority, he cannot delegate it to another, and the rules made by the latter shall be void.[45]

A corollary from the above rule is that where mere delegation is authorised by the statute, the delegate cannot sub-delegate that power; if he does sub-delegate, the order making the sub-delegation as well as the act of the sub-delegate will become *ultra vires.*[46] The principle is applicable to administrative and *quasi-judicial* decisions.

In short, where the Legislature vests the rule-making power in a specified authority, the power must be exercised by that very authority, so that a Rule made by some other authority is void *ab initio* and it cannot be validated by ratification or approval by the proper authority.[47]

Conversely, where the statute provides that an action is to be taken by a specified authority, after hearing objection, which he takes without such

40. *Venkateswara* v. *Govt. of A.P.,* A. 1966 S.C. (836-7).
41. *Mandir Sita Ramji* v. *Governor,* A. 1974 S.C. 1868 (paras. 5-6).
42. *Burgess* v. *Jervis,* (1952) 1 All E.R. 592.
43. *East Riding C.C.* v. *Park Estate,* (1952) 2 All ER 669 (672) H.L.
44. *Asst. Collector* v. *N.T. Co.,* A. 1972 S.C. 2563 (para. 31).
45. *Bagalkot City Municipality* v. *Bagalkot Cement Co.,* A. 1963 S.C. 771; *Ganapati* v. *State of Ajmer,* (1955) 1 S.C.R. 1065 (1069).
46. *Allingham* v. *Minister of Agriculture,* (1948) 1 All E.R. 780; *Vine* v. *National Dock Labour Bd.,* (1956) 3 All E.R. 393 (H.L.).
47. *Bar Council* v. *Surjeet,* A. 1980 S.C. 1612 (para. 8).

hearing, the impugned action cannot be upheld on the ground that the action was subject to approval by a superior authority, who heard the party concerned.[48]

Limits of the rule of Procedural *Ultra Vires*.

(i) The rule cannot be applied so as to take more away any of the powers conferred by a statute which contains provisions conferring more than one power.[49]

(ii) Unless a particular mode of securing the purpose of the statute is laid down in the statute itself, the subordinate law-making body be held to have acted *ultra vires* merely because he prescribed a particular mode and not another.[50]

(i) S. 3 of the Essential Commodities Act, 1955, empowered the Central Government to make orders for securing the equitable distribution and "availability at fair prices" of essential commodities, and for this purpose, for controlling the price at which any essential commodity might be bought and sold. By an Order made in pursuance of this power, the Central Government fixed the minimum *ex-factory* price of sugar.

It was contended that the object of the Act was only to fix the prices at which the essential commodities could be available to the *consumer* at fair prices and, that, accordingly, the Government had no power to fix the *ex-factory* price. Negativing this contention it was held that though the object of the Act was to ensure a fair price to the consumer, the Act did not lay down at what stage that price should be fixed and did not debar the Government from fixing the *ex-factory* or wholesale prices (as distinguished from retail prices) if that would tend to stabilise the prices at which the commodities would be available to the consumer. What prices the Government should fix or at what stage, was left to the Government's estimate of the situation. Hence, where there was no allegation that wholesalers or retailers were profiteering, it could not be held that the fixing of the factory price of a commodity like sugar was beyond the purposes of the statute.[50]

(ii) Where a statute confers a power but does not prescribe any particular form for exercising it, it is immaterial whether it is exercised by issuing an order or a notification.[51]

(iii) Ordinarily, retrospective effect is not given by the Legislature to a *procedural* requirement in a statute and the Courts also do not favour such a construction by implication.

But sometimes the Legislature gives retrospective effect even to a procedural requirement by express words or by introducing what is known as 'deeming clause',[52] which places the new provision in the statute book by fiction, from a date earlier than the date when the relevant statute came into force.[53]

The Income-tax Amendment Act 48 of 1948 substituted s. 34, introducing, *inter alia*, the following Proviso—

"The Income-tax Officer shall not issue a notice under this sub-section unless he has recorded his reasons for doing so and the Commissioner is satisfied that it is a fit case for the issue of such notice."

This Proviso was given retrospective effect by providing that it shall be "deemed to have come into force on March 30, 1948", i.e., from a date prior to the date on which the Amendment Act received the assent of the Governor-General.

48. *Mandir Sita Ramji* v. *Governor*, A. 1974 S.C. 1868 (paras. 5-6).
49. *P.T.C.S.* v. *R.T.A.*, A. 1960 S.C. 801.
50. *Diwan Sugar & General Mills* v. *Union of India*, A. 1959 S.C. 626.
51. *Pine* v. *Assessing Authority*, (1992) 2 S.C.C. 683 (para. 9).
52. *Commr. of I.T.* v. *Pratapsingh*, A. 1961 S.C. 1926 (1928).
53. Cf. *Itco Ltd.* v. *Asst. Commr. of Commercial Taxes*, (1966) C.R. 693 (W) of 1962 (Cal).

Held, it must be taken that the Proviso was in existence on and from 30-3-1948 and any notice, which was issued thereafter without obtaining prior approval of the Commissioner, was invalid, even though, physically, there was no such requirement in the statute at that time.[52]

Effects of *Ultra Vires.*

I. Any act of a statutory body which is *ultra vires* is a nullity,[54] so that the plea of *ultra vires cannot* be defeated by any rule of estoppel,[54-55] and even the statutory authority itself cannot be precluded from setting up *ultra vires*.[55] A statutory authority cannot either enlarge its powers[54] or relieve itself of its duties[56] by creating an estoppel.

A person is not estopped from challenging a statutory instrument as *ultra vires* merely because he has paid a tax due under the instrument for some time.[57] The reason is that no amount of waiver, acquiescence or estoppel can give to a statutory authority a power which has not been given to him by the statute.[58]

In the result, any subordinate legislation or statutory order shall be void if it is *ultra vires,* whether on a substantive or procedural[59] ground.

II. The doctrine of severability, however, applies to all situations of *ultra vires*—constitutional or non-constitutional. In the result, only that portion of a statutory rule which is *ultra vires* will fail if it is severable from the rest,[60] but where it is impossible to work the rest without the offending portion, the entire Rule must fail.[61-62]

III. The doctrine of 'eclipse', enunciated in relation to unconstitutionality of a pre-Constitution law, under Art. 13(1) of the Constitution has been extended by *our* Supreme Court[63] to *ultra vires* subordinate legislation.

In the result, where a Rule is struck down as *ultra vires* because of inconsistency with a section in the Act under which the Rule was framed, the Rule would *revive* as soon as that section is subsequently amended so as to remove the provision to which the Rule was repugnant.[63]

This view, however, is not consistent with the doctrine evolved in *England,* by the House of Lords that what is *ultra vires* is void *ab initio.* A nullity cannot be revived on any account.

IV. An administrative order which has been declared *ultra vires* by a Court cannot be revived by any subsequent order without having any statutory authority for the same.[64]

V. An *ultra vires* act of a public official cannot bind the Government by the doctrine of 'promissory estoppel'.[65]

54. *Campbell's Trustees* v. *Police Commrs.,* (1870) 2 H.L. (S.C.) 1 (3); *Hoffman* v. *Secy. of State,* (1975) A.C. 295 (365) H.L.
55. *Rhyl U.D.C.* v. *Rhyl Amusements,* (1959) 1 All E.R. 257 (265).
56. *Maritime Electric Co.* v. *General Dairies,* (1937) A.C. 610.
57. *Dharangadhara Works* v. *State of Gujarat,* (1973) 2 S.C.C. 345 (para. 16).
58. *Essex Union* v. *Essex C.C.,* (1963) A.C. 808; *Munich* v. *Godstone R.D.C.,* (1966) 1 W.L.R. 427; Wade (1977), p. 222.
59. *Narayana* v. *State of Kerala,* A. 1974 S.C. 175 (para. 20); *Naraindas* v. *State of M.P.,* A. 1974 S.C. 1232 (para. 16) C.B.
60. *Fielding* v. *Thomas,* (1896) A.C. 600.
61. Cf. *Shivdev* v. *Krishan Kumar,* (1962) S.C. [Petn. 261/61].
62. *Great West Saddlery Co.* v. *R.,* (1921) 2 A.C. 91.
63. *Muhammadbhai* v. *State of Gujarat,* A. 1962 S.C. 1517 (1528-29).
64. *Shridhar* v. *Nagar Palika,* (1990) 1 Supp. S.C.C. 157 (para. 4).
65. *Vasantkumar* v. *Bd. of Trustees,* (1991) S.C.C. 761 (paras. 18, 23).

VI. An appointment which is made in contravention of the relevant statutory Rules is void; but the Court may not disturb it when it is temporary and its term is expiring.[66]

Avenues of judicial review of subordinate legislation[67].

A study of the various principles relating to *ultra vires* as discussed in the preceding pages would show that the corollaries are so many that the validity of a subordinate legislation may be challenged on various grounds. Shinghal, J., of the Supreme Court[68] has attempted to enumerate them as follows, but the enumeration should not be taken as exhaustive :

Ultra vires.

i. That the power to make the (subordinate) law could not have been exercised in the circumstances which were prevailing at the time when it was made;

ii. That a condition precedent to the making of the legalisation did not exist;

iii. That the authority which made the order was not competent to do so;

iv. That the order was not made according to the procedure prescribed by law;

v. That its provisions were outside the scope of the enabling power in the parent Act, in other words, the provisions of the regulations *exceeded* the power conferred on the delegate by the statute.[69]

vi. That the rules or regulations were in any way *inconsistent* with the provisions of the parent Act,[69] or that it is *ultra vires.*[70]

vii. That its provisions were otherwise violative of any other existing statute.[71]

viii. That they infringed any of the fundamental rights or other limitations imposed by the Constitution.[69]

ix. That they deny the principle of 'fair play' to the persons affected.[69]

Limits of judicial review of subordinate legislation.

(i) The scope of judicial review is narrowed down when a statute confers *discretionary* power upon an executive authority to make such rules or regulations or orders 'as appear to him to be necessary' or 'expedient', for carrying out the purposes of the statute or any specified purpose.

In such a case, the check of *ultra vires* vanishes for all practical purposes inasmuch as the determination of the necessity or expediency is taken out of the hands of the Courts and the only ground upon which the Courts may interfere is that the authority acted *mala fide* or never applied his mind to the matter,[72] or applied an irrelevant principle in making a statutory order.[73] All these grounds will be discussed hereafter under the head—'Abuse of discretion'.

As will be seen hereafter, the Legislature resorts to confer such unlimited discretion particularly in the case of legislation for the maintenance of national security.[74]

(ii) The scope for the application of the doctirne of *ultra vires* is also

66. *Sodhi* v. *State of Punjab,* (1990) 3 S.C.C. 694 (paras. 10-11)—3 Judges.
67. See 11 Sh. 695-96.
68. *State of U.P.* v. *Hindusthan Aluminium,* A. 1979 S.C. 1459 (para. 41).
69. *Maharashtra S.B.E.* v. *Paritosh,* A. 1984 S.C. 1543 (paras. 16, 18, 22, 26, 29).
70. *S.C. Employees* v. *State of T.N.,* A. 1990 S.C. 334 (para. 105).
71. *Home Secy.* v. *Darshjit,* (1993) 4 S.C.C. 25.
72. *R.* v. *Comptroller-General,* (1941) 2 All E.R. 677 (C.A.); *Carltona* v. *Commr. of Works,* (1943) 2 All E.R. 560; *Demetriades* v. *Glasgow Corpn.,* (1951) 1 All E.R. 457 (460) H.L.; *Franklin* v. *Minister of Town Planning,* (1947) 2 All E.R. 289 (H.L.).
73. *A.G.* v. *Gamage,* (1949) 2 All E.R. 732 (735).
74. Cf. *Liversidge* v. *Anderson,* (1942) A.C. 206.

reduced where the statute conferring the power to make statutory instruments provides that the instruments shall prevail "notwithstanding any provision made by any enactment in force at the passing of this Act".[75]

(iii) The Court cannot question the *wisdom* of the *policy* adopted by the rule-making body.[69, 76]

(iv) An *intra vires* statutory instrument (e.g., a notification[77]) has statutory force, as if enacted by the Legislature itself, even though it exempts a person or object from the operation of the Act.[77]

Of course, even though a statutory power be *intra vires*, it remains open to challenge on the grounds of—

(a) Contravention of the Constitution;[76] or

(b) Violation of the general principles of the law of the land, e.g., that it is vitiated by absence of good faith; or of relevant consideration of material facts; or it is so arbitrary or unreasonable that no fair-minded authority could ever have made it.[76]

(v) The Court cannot direct a statutory authority to exercise its statutory power (e.g., to make Rules) or to exercise it in a *specific manner*.[78] The only thing that the Court can do is to set aside the impugned State act or statutory instrument which is unconstitutional[79] or *ultra vires*.[78]

Exclusion of judicial review.

The various devices which are usually resorted to by a Legislature to save subordinate legislation from being challenged in the courts on the ground of *ultra vires* may now be discussed.

I. 'As if enacted in this Act' clause.

There are observations of the House of Lords in *Institute of Patent Agents* v. *Lockwood*[80] to the effect that where a statute provides that rules or regulations made under it 'shall have the same effect as if enacted in this Act', the subordinate legislation is *completely* exempt from judicial review, but the later observations of the House of Lords, in *Minister of Health* v. *R.* (*Ex parte Yaffe*)[81] and *Wicks* v. *D.P.P.*,[82] lead to the view that the statutory rules shall have this effect only it they are validly made *under* the Act, i.e., it they are *ultra vires* the parent statute itself.

U.K.

In *Yaffe's case*,[81] Viscount Dunedin observed—

"The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but 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.* The mere confirmation will not save it. 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*. But as it is, if one can find that the scheme is inconsistent with the provisions of the Act which authorizes the scheme, the scheme will be bad ....."[81]

75. *Harlow* v. *Minister for Transport*, (1950) 2 All E.R. 1005 (C.A.)
76. *Sitaram Sugar* v. *Union of India*, (1990) 3 S.C.C. 223 (paras. 47, 51, 52, 59) (C.B.).
77. *Video* v. *State of Punjab*, (1990) 3 S.C.C. 87 (para. 31)
78. *Mallikarjuna* v. *State of A.P.*, (1990) 2 S.C.C. 707 (paras. 11, 13).
79. *Asif* v. *State of J. & K.*, (1989) Supp. (2) S.C.C. 364.
80. *Institute of Patent Agents* v. *Lockwood*, (1894) A.C. 347.
81. *Minister of Health* v. *R.*, (1931) A.C. 494.
82. *Wicks* v. *D.P.P.* (1947) 1 All E.R. 205 (260) H.L.

In *Wick's case*,[82] similarly, the House of Lords inserted the words 'which is validly made under the Act, i.e., which is *intra vires* of the regulation-making authority', while affirming the observations the court of appeal.[83]

There is not doubt[84] that a writ of Prohibition will lie to prevent an *ultra vires* scheme from being finalised, notwithstanding an 'as if enacted' clause in the statute. And, from the observations of the House of Lords in the two cited cases,[81-82] it would seem that judicial review will not be precluded by the clause even after a scheme is finalised and the clause comes into operation, on the ground that it is not a scheme under the Act at all.

The better view, therefore, is that a statutory instrument is subject to the rule of *ultra vires* and open to review on that score, even where the statute has used expressions such as 'as if enacted in this Act'.[84-86] If the Act is plain, the rule must be so interpreted as to be reconciled with it, but if it cannot be so reconciled, the rule must give way to the plain terms of the Act.[87]

It is gratifying to note that this view of the Author (at pp. 156-57 of Vol. 1 of the 4th Ed. of the *Commentary on the Constitution*) now stands confirmed by the observations of *our* Supreme Court[88] in *Chief Inspector of Mines* v. *Thapar*,[88] speaking through Das Gupta, J. Though, in that case, the question was not as to the *vires* of the regulations but as to whether, by reason of the 'as if enacted' clause the regulations had become so much identified with the Act that they were also to be deemed to have been repealed with the repeal of the Act, nevertheless, the observations do suggest that the 'as if enacted' clause does not elevate the status of the subordinate legislation. If this principle be accepted, the question of *ultra vires* is bound to arise.

India.

The observations of Shah, J., in the *Kerala case*[89] leave no doubt on this point. S. 19(5) of the Madras General Sales Tax Act, 1949, provided—

"All rules made under this section shall be published in the Fort St. George Gazette, and upon such publication shall have effect *as if enacted in the Act.*"

The challenge to r. 14A made in exercise of the rule-making power conferred by s. 19 of the Act was sought to be repelled on the preliminary ground that the validity of no rule framed under the Act could be challenged in view of the provision in s. 19(5). Repelling this contention, the Court held that the challenge on the ground of *ultra vires* was open notwithstanding s. 19(5), which was intended only to protect *intra vires* rules. So observed Shah, J.—

"The rules made under s. 19 and published in the Government Gazette have by the express provision to have effect as if enacted in the Act; but thereby *no additional sanctity* attaches to the rules. Power to frame rules is conferred by the Act upon the State Government and that power may be exercised *within the strict limits* of the authority conferred. If in making a rule, the State transcends its authority, the rule

83. *R.* v. *Wicks,* (1946) 2 All E.R. 529 (531).
84. *R.* v. *Electricity Commrs.,* (1924) 1 K.B. 171.
85. *R.* v. *Minister of Health,* (1929) 1 K.B. 619.
86. For a similar 'deeming clause' seeking to exclude judicial review, see *Lynch* v *Brisbane City Council,* (1961) 104 C.L.R. 353.
87. Halsbury, 2nd Ed., Vol. 31, para. 575.
88. *Chief Inspector of Mines* v. *Thapar,* A. 1961 S.C. 838 (845).
89. *State of Kerala* v. *Abdulla & Co.,* A. 1965 S.C. 1585 (1589); *Chief Commr.* v. *Radheshyam,* A. 1957 S.C. 304.

will be invalid, for statutory rules made in exercise of delegated authority are valid and binding *only if made* within the limits of authority conferred. Validity of a rule *whether it is declared to have effect as if enacted in the Act* or otherwise is always open to challenge on the ground that it is unauthorised."[89-90]

The same view has been taken in *Australia*.[91]

II. The 'conclusive evidence' clause.

Some statutes seek to shield subordinate legislation from challenge on the ground of *ultra vires* made thereunder by inserting a 'conclusive evidence' clause to the effect that as soon as a Rule,[92] scheme[93] of the like is 'notified' in the manner prescribed by the statute, 'it shall be conclusive evidence that (the rule, scheme or the like).....has been duly framed and sanctioned'.

The Courts have, however, curtailed the sweep of such clause by holding that it might protect the subordinate legislation only if the statutory requirement which has been contravened can be construed as merely directory.[92, 94] It will not stand in the way of invalidating the Rule or Scheme—

(i) Where the provision contravened is *mandatory;*[95] or

(ii) Where the defect goes to the *root of the jurisdiction* of the statutory authority to make the rule, scheme or notification,[93] as distinguished from a mere irregularity.[96]

Whether the provision which has been violated is to be construed as directory or mandatory would, of course, depend upon its object.[94, 96]

III. The 'subject to' clause.

Sometimes the Legislature gives predominance to subordinate legislation by making a provision by itself "subject to" or "except as may be otherwise prescribed".[97] In such a case, the provision in the statute, as soon as a rule is made, becomes modified to the extent that the rule makes a contrary provision.[97]

Judicial interpretation of statutory instruments.

I. It would follow from the doctrine of *ultra vires* that a statutory instrument should be so interpreted as not to be *ultra vires* the statute under which it has been made.[98]

Thus, it cannot be so interpreted as to confer a power which cannot be derived from the statute.[99]

---

90. The contrary view expressed in cases like *Subba Rao* v. *C.I.T.*, A. 1956 S.C. 604, it is submitted, is not good law.

91. *Foster* v. *Aloni*, (1952) A.L.R. 18.

92. *Maheshwari* v. *Zila Parishad*, A. 1971 S.C. 1696 (paras. 17, 19).

93. *Trust Mai Lachmi* v. *Improvement Trust*, A. 1963 S.C. 976 (paras. 2, 9, 10). See contra *Tulsipur Sugar* v. *Notified Area Committee*, A. 1980 S.C. 882 (para. 19).

94. *Vallabhdas* v. *Municipal Committee*, A. 1967 S.C. 133 (para. 6).

95. *Hapur Municipality* v. *Raghavendra*, A. 1966 S.C. 693; *Raza Buland Sugar* v. *Municipal Bd.*, A. 1965 S.C. 895.

96. *Sitapur Municipality* v. *Prayag*, A. 1970 S.C. 58 (para. 6); *Tharoo* v. *Puran*, A. 1978 S.C. 306 (paras. 14-15).

97. E.g., s. 63(1) of the Motor Vehicles Act, 1939 [*P.S.R. Motor Service* v. *R.T.A.*, A. 1966 S.C. 1318 (1321)].

98. *Att. Gen.* v. *Brown*, (1920) 1 K.B. 773 (known as the *Pyrogallic Acid case*).

99. *Gopal Vinayak* v. *State of Maharashtra*, (1961) 3 S.C.R. 440 (446).

II. Terms used in a statutory instrument should, therefore, receive the same interpretation as like terms in the statute,[100] unless a contrary intention appears in the instrument.[1-2]

Section 43 of the (British) Customs Consolidation Act, 1876, provided—"The importation of arms, ammunition, gunpowder or *any other goods* prohibited by Proclamation ...." In exercise of this power a Proclamation was issued, prohibiting the importation of *"all chemicals"* except under a licence and a person was prosecuted for importing pyrogallic acid without licence. *Held,* that the words 'any other goods' must be interpreted according to the rule of *ejusdem generis* and the contention that it authorised the prohibition of "importation of goods of any description" and that the Government "could be relied upon to see that the power was reasonably exercised" was rejected. The sole question before the Court, it was held, was whether the statutory instrument was within the power delegated, according to the canons of statutory interpretation.[1]

This is expressly provided in s. 20 of *our* General Clauses Act, 1897, which corresponds to s. 31 of the (Eng.) Interpretation Act, 1889—

"Where by any Central Act or Regulation, a power to issue any notification, order, scheme, rule, form, or by-law, is conferred, then expressions used in the notification, order, scheme, rule, form, or bye-law if it is made after the commencement of this Act, shall, unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or Regulation conferring the power."

III. It would not follow, however, that where a statutory instrument, such as a regulation, uses words of a narrower connotation than those used in the statute, with the object of confining the operation of the regulations to a class of persons or objects *narrower* than those envisaged by the statute, the statutory instrument can be given a wider interpretation than its terms permit, simply because the statute intended to apply to a wider class.[3]

IV. When the statute under which a statutory instrument was made is itself amended or substituted by another enactment, but the statutory instrument is made to continue under the new enactment, the *vires* or construction of the statutory instrument is to be determined with reference to the statute under which it had been originally made, and its ambit cannot be extended (without an amendment of the instrument itself) merely because the new statute is wider in scope.[3]

V. Though rules should be interpreted in such manner that they do not become *ultra vires* the statute and it is the interpretation put on the statute that should govern the interpretation of the rules, in case of ambiguity in the statute, reference to the rules made under the statute is permissible for the purpose of construction of the statute itself.[4]

But, if the rule goes beyond the statute, it cannot enlarge the meaning of the section; on the other hand, it shall itself be *ultra vires.*[5]

VI. In case of an apparent conflict between a statute and the instruments made under it, the rule of harmonious construction should be applied. If, however, reconciliation is impossible, the subordinate legislation must give way to the clear provisions of the statute.[6]

100. *Prestige Engg.* v. *C.C.E.,* (1994) 6 SCC 465 (para. 17).
1. *Blashill* v. *Chambers,* (1884) 14 Q.B.D. 485.
2. *Macfisheries* v. *Coventry Corp.* (1957) 3 All E.R. 299.
3. *Canadian Pacific Steamships* v. *Bryers,* (1957) 3 All E.R. 572 (578) H.L.
4. *A.G.* v. *De Keyser's Royal Hotel,* (1920) A.C. 508 (551).
5. *Central Bank* v. *Workmen,* A. 1960 S.C. 12 (23).
6. Cf. *Minister of Health* v. *Yaffe,* (1931) A.C. 494 (503). Halsbury, 2nd Ed., Vol. 31, para. 575; *Belanger* v. *The King,* (1916) 54 S.C.R. 265 (*Can.*).

VII. Penal provisions in statutory instruments are construed in the same way as such provisions in a statute would be construed, namely, that the benefit of any ambiguity in the instrument shall go to the accused.[7]

VIII. Subject to the rule of *ultra vires* a statutory instrument is to be interpreted in the same way as a statute, i.e., to give effect to the intention of the authority which made it and not to render it meaningless.[8]

IX. It follows that in the interpretation of a statutory instrument as that of a statute, the Court cannot seek guidance from the interpretation given to it by the Government or its officers.[9]

X. The question arises whether, when a Court finds a statutory instrument to be *ultra vires* in whole or in part, it would rewrite or modify it so as to bring it within the statute. The general rule is that this cannot be done, because the Court's function in this respect is not appellate but supervisory and that the Court's function ends simply by quashing an instrument in so far as it is *ultra vires.*[10-11] It cannot substitute its own judgment for that of the authority in whom the power has been vested by the Legislature.

In *some* cases in *India,* it has been held that since the technicalities of the English prerogative writs are not binding upon the constitutional jurisdiction of our Supreme Court and the High Courts, the Court may, in proper cases, give suitable directions for complying with the statute. The decisions to this effect so far relate to *quasi-judicial* orders.[12] Thus, where the Transport Authority, in granting the renewal of a permit, violated the relevant statutory provisions and imposed conditions which were *ultra vires,* and it appeared that the Authority was clearly determined to grant a renewal in any case, the Court quashed the *ultra vires* part of the order and *directed* the Authority *"to comply with the requirements of the law*.....in the order of renewal made by it in favour of the Petitioners ...."[12]

The principle involved in the decision may be applicable to other statutory orders; but an extension of the principle is not to be expected in view of the peculiar facts of the case where the principle was evolved.

Sanction for disobedience.

1. Since an *intra vires* statutory instrument has the same force as the statute itself, it would follow that, unless stated otherwise, the sanction for violation of a statutory instrument is the same as that of a violation of the provision of a statute itself.

"Where a statute enabled an authority to make regulations, a breach of the regulation or regulations made under the Act becomes, for the purpose of obedience or disobedience, breach of a provision of the Act. A regulation is only a machinery by which Parliament has determined whether certain things shall or shall not be done."[13]

---

7. *Elderton* v. *Totalisator Co.,* (1945) 2 All E.R. 624 (C.A.).
8. *McQuade* v. *Barnes,* (1919) 1 All E.R. 154 (155); *Municipal Corpn.* v. *Bijlee Products,* (1978) U.J.S.C. 776 (para. 11).
9. *Babaji* v. *Nasik Co-op. Bank,* A. 1984 S.C. 192 (para. 15).
10. Cf. *Associated Prov. Picture Houses* v. *Wednesbury Corpn.,* (1947) 2 All E.R. 680.
11. *Veerappa* v. *Raman,* (1952) S.C.R. 583 (596).
12. *Sheriff* v. *Mysore S.T.A.,* A. 1960 S.C. 321 (327).
13. *Willengale* v. *Norris,* (1909) 1 K.B. 57 (64).

Of course, where the statute specifies a particular penalty for violation of the statutory instrument made under it, that will prevail.[14]

2. For the same reason, once validly made, a statutory Rule is binding on the very authority which made it.[15]

3. The Rule-making authority has, therefore, no power to relax a *mandatory* Rule, unless the Rule itself authorises a relaxation in specified circumstances.[15]

Relaxation, if permissible.

4. But even where such relaxation is permissible, it must be guided by *objective* considerations,[88] which shall be applicable to all similar cases, and not capriciously, in order to pick and choose persons for receiving the benefit of such relaxation.[15]

5. Even the Court cannot authorise an administrative authority to dispense with or relax or rewrite Rules having statutory effect.[16]

6. But where such power to relax has been conferred to meet the ends of justice in particular cases of hardship, the power of relaxation can be exercised with retrospective effect, if necessary, in the interests of justice.[17]

Conflict between two statutory instruments relating to the same matter.

If there is an inconsistency between an earlier rule and a later rule or between an earlier bye-law and a later bye-law,[18] the *later one,* if validly made, shall prevail.

The reason is that under s. 21 of *our* General Clauses Act [corresponding to s. 32(3) of the (Eng) Interpretation Act] an authority which has the power to make statutory rules or bye-laws has, unless the statute expresses a contrary intention, the power to amend or vary such rules or bye-laws.

In *India,* the above principle extends to successive *orders* and *notifications* also, since s. 21 of *our* General Clauses Act comprises them.

Revocation of one statutory instrument by another.

(A) *England.*—It has been held that s. 38(2) of the Interpretation Act, 1889, applies only to enactments and not to statutory instruments. Hence, when one rule or regulation is revoked by another the common law rule will apply, namely, that the revoked rule or regulation will be treated in all respects as if it had never existed (except as to transactions completed while it was in force)[19] unless, of course, the revoking rule keeps alive the revoked one in whole or in part for certain purposes, expressly.[20]

(B) *India.*—Even though s. 6 of the General Clauses Act does not apply to statutory instruments,[21] in effect the same result as under s. 6 was reached by the Patna High Court[21] where certain orders made under the Defence of

14. E.g., s. 13 of the Industrial Employment (Standing Orders) Act, 1946.
15. *Principal* v. *Vishan,* A. 1984 S.C. 221 (para. 16).
16. *Krishna Priya* v. *University of Lucknow,* A. 1984 S.C. 186 (paras. 18-19, 26).
17. *Govt. of A.P.* v. *Rao,* A. 1977 S.C. 451 (para. 8); *Khanna* v. *Abbas,* A. 1972 S.C. 2350.
18. *Gosling* v. *Green,* (1893) 1 Q.B. 109 (112).
19. *Kay* v. *Goodwin,* (1830) 6 Bing. 576.
20. *Boddington* v. *Wisson,* (1951) 1 K.B. 606 (C.A.).
21. *Madho Singh* v. *Emp.,* A. 1944 Pat. 219.

India Rules were revoked by an amendment of the Rules, though the reasoning adopted was not very clear.

More definite is the view pronounced by a Single Judge of the Madras High Court[22] that though s. 6 does not apply to statutory orders the principles embodied therein apply to the case of revocation of a statutory order, so that according to the principle underlying s. 6(d), prosecution may lie, after such revocation, for offences committed for breach of such order while it was in force.

Implied repeal by subsequent statute.

Just as a statute may be impliedly repealed by another subsequent statute by reason of inconsistency, so a rule or an order may be impliedly repealed by a subsequent enactment, provided they operate in the same field and cannot be allowed to stand together.[23] In other words, a statutory instrument must not be inconsistent not only with the provisions of the statute under which it has been made but also with those of other statutes subsequently made relating to the same subject.

Effect of repeal of parent statute on statutory instruments.

1. The general rule is that when a statute is repealed by a subsequent statute, either expressly or by implication, all statutory instruments, such as rules, orders, bye-laws, fall with the repealed statute and cease to have effect unless the repealing statute contains a saving clause to provide for the validity of the statutory instruments notwithstanding the repeal of the parent statute.[24] Such saving clause cannot, however, save anything which could not be validly done under the repealed enactment.[24]

2. To this rule, an exception is acknowledged in the case where the repealed statute is re-enacted without any substantive modification. This exception is being separately treated below.

Continuance of statutory instruments where a statute is repealed and re-enacted.

This situation is provided for by s. 24 of the General Clauses Act, 1897, which provides for the continuance of the rule, order, notification, scheme or bye-law issued under a repealed Act, on the following conditions :

(a) That after repeal, the Act is re-enacted, without any modification;[25]

(b) That there is nothing in the new Act which is inconsistent with the provisions of the statutory instrument in question;[26]

(c) There is no express provision against such continuance in the repealing Act. If the foregoing conditions are satisfied, the statutory instrument in question shall be deemed to have been issued under the new Act,[26] and will continue to be in force until it is superseded by a corresponding instrument

22. *Chockalingam, in re,* A. 1945 520 (522).

23. *R.* v. *Charing Cross Bank,* (1890) 24 Q.B.D. 27.

24. *Harish* v. *State of M.P.,* A. 1965 S.C. 932; *Firm Surajmal* v. *Ganganagar Municipality,* A. 1979 S.C. 246 (para. 7).

25. *B.M. Sugar Syndicate* v. *Janardan,* A. 1960 S.C. 794.

26. *State of Assam* v. *Assam Tea Co.,* A. 1971 S.C. 1358 (para. 3); *Mineral Development* v. *Union of India,* A. 1961 S.C. 1543; *Chief Inspector* v. *Karam,* A. 1961 S.C. 838.

under the new Act.[27] The new Rule (or other statutory instrument) issued under the new Act may supersede the old Rule (or other instrument) not only expressly, but also by implication.[28]

Subordinate Legislation, different kinds of.

Statutory instruments or instruments made by the Administration by virtue of power delegated by the Legislature are of different kinds.[29] Though Rules constitute the primary instance of such *quasi-legislation*, there are a number of other instances, such as bye-laws, regulations, orders, etc., as will presently appear. It would, accordingly, be a misnomer to describe the *quasi-legislative* function as 'the rule-making function of the Administration', as is found in some books.

(I) BYE-LAW.

Bye-laws are rules made, in exercise of statutory power, by some authority, subordinate to the Legislature (e.g., municipal[30] and other local bodies, public utility corporations, empowered by statute to make bye-laws), for the regulation, administration or management of some local area, property undertaking etc., which are binding on all persons who come within their scope.

"A bye-law is an ordinance affecting the public or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done, and accompanied by some sanction or penalty for its observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the bye-law, they would be free to do or not to do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation."[31]

Commonly, rules made by local authorities under statutory power are regarded as bye-laws. But any other statutory body[31] also may be vested with power to make bye-laws. What distinguishes a bye-law from a 'rule', however, is that a rule is made by some governmental authority other than the Legislature and a rule made by a Government department would never be called a 'bye-law'; the latter term is used with reference to subordinate legislation by a statutory body.

Conditions for the validity of bye-laws.

In order to be valid and enforceable as law, a bye-law must satisfy the following conditions :[32]

(a) It must not be *ultra vires*. If the subordinate authority exceeds the powers conferred upon it by the statute which empowered it to make bye-laws, such bye-laws are invalid as *ultra vires*.[31]

(i) Ss. 293 and 298 of the U.P. Municipalities Act, 1916, empowered the Town Area Committee to make bye-laws to charge fees for the 'use and occupation of any property *vested in* or entrusted to the management of the Town Area Committee.

Bye-law 1, framed under the above power provided that no person shall sell or

27. *State of Bombay* v. *Pandurang*, A. 1953 S.C. 244.
28. *Swastik Rubber* v. *Poona Municipality*, A. 1981 S.C. 2022 (para. 14).
29. Cf. *Parvez v. Union of India*, A. 1975 S.C. 446.
30. Cf. *Afzal* v. *State of U.P.*, A. 1964 S.C. 264.
31. *Kruse* v. *Johnson*, (1898) 2 Q.B. 91 (96).
32. *Craies, Statute Law*, 6th Ed., pp. 322-29.

purchase any vegetable or fruit within the limits of the Town Area Committee without paying the fee prescribed. Bye-law 4(b) provided that any person can sell wholesale *at any place* in the Town Area provided he paid the prescribed fee. *Held,* the bye-laws were *ultra vires;* for, the Act did not empower the Committee to charge any fees otherwise than for the use or occupation of any property vested in or entrusted to the Committee. But the bye-laws in effect forbid a person to use *any land* or *place* within the limits of the Committee, without payment of the prescribed fee.[33]

(ii) S. 29(1)(g) of the Port Authorities Act, 1963, authorised a Port Authority to make bye-laws—

"for *limiting* the liability of the authority in respect of any loss . . . occurring without the actual *fault* or *privity* of the authority".

The Port Swettenham Authority (Malaysia) made bye-law 91(1) as follows :

"The authority shall *not* be liable for any loss... of goods... from any cause, unless such loss... has been caused solely by the *misconduct* or *negligence* of the authority or its officers or servants."

The Privy Council held bye-law 91(1) to be *ultra vires* for two reasons :

(a) While s. 29(1)(g) of the Act empowered the authority to *limit* its liability, the bye-law *wholly excluded* the liability.

(b) While the Act would make the authority liable for any loss caused by the actual fault or *privity* of the *authority,* the bye-law would not cover a loss unless it was caused *solely* by the misconduct or negligence of the authority and its officers or servants. Hence, where a loss was caused by theft to which the managing director of the Authority was privy, the Authority would not be liable under the bye-law, because the loss was caused *partly* by thieves and not *solely* by the fault or privity of the Authority. The liability, under s. 19(1)(g) was not limited by any word such as 'solely'.[34]

(iii) Unless a power to prohibit trade is expressly conferred, the statutory power to make bye-laws for the regulation of trade will not be construed as including the power to make a bye-law involving restraint of trade but a a regulatory bye-law will not be invalid merely because it incidentally involves a partial restraint.[35]

(b) It must not go beyond, nor be repugnant to the *statute under which it has been made.* In other words, it must be made strictly in accordance with the provisions of the statute which confers the power to make the bye-law.[36] Thus, a power to make bye-laws with respect to the 'level and construction of new streets' confers no power to make a bye-law authorising demolition of buildings,[36] and a power to 'regulate' would not include the power to make a bye-law authorising prevention or prohibition of a trade or business.[37-38]

But—

(i) Where the statute which creates the Authority confers a general power to make bye-laws as well as a specific power to make bye-laws for certain enumerated powers, the failure of a bye-law to come in under any of the enumerated powers would not render the bye-law *ultra vires* if it can be covered by the general powers.[29]

(ii) Nor would it be *ultra vires* merely because a wrong provision of the statute is referred to in the bye-law as the source of its authority, if the Authority has the power to make the bye-law in question under any other provision of the statute.[29]

---

33. *Yasin* v. *Town Area Committee,* (1952) S.C.R. 572.
34. *Port Swettenham Authority* v. *T.W.W. Co.,* (1978) 3 W.L.R. 530 (537) P.C.
35. *Scott* v. *Glasgow Corpn.,* (1899) A.C. 470 (H.L.).
36. *Brown* v. *Hoyhead Local Board,* (1862) 32 L.J. Ex. 25..
37. *City of Toronto* v. *Virgo,* (1896) A.C. 88 (P.C.); *Rossi* v. *Edinburgh Corpn.,* (1905) A.C. 21 (27).
38. *Sydney Municipal Council* v. *Australian Freezing Works,* (1905) A.C. 161.

(c) A bye-law which is repugnant to the *general law of the land* is void.[39]

"A bye-law must be, as a general rule, consistent with the principles of the common law; that if it violates those principles it is bad; and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law."[40]

But if it is capable of two constructions, we must adopt that construction which would make it consonant with the principles of the common law.[41]

This does not mean, however, that a bye-law is bad because it deals with something that is not dealt with by the general law, for, by nature, a bye-law is supplementary to the general laws.[42] For the same reason, where a statute prohibits certain *specified* acts and empowers an authority to make bye-laws not inconsistent with the general law of the land, a bye-law prohibiting *another* act sanctioned or provided for by the statute is now invalid.[43]

"A bye-law must necessarily *add* something to the common law, otherwise it would be idle."[44]

"A bye-law is repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful. It is repugnant if it makes *unlawful* which the general law says is *lawful*..... if it expressly or by necessary implication professes to alter the general law of the land. . . if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the bye-law bad as repugnant."[45]

What the rule means is that the bye-law—

"must not alter the general law by making that lawful which the general law makes unlawful, or that unlawful which the general law makes lawful".[42]

'General laws' include the general statutes.

If an Act prohibits certain acts, subject to exceptions, the construction is that the Act impliedly authorises the doing of those excepted things; hence, if a bye-law prohibits the doing of such expected acts, the bye-law would be void for repugnancy to the general law.[46]

(i) Where a bye-law prohibited book-makers from doing acts which had been made lawful by the Street Betting Act, 1906, a conviction for violation of the bye-law was quashed.[46]

(ii) *S. 2 of the Wheat Act, 1932 (Australia),* provided that—"bye-laws made under the section shall provide for the final determination by arbitration of disputes arising as to such matters as may be specified by the bye-laws." A bye-law made under this section provided that the Arbitration Act, 1899, shall not apply to the decision of the referee to whom a dispute was referred under the bye-law, thus precluding resort to the Courts on any point of law arising during the arbitration. *Held,* the bye-law was *ultra vires* being at variance with the general legislative policy of leaving open resort to the courts of law, as expressed in the Arbitration Act, 1899—in the absence of *express words* in the Wheat Act ousting the jurisdiction of Courts. A bye-law could

39. *Hall* v. *Nixon,* (1875) 10 Q.B. 152.
40. *Collman* v. *Mills,* (1897) 1 Q.B. 396 (399).
41. *Scott* v. *Pilliner,* (1904) 2 K.B. 855 (899).
42. *White* v. *Morley,* (1899) 1 Q.B. 34 (39); *Nicholls* v. *Tavistock,* (1923) 2 Ch. 18.
43. *Edmonds* v. *Waterman's Co.,* (1855) 1 Jur. (N.S.) 727.
44. *Q.* v. *Saddlers' Co.,* (1863) 10 H.L.C. 404.
45. *Gentel* v. *Rapps,* (1902) 1 K.B. 160 (166); *L.M. & S. Ry.* v. *Greaves,* (1937) 1 K.B. 367 (376).
46. *Powell* v. *May,* (1946) 1 All E.R. 444.

override the general law only when the Act under which the by-law was made expressly abrogated the general law with reference to the subject-matter under the Act.[47]

The function of a bye-law being to *supplement* the general law, if a bye-law merely reproduces[48] the provisions of a statute it becomes unnecessary and, accordingly, void. If however, on a proper construction, it appears that the subject-matter of the bye-law is different, the bye-law cannot be held to be *ultra vires*.[49]

(d) It must be made, sanctioned and published in the manner prescribed by the statute which authorises the making. Compliance with this condition only makes the bye-law formally good; it does not follow that a bye-law which is formally valid is *intra vires* the statute which authorises it.

Even approval by a superior authority specified by the statute does not cure invalidity due to non-conformity with the statutory procedure.[50]

(e) A bye-law is liable to be declared void if it is not certain and positive in its terms,[51] and offers no direction to the citizen or the courts.[52]

The principle behind the rule of certainty is that the bye-law, in order to be binding, must give "adequate information as to the duties of those who are to obey",[53] and must not, therefore, be ambiguous.[54]

Thus, the following bye-laws have been held to be void for uncertainty.

(i) A bye-law for 'good rule and government' which provided that "no person shall wilfully *annoy* passengers in the streets".

(ii) A bye-law for the prevention of betting imposed a penalty for using any street or public place "for the purpose of selling or distributing any paper... devoted wholly or mainly to giving information as to the probable result of races, steeplechases, or other competitions". Lord Alverstone, C.J., observed—"...the main objection to this bye-law is that it is too wide and that it would include cases where the sale of paper is *not in aid* of street betting or of any betting at all."[41]

If, however, a bye-law is capable of two constructions, one of which would make it invalid and the other good, the latter construction will prevail.[55] This is not a case of uncertainty.

(f) A bye-law must not be *unreasonable*.[30,56] But unreasonableness does not mean that any particular Judge, or Judges think it to be unnecessary or inconvenient; it means that the bye-law "must not be partial and unequal in its operation between different classes; must not be manifestly unjust; nor involve such oppressive or gratuitous interference with the right of those subject to them as could find no justification in the minds of reasonable men"[30], so that "the Court might well say, 'Parliament never intended to give authority to make such rule'".[30] Bye-laws made by private corporations are, accordingly, jealously watched lest they should work to the public disadvantage.[30]

47. *Paul* v. *Wheat Commr.*, (1937) A.C. 139 (153).
48. *Thomas* v. *Sutters*, (1900) 1 Ch. 10 (14) C.A.
49. *R.* v. *Wheat Commr.*, (1937) A.C. 139.
50. *Slattery* v. *Naylor*, (1888) 13 App. Cas. 446.
51. Halsbury, 4th Ed., Vol. 28, para. 1329; *Townsends* v. *Cinema News*, (1959) 1 All E.R. 7 (C.A.); *Nash* v. *Finlay*, (1901) 66 J.P. 183.
52. *Cann's Pty. Ltd.* v. *Commonwealth*, (1946) 71 C.L.R. 210.
53. *R.* v. *Broad*, (1915) A.C. 1110.
54. *Nash* v. *Finlay*, (1901) 85 L.T. 682.
55. *R.* v. *Saddlers' Co.*, (1863) 10 H.L.C. 404 (463); *Fawcett* v. *B.C.C.*, (1960) 3 All E.R. 503 (517) H.L.
56. In the case of a Rule or a Regulation, the Court has no jurisdiction to question its reasonableness. It is concerned only with its *vires* [*Sparks* v. *Edward*, (1943) 1 All E.R. 1 (6) C.A.; *Taylor* v. *Brighton B.C.*, (1947) 1 All E.R. 864 (870)].

Thus,—

(i) A bye-law should not make unlawful an act which is otherwise innocent.[57-58]

(ii) A penal bye-law may be held to be unreasonable if it is vague and uncertain in its terms.[57]

(iii) A power to 'regulate' a transaction by bye-law does not include the power to destroy or prohibit it, unless the statute confers such power by express words.[59]

(iv) Where a bye-law imposes a liability, it may be held unreasonable if it violates the principles of natural justice, e.g., if it provides for the imposition of the liability, without issuing a notice of non-compliance.[60]

But bye-laws made by *public representative* bodies should be 'benevolently interpreted' and credit ought to be given to those who have to administer them that they will be reasonably administered'. In other words, Courts would be slow to declare invalid the legislative act of a local *authority*,[61-62] and slower when such local authority is not a party to the proceedings.[63] Thus, a bye-law which enjoins all ice-cream shops to close at 10 p.m.,[64] or a bye-law which makes it an offence to sing within fifty yards of a dwelling,[61] has been held not to be unreasonable.

The above rule, however, is only one of beneficient construction of a bye-law made by a representative body, namely, that it should be supported 'if possible'.[61] It does not prevent the Court from striking down a bye-law made by a local or other representative authority if it cannot be justified by any reasonable man, e.g.—

(i) Where it enjoins a landlord, under penalty, to cleanse a lodging-house annually even though he may not have any access to the tenement against the tenant and even though it is impossible to comply with the bye-law without committing a breach of contract or trespass.[62]

(ii) Where it requires an open space to be kept at the rear of every new building so that in many cases it becomes impossible to build extensions to existing buildings.[63]

(g) Some statutes require that bye-laws made thereunder shall have no effect until confirmed by the specified confirming authority.

(h) Like other laws, a bye-law shall be void if it violates any of the limitations imposed by the Constitution, e.g., fundamental rights.[65]

Can there be statutory bye-laws without statutory force?

1. There is little doubt that where articles of association are incorporated for the formation of a company under the Companies Act,[66] such articles of association have no statutory force, but are nevertheless binding upon the members thereof as rules of contract. The same principles may be applied to bye-laws adopted by a co-operative society at the time of its formation.[66]

2. But can that analogy be extended to such bye-laws as are made by

57. *Scott* v. *Pilliner*, (1904) 2 K.B. 855 (858).
58. *Municipal Council* v. *Virgo*, (1896) A.C. 88.
59. *Kanhai* v. *Emp.*, A. 1941 Pat. 53 (57).
60. Cf. *E.I.C.C.* v *Collector*, A. 1962 S.C. 1793.
61. *Kruse* v. *Johnson*, (1898) 2 Q.B. 91.
62. *Matwal Chand* v. *D.M.*, A. 1953 All. 681.
63. *Townsends* v. *Cinema News*, (1959) 1 All E.R. 7.
64. *De Prato* v. *Provost*, (1907) A.C. 153.
65. *Tahir Hussain* v. *Dt. Bd.*, A. 1954 S.C. 630.
66. *Co-op. Bank* v. *Industrial Tribunal*, A. 1970 S.C. 245 (para. 10).

a co-operative society or other association,[67] after its formation, and in exercise of the power to make bye-laws as conferred by the governing statute?

Two Division Benches of the Supreme Court[66,68] have held that such bye-laws may be operating as contract as between the society or association and its employees,[66] but they have no statutory force of the same nature as Rules framed in exercise of statutory power.[66] The result will be that such bye-laws, though of a statutory origin, shall not be binding on third parties or would not be binding on an Industrial Tribunal;[66] not would they attract the operation of the rule of *ultra vires*.

The Author finds it difficult to agree with the foregoing view and would prefer the view taken by another Division Bench in the *Megna Mills case*,[67] where it was held that a contract made in violation of the formality prescribed by a bye-law made by an Exchange Association in exercise of the power conferred by statute[67] was "illegal and void".[67] Another Division Bench[69] has given full statutory effect to a bye-law of a co-operative society, by invalidating the constitution of a Board of Directors made by the Registrar in contravention of the provisions of a bye-law, and in accordance with the dictates of the Chief Minister.

It should also be pointed out that in the *U.K.*, it is well-established that *intra vires* bye-law, like other statutory instruments, may be enforced in the same manner as a statute, and no exception appears to have been admitted in the case of bye-laws made by any society by *virtue of statutory power*.[70] A distinction must be made between a bye-law made in exercise of power conferred by statute and a bye-law made in exercise of power conferred by the constitution or articles of association of a corporation or non-statutory society.[71]

(II) STANDING ORDERS UNDER THE INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946.

Standing on an analogous but independent footing are the Standing Orders which are made by industrial establishments which are governed by the Industrial Employment (Standing Orders) Act, 1946. But for this Act such standing orders would have belonged to the realm of the law of contract, being the conditions of service agreed to between the employer and employees of an industrial establishment. But this Act provides that in the case of certain industrial establishments, such as the Railways or other establishment to which the Factories Act or the Payment of Wages Act applies, the draft of such Standing Orders must be submitted by the prescribed officer for being certified and a Standing Order would be enforceable only after such officer certifies it after being satisfied that it is *intra vires* and 'reasonable'. The Act also provides for an administrative appeal against the order of the Certifying Officer (s. 6). Once a Standing Order is so certified, it acquires a 'statutory' force;[72] in other words, a certified Standing Order becomes 'part

67. E.g., under s. 11 of the Forward Contracts (Regulation) Act, 1952; *Megna Mills* v. *Ashoka Marketing*, A. 1971 S.C. 166 (paras. 4, 6, 7).

68. *Babaji* v. *Nasik Co-operative Bank*, A. 1984 S.C. 192 (para. 15).

69. *State of T.N.* v. *Abu*, A. 1984 S.C. 322 (paras. 14-16).

70. Halsbury, 4th Ed., Vol. 44, paras. 981-982; Vol. 28, paras. 1323 *et seq.*; Vol. 9, para. 1280; *R.* v. *Spencer*, (1766) 3 Burr. 1827 (1837).

71. Halsbury, 4th Ed., Vol. 9, paras. 1280-1283.

72. *Bagalkot Cement Co.* v. *Pathan*, A. 1963 S.C. 439 (443).

of the *statutory* terms and conditions of service'[73] between the employer and employees of the industrial establishment concerned, and the statute imposes a penal sanction upon an employer who acts in contravention of a Standing Order so certified.

The Supreme Court has even upheld the validity of a State Law, duly made, which provided that a certified Standing Order would, in specified cases, prevail over the contrary provisions in a Central Act.[74]

A finally certified Standing Order cannot be modified except in the manner laid down in s. 10 of the Act.[73] Once a Standing Order has been duly modified, the Court would not interfere with it unless it has contravened any provision of the Act or any other statute or is shockingly violative of fairness or justice.[75]

Since Standing Orders have to be made in discharge of the statutory obligation imposed by s. 30 of the Act upon the employer of an industrial estalishment, Standing Orders should be so interpreted as to make them consistent with the compliance of that statutory obligation,[76] and with the scheme of the Act.[72] Otherwise they will be *ultra vires* and invalid.[75]

For the violation by an employer of the terms of a Standing Order, which has been duly certified under the Act, the following remedies are open to the aggrieved employee :

(i) Criminal prosecution, with the sanction of the appropriate Governments under s. 13(2)-(3).

(ii) To raise an industrial dispute for adjudication under the Industrial Disputes Act, 1947.[77]

(iii) Reference to a Labour Court under s. 13A of the Industrial Employment (Standing Orders) Act.[78]

(iv) Suit for wrongful dismissal.[76]

(v) As to whether a Petition under Art. 226 of the Constitution would lie—in one case,[76] thw Supreme Court kept the question open, after a finding, on the merits, that the Standing Order in question had not been violated. But such relief cannot be available if s. 13A of the Industrial Employment (Standing Orders) Act be held to provide a self-contained remedy for an improper 'application' of a Standing Order.[78]

Constitution, Statute, Rule and Administrative Order.

Action in exercise of power under a rule framed under a statute cannot override the statute.[78a]

Rule which contravenes any of the provisions of Arts. 14—16, 19, 229, 234, 310(1), 311(7) or 311(2) is void.[78b]

Government has power under Art. 309 proviso to make and amend

---

73. *Workmen of Dewan Tea Estate* v. *Their Workmen*, A. 1964 S.C. 1458 (1463).
74. *Hissar Electric Supply Co.* v. *State of U.P.*, (1966) 2 S.C.R. 863.
75. *Ghaziabad Co.* v. *Certifying Officer*, A. 1978 S.C. 769 (para. 3).
76. *Nagpur Electric Co.* v. *Shreepathirao*, A. 1958 S.C. 658 (663).
77. Cf. *U.B. Dutt & Co.* v. *Workmen*, A. 1963 S.C. 411 (412); *Murugan Mills* v. *Industrial Tribunal*, A. 1965 S.C. 1496 (1497); *Guest, Keen, Williams Ltd.* v. *Sterling*, A. 1959 S.C. 1279 (1284).
78. *Salem Electricity Co.* v. *Employees*, (1966) 2 S.C.R. 498 (505).
78a. *Major Radha Kishan* v *Union of India*, (1996) 3 S.C.C. 507.
78b. *State* v *Nripen Bagchi*, A. 1966 S.C. 447, 450; *Mati Ram* v *N.E.F. Rly*, A. 1964 S.C. 600, 610; *State* v *Padmanabhacharya*, A. 1966 S.C. 602, 605.

rules even retrospectively. But it cannot take away vested right. The amendment must be reasonable and not arbitrary.[78c] But statutory rules cannot be amended or superseded by office memo or administrative order.[78c] Rule made under Art. 309 can be amended only by a rule or notification duly made under Art. 309.[78d]

Statutory rule prevails over executive order.[78e]. Notification having no statutory force cannot prevail over statutory rules.[78f]

Rule has a statutory force and so it is enforceable in a court of law.[78g]

Statutory power cannot be limited, restricted or circumscribed by any rule framed under the statute.[78h]

Circulars of the Board are binding on the Income Tax Department. They are in the nature of *contemporanea expositio* furnishing legitimate aid in the construction of relevant provisions.[78i] Circulars of the Board are statutory in character.[78j] Circulars issued by the Department are clearly meant to be accepted by the authorities.[78k]

Expert Committee laid down modalities for identification of the logs and the wood purchased from the auction depots. Administrative instruction issued accepting the modalities has no force of statutory rule.[78l]

(III) RULE, REGULATION, ORDER.

These are all instances of subordinate law-making by the Executive under statutory authority.

I. S. 3(51) of *our* General Clauses Act defines a rule as a—

"rule made in exercise of a power conferred by enactment, and shall include regulation made as a rule under any enactment".

A rule is of general application in the same way as a statute, differing only in the nature of the authority by which it is created.

"Rules made under an Act... are to be of the same effect as if contained in the Act and are to be judicially noticed, must be treated for all purposes of construction or obligation or otherwise, exactly as if they were in the Act. If there is a conflict between one of these rules and a section of the Act, it must be dealt with in the same spirit as a conflict between two sections of the Act should be dealt with. If reconciliation is impossible, the subordinate provision must give way, and probably the rule would be treated as subordinate to the section."[79]

In other words, when a rule, regulation or notification[80] made under statutory authority is *'validily made under the Act, i.e., is intra vires the regulation-making authority*,[81] it should be regarded as part and parcel of the statute itself and should be regarded as though it were contained in the Act itself.[82]

78c. *Aggarwal* v *State*, A. 1987 S.C. 1676.
78d. *Nagarajan* v *State*, A. 1966 S.C. 1942; *Saksena* v *State*, A. 1967 S.C. 1264.
78e. *Kumar* v *Union of India*, A. 1982 S.C. 1064.
78f. *Bhagwati* v *Chandramaul*, A. 1966 S.C. 735.
78g. *State* v *Bellary*, A. 1965 S.C. 868.
78h. *Delhi Science Forum* v *Union of India*, (1996) 2 S.C.C. 405 : A. 1996 S.C. 1356.
78i. *K.P. Vergese* v *I.T.O.*, (1981) 4 S.C.C. 173 : 1981 S.C.C. (Tax) 293 : (1981) 131 I.T.R. 597.
78j. *Keshavji* v *C.I.T.*, (1990) 2 S.C.C. 231 : 1990 S.C.C. (Tax) 268 : (1990) 183 I.T.R. 1.
78k. *C.I.T.* v *Vasudeo*, 1993 Supp. (1) S.C.C. 612.
78l. *Madanlal* v *State*, (1997) 5 S.C.C. 141.
79. *Wicks* v. *D.P.P.*, (1947) 1 All E.R. 205 (H.L.).
80. *Kailash Nath* v. *State of U.P.*, A. 1957 S.C. 790 (791).
81. *Ibrahim* v. *R.T.A.*, (1953) S.C.R. 290 (298).
82. Cf. *Tika Ramji* v. *State of U.P.*, (1956) S.C.R. 393 (448); *Willingdale* v. *Norris*, (1909) 1 K.B. 57.

In *our* Supreme Court decision in *Ibrahim* v. *R.T.A.*,[81] there are certain observations which should be read in the above light :

"Reliance was placed on a passage at p. 299 of Craies *on Statute Law* as laying down that a bye-law must not be repugnant to the *statute* or the general law. But bye-laws and rules made under a rule-making power conferred by a statute do not stand on the same footing, as such rules are part and parcel of the statute itself."[81]

Rule-making power may be conferred not only by a statute but also by a statutory order.[83]

II. Broadly speaking, there is little difference between a rule and a regulation, excepting that where a rule-making power is vested in a non-governmental body, e.g., a statutory corporation such as a University,[84] the subordinate legislation is *usually* called a regulation.

Sometimes the power to make rules as well as regulations is vested in the same authority, e.g., the Central Government—by ss. 29-30 of the Mines Act, 1923, and if made in compliance with the formality prescribed by the Act, and if not inconsistent with the Act, both acquire the same status of "having effect as if enacted in this Act"[85] [s. 31(4)]. In such a case, the apparent distinction between the two powers is that while the Rules deal with major problems arising under the Act, the Regulations are to provide for minor and subsidiary matters.

It has also been held that regulation, made in exercise of a statutory power, amounts to a 'rule' within the meaning of s. 24 of the General Clauses Act.

Legislative, administrative and quasi-judicial orders.

III. While a rule or regulation[86] is general in scope, an order is *specific* in its application and its function relates more particularly to the execution or enforcement of some rule previously made, or of some provision of the statute itself to particular cases or classes of cases.[86-87] Since an order is specific in its application, a nice question arises as to whether a particular order is legislative in nature or merely administrative. If it embodies the decision in an individual case, it is an *administrative* order,[88] and, if the administrative authority, in making such decision, has the obligation to follow the judicial method, the order is called *'quasi-judicial'*.[89-90] If a superior administrative authority issues an order as to how his subordinate should dispose of an individual case, it is an administrative direction.[91] If, however, the order or direction lays down the rule according to which cases of the same nature are to be disposed of, it becomes *legislative* in character,[92]

83. Cf. *State of Punjab* v. *Dial*, A. 1983 S.C. 743.

84. E.g., ss. 22-23 of the Mysore University Act, 1956 [*Mysore University* v. *Gopala*, A. 1965 S.C. 1932].

85. *Chief Inspector of Mines* v. *Thapar*, A. 1961 S.C. 838 [842, 845].

86. Cf. *Att. Gen. for Alberta* v. *Huggard Assets*, (1953) 2 All E.R. 951 (961) P.C.

87. But in legislative practice, the distinction between these three forms is not always maintaned and the Committee on Ministers' Powers considered the desirability of maintaining the distincton as suggested by them [Report, (1932) Cmd. 4060, p. 6.]

88. E.g., an order of detention of a person under r. 30 of the Defence of India Rules, 1962.

89. Cf. *Dunichand* v. *Dy. Commr.*, (1954) S.C.R. 578.

90. These will be dealt with separately.

91. *Blackpool Corporation* v. *Locker*, (1948) 1 All E.R. 85 (91).

92. *Willapoint Oysters* v *Ewing*, (1949) 174 F. 2d/676 (687-88), *cert. denied*, (1949) 338 U.S. 860. [In this connection see the orders issued under the Essential Commodities Act or the Defence of India Act, such as the Iron and Steel Orders, Foodgrains Control Orders—Cf. *Union of India* v. *Bhanmal*, A. 1960 S.C. 475].

and such order assumes the form of subordinate legislation, provided it is used under Standing Authority.

Order distinguished from rule.

The distinction between an administrative order and a legislative order is thus one of degree and is based upon the question whether the general or the individual aspect is predominant in the applicability of the order,[92] that is to say, whether the order seeks to determine the existing rights and liabilities of named parties or is directed at future 'situations' rather than particular persons.[92] In short, if it is specific in its application, it would be an administrative order;[93] it would be legislative in nature only if it is general in its application.

Thus,—

In the *U.S.A.*, it has been held that 'rate-making', i.e., the prescription of specific maximum or minimum rates to be charged by carriers or other public utility services, is a *'quasi-legislative'* function[94] and that, accordingly, an administrative order which

"prohibits the company from charging.... rates higher than those prevailing in 1913, *in effect* prescribed maximum rates for the service. It was, therefore, a *legislative* order".[95]

The *English* decisions also demonstrate that to classify the function, in particular cases, may not always be an easy task; for, the question is one of substance, not of form.[96]

1. Defence Regulation 51 empowered the Minister of Health to *take possession* of any land and to give such directions as appeared to him to be necessary or expedient in connection with the taking of possession of that land, and also empowered the Minister to delegate *these functions* to such extent and subject to such restrictions as he thought proper.

The Minister of Health issued certain circulars to the local authorities, empowering to take possession of lands, subject to certain *conditions* laid down in the circulars. These conditions were changed from time to time by issuing fresh circulars. Amidst these conditions, e.g., were—(i) that a house could not be requisitioned unless unoccupied; (ii) that furniture should not be requisitioned. *Held,* the circulars amounted to *legislative* in character and *not mere executive directions* in the matter of taking possession of a land. For, they conferred powers on the corporations to take away individual rights which they would not have otherwise possessed and also imposed on them duties for the reasonable protection of the individual house-owner. They were not mere executive directions as between the Minister of Health and the Corporation. Such sub-delegation was not authorised by the Regulation.[96]

2. The Electricity Commissioners were empowered by statute to formulate schemes for effecting improvements for the supply of electricity in a certain district, and were directed to hold inquiries upon the schemes. Their decisions would come into operation only after they were confirmed by the Minister of Transport and approved by resolution of both Houses of Parliament. When the Commissioners proceeded to hold an inquiry, the Electricity Company applied for a Prohibition to restrain the Commissioners on the ground that the scheme formulated by them was *ultra vires.* The Court of Appeal granted the writ, holding that the Commissioners were exercising *judicial and not*

---

93. See next Chapter.
94. *Arizona Grocery Co.* v. *Atchison T. & S.R. Co.*, (1932) 284 U.S. 370.
95. *Oklahoma Operating Co.* v. *Love,* (1920) 252 U.S. 331 (335).
96. *Blackpool Corporation* v. *Locker,* [(1948) 1 All E.R. 85 (91). Scott, L.J.]. [But the act of requisition, in a specific case, is an *administrative* act: *Lewisham B.C.* v. *Roberts,* (1949) 1 All E.R. 815 (829)].

legislative functions, in deciding upon the scheme and that "as they are proposing to act in excess of their jurisdiction they are liable to have the writ of Prohibition issued against them".[97]

Indian instances of statutory orders of a legislative nature are offered by the Orders issued under the Essential Commodities Act, 1955, e.g.—

The Iron and Steel Control Order 1956—fixing the maximum selling prices of various categories of iron and steel.[98]

Sugar (Control) Order, 1966,—regulating the production, storage sale, etc., of sugar.[99]

Non-ferrous Metal Control Order, 1958.[100]

Reasonableness of Rules.

In some quarters, a suggestion has been made[1] that the condition of 'reasonableness', which is applicable to *bye-laws* must be extended to *Rules* as well, and that the subordinate authority, while exercising delegated authority, cannot avoid the test of reasonableness of exercise of statutory authority, simply by designating a statutory instrument as a rule or regulation. Since this view rests on a confusion of several analogous but distinct considerations, it would be useful to discuss the issue under separate heads.

I. In the *U.K.*, bye-laws are distinguished from Rules on the footing that while a bye-law is made by a local authority or similar statutory corporation, a Rule is usually made by a Government Department. Even though this distinction is often blurred by indiscriminate nomenclature by the Legislature itself,[2] the archaic law still prevails that statutory instrument shall be struck down on the ground of unreasonableness if it is a bye-law but not if it is a Rule or regulation.[3]

U.K.

II. No doubt, it is an incident of statutory power and that it must be reasonably and not arbitrarily exercised.

But, as the House of Lords pointed out,[3] common law makes a distinction, on this point, between *executive* and *legislative* powers. Where *discretionary* executive or administrative power is vested in a statutory authority, its act or order will be struck down if it is arbitrary or unreasonable;[4] but when legislative power to make rules or regulations is conferred, the latter may be invalidated only on the ground of *ultra vires* and good faith.[3]

In other words, the Courts do not enter into the *policy* involved in the subordinate legislation, except in so far as it is necessary to determine its *vires*. Thus, in determining the validity of a statutory scheme, the House of Lords observed—

"It is entirely beyond the scope of their duty to consider the policy of the scheme, and they have no power to determine that any modifications should be made in it,

97. *R.* v. *Electricity Commrs.*, (1924) 1 K.B. 171 (205).
98. *Atlas Cycle Co.* v *State of Haryana*, A. 1979 S.C. 1149 (para. 21).
99. *P.P. Enterprises* v. *Union of India*, A. 1982 S.C. 1016 (para. 1); *Sukhnandan* v. *Union of India*, A. 1982 S.C. 902 (para. 3).
100. *Narendra* v. *Union of India*, A. 1958 S.C. 430 (paras. 26-28).
1. M. P. Jain, *The Evolving Indian Administrative Law* (1983), pp. 277-78.
2. Cf. Wade, *Administrative Law* (1977), pp. 703-04.
3. *McEldowney* v. *Forde*, (1969) 2 All E.R. 1039 (1058, 1061-62, 1066- 67) H.L.; *Sparks* v *Edward*, (1943) 1 All E.R. 1 (6) C.A.
4. *Padfield* v. *Min. of Agriculture*, (1968) 1 All E.R. 694 (H.L.).

unless it is established to their satisfaction that the scheme is one which was not within the legal powers of its framers."[5]

Thus, where a statute empowers an authority to include in a scheme 'such provisions as are necessary or expedient', the question whether any particular proposal in the scheme is necessary or expedient is *not* a matter for the Court, and the Court is left with the question whether it can be *lawfully* inserted in the scheme,[6] according to the doctrine of *ultra vires*.[7] But even then the scope of inquiry by the Court is narrowed down by conferring an omnibus power to provide for the general object of the Act.[6]

The decision in *Commrs.* v. *Cure & Deeley*[8] is sometimes supposed to be an authority for the proposition that a statutory regulation is subject to judicial review on the ground of unreasonableness.[9] But in this case the regulation was struck down[8] on the ground that it was *ultra vires* on three counts, as an exercise of power that had not been conferred by the statute. It did *not* lay down that a regulation (like a bye-law) could be invalidated on the ground that it provided for something which was unjust or improper.

This case,[8] along with others, has been reviewed by the House of Lords in *McEldowney's case*,[3] and there it has been authoritatively laid down that the only grounds upon which a Rule or Regulation could be invalidated are—

(i) that it is *ultra vires*, having exceeded the power conferred by the statute or transgressed the conditions imposed by it;

(ii) that it has not been made in good faith, i.e., for the purposes for which the power of subordinate legislation had been conferred upon the Rule-making authority.[3,10]

U.S.A.

(B) *U.S.A.*—In the *U.S.A.*, not only bye-laws, but any kind of statutory instrument is subject to judicial review on substantive grounds apart from the general ground of *ultra vires*.

The Court is entitled to say whether there is a rational relationship between the statute and the subordinate legislation made under it, e.g., whether the rule or regulation is 'reasonably appropriate and calculated to carry out the legislative purpose'[11], but not whether a different regulation could have been made to effectuate the purpose of the statute.[12]

The Court is, however, concerned only to see whether it is capricious or arbitrary and would not inquire into its *wisdom*.[13] Nor will the Court inquire as to whether the circumstances or facts upon which the administrative authority has been authorised by the Legislature to make the rules or regulations existed at the time of their making or continue to exist.[14]

As in the case of a statute, if the Court finds a regulation invalid, it will simply annul it instead of amending it so as to make it valid.[15] The

5. *In re Endowed Schools Act*, (1894) A.C. 252 (255).
6. *Taylor* v. *Brighton Corpn.*, (1947) 1 All E.R. 864 (C.A.)
7. *Prescot* v. *Birmingham Corpn.*, (1954) 3 All E.R. 698 (C.A.)
8. *Commrs.* v. *Cure & Deeley*, (1961) 3 All E.R. 641 (659) Q.B.D.
9. *Vide*, Wade (*op. cit*), p. 715.
10. *Carltona* v. *Commrs.*, (1943) 2 All E.R. 560; *A.G. for Canada* v. *Hallet*, (1952) A.C. 427.
11. *Manhattan General Equipment* v. *Commr.*, (1936) 297 U.S. 129.
12. *Fed. Security Administrator* v. *Quaker Oats*, (1943) 318 U.S. 218 (231-33).
13. *Pacific States Box* v. *White*, (1935) 296 U.S. 176 (182).
14. *National Broadcasting Co.* v. *U.S.*, (1943) 319 U.S. 190 (216).
15. *Hynes* v. *Grimes Packing Co.*, (1949) 337 U.S. 86.

Court will not substitute its own judgment for that of the administrative authority.[16] Thus, where the definition of 'area of production' in a Regulation was *ultra vires* by reason of the inclusion of elements not warranted by the statute, the Court simply annulled the entire definition instead of modifying it so as to bring it in conformity with the statute, with the observation :

"It is not our duty to write a definition. That is the Administrator's duty."[16]

In the *U.S.A.*, even in the non-constitutional sphere, the 'reasonableness' of the rule or regulation is an additional condition in the sense that it must be *'reasonably* appropriate and calculated to carry out the legislative purpose', and it is for the Court to determine whether it is so reasonably appropriate.

Where constitutionality is impugned, the question of reasonableness also arises on the footing of 'Due Process'.[11]

India.

(C) In *India,* while it is well-settled that the exercise of discretionary administrative power would be struck down if it is arbitrary[17] or perverse,[17] i.e., where no reasonable person could have come to the impugned conclusion upon the materials before the authority;[18] it has also been established that the Court cannot interfere with the *legislative* power to make rules or regulations,[19] say, for fixing rates of charges for public services.

Constitutional ground.

In *India,* however, there is a constitutional ground upon which the Court may use the touchstone of reasonableness of a rule or regulation, just as it may use the same test to determine the validity of the parent Act itself which conferred the rule-making power.

If a bye-law, rule, regulation or order operates as a restriction upon a fundamental right guaranteed by Art. 19, it must, in order to be valid, be 'reasonable' and, in such cases, the rule etc. becomes subject to the additional ground of attack as having imposed an 'unreasonable restriction' on the fundamental right.[20]

Whether a Rule purported to be issued under statutory power can be construed as an administrative instruction.

I. As stated earlier, an *intra vires* statutory Rule would have the effect of law as if it had been enacted as part of the statute.

But it may be that though a statutory authority has the power to issue a Rule for the purposes specified in the Act, the Rule so framed is *ultra vires* the statute, either substantively or procedurally.[21] In such a case, it would not have the force of law, and, therefore, nobody could enforce such Rule in a court of law; but even there is no bar to its being treated as an administrative instruction or direction, inter-departmentally.[21]

The foregoing proposition was well illustrated by the decision of the Supreme Court in the case just cited :[21]

16. *Addison* v. *Holly Hill Fruit Products,* (1944) 322 U.S. 607.

17. *Narayan* v. *State of Maharashtra,* A. 1977 S.C. 183 (para. 10).

18. *Venkataraman* v. *Union of India,* A. 1979 S.C. 49; *Baldev* v. *Union of India,* A. 1981 S.C. 70 (paras. 4, 8).

19. *Narayan* v *Union of India,* A. 1976 S.C. 1986 (para. 7) C.B.; *Trustees* v. *Aminchand,* A. 1975 S.C. 1935 (para. 21)—3 Judges.

20. Cf. *Rashid* v. *Municipal Bd.,* (1950) S.C.R. 566; *Chandrakant* v *Jasjit,* A. 1962 S.C. 204; *Ganapati* v. *State of Ajmer,* A. 1955 S.C. 188; *Sakal Papers* v. *Union of India,* A. 1962 S.C. 305.

21. *Regina* v. *St. A.H.E. School,* A. 1971 S.C. 1920 (paras. 11-14).

Part II of the Rules made in 1939 under the Madras Elementary Education Act, 1920, relating to Government recognition and aid of elementary schools was held to be *ultra vires* because the provisions of the Act relating to recognition and aid had been repealed before 1939. The Court accordingly held—

(a) that since the Rules could not operate as statutory Rules, a teacher of a school who had been reduced in rank in contravention of the provisions of these Rules could not maintain any legal action as against the management of the school. The relations between the teacher and the school would continue to be governed solely by the terms of her contract of employment, as in the case of all non-statutory private employments;

(b) that, neverthless, the Rules would operate as administrative instructions issued by the Government to its officers dealing with the matter of recognition and aid; hence, if a teacher was reduced or removed otherwise than in accordance with these Rules, Government might withdraw recognition or aid from the management of such school. But that would be a matter as between the Government and the school, and a third party such as an employee of the school could not claim any legal right to be enforced against the school, in a court of law.[21]

II. As to a statutory order being construed as an administrative direction, see *post*.

(IV) NOTIFICATION.

1. Though the word 'notification' is used in certain sections of the General Clauses Act, 1897 (e.g., ss. 20-21) as species of statutory instrument, it is not defined in that Act, presumably because its meaning is clear, namely, that it is an instrument, by publishing which in the Official Gazette (or otherwise), some other action of the Government, such as the making of a rule,[22] or an order, or the exercise of some power conferred by statute is brought to the notice of the public.

Thus—

(a) S. 3(1) of the Defence of India Act, 1952, provides—

"The Central Government may, by notification in the Official Gazette, direct such rules as appear to it necessary ...."

(b) S. 4 of the same Act offers an instance of a notification publishing an order—

"The Central Government may, by notification in the Official Gazette, direct by general or special *order* that any persons not being members of the Armed Forces...shall be subject to naval or military or air force law ..."

2. A notification is to be distinguished from a public 'notice'. Sometimes the same statute provides for the issue of both; while the notification is intended to effect the rights of parties, *public* notices are intended to be issued for the information of the public as regards the policy of the Government or the like.[23] Such public notices have no statutory force and may, therefore, be changed without repealing earlier notices, and without any formality.[24]

3. A *public* notice, again, is to be distinguished from an *individual* notice which has to be served upon a person to be affected in his civil rights by the order of a statutory authority. Whether required by the statute specifically or not, such notice is an ingredient of natural justice which must be given to the person in order to give him an opportunity to make his representation to the action proposed,[25] except where there are exceptional

22. Cf. *Union of India* v. *Kishengarh Mills*, A. 1961 S.C. 683 (686).

23. *Vallabhdas* v. *Municipal Committee*, A. 1967 S.C. 133 (para. 5).

24. *East India Commercial* v. *Collector*, A. 1962 S.C. 1893 (para. 33).

25. *North Bihar Agency* v. *State of Bihar*, A. 1981 S.C. 1758 (para. 2); *Vilangandan* v. *Executive Engineer*, A. 1978 S.C. 930 (paras. 17-18); *Erasian Equipment* v. *State of W.B.*, A. 1975 S.C. 266 (269).

circumstances which make it inexpedient to issue such notice before the action is taken.[26]

Where the giving of such notice is required by the relevant statute, expressly[27] or impliedly,[28] such condition is construed by the Court as mandatory,[27-28] and in default, the resultant order is invalidated, apart form the general principles of natural justice.

4. Like other kinds of subordinate legislation, a notification is subject to the rule of *ultra vires;* but a mere reference to a wrong section of the Act as the source of the power would not vitiate a notification.[29]

5. A notification sometimes takes the nature of conditional legislation, which is issued as a preliminary for the application of the Act in a particular area or with respect to a particular subject-matter.[30]

6. Where a statute authorises an authority to delegate his powers to some other person "authorised in this behalf", he may name his delegate or delegates by a notification.[31] Similarly, s. 3(2) of the Central Excises and Salt Act, 1944, empowers the Central Government to fix the tariff value of articles by notification in the Official Gazette, and s. 5 of the same Act empowers it to declare a territory as 'foreign territory' for the purposes of the Act. S. 20 of the East Punjab Safety Act, 1949, empowered the Provincial Government to declare the whole or any part of the Province as a 'dangerously disturbed area', for the purpose of applying the special procedure for trial of certain offences under the Act.[32]

7. Like any other statutory instrument, a notification may be *ultra vires,* if it transgresses the powers conferred in this behalf by the statute[32] or the relevant statutory instrument;[33] or unconstitutional, if it offends against constitutional provisions.[34] But, if *intra vires,* it has the force of law,[35] and has to be read along with the statute.[36]

(V) RULES MADE BY COURTS

The superior Courts, in all countries, possess the power the make rules to regulate proceedings before them, as ancillary to their judicial powers.

England.

Being conferred by statute, the power to make such rules is subject to the limitation of *ultra vires* like any other statutory instrument.[37] A rule made by Court must not, therefore, be repugnant to the provisons of the Act which conferred the power.[38] The rule must be interpreted so as to be reconciled with the statute,[39] but if it cannot be reconciled, it must give way to the plain

26. *Bd. of Mining Exam.* v. *Ramjee,* A. 1977 S.C. 965.
27. *Nasir* v. *Asst. Custodian,* A. 1980 S.C. 1157 (paras. 4-5).
28. *C.A.T.A.* v. *A.P. Govt.,* A. 1977 S.C. 2313 (para. 22); *N. S. Transport* v. *State of Punjab,* A. 1976 S.C. 57 (paras. 5,7).
29. *Maunath Municipality* v. *S.C. Mills,* A. 1977 S.C. 1055 (paras. 8-9).
30. *Tulsipur Sugar* v. *Notified Area Committee,* A. 1980 S.C. 888 (para. 18).
31. Cf. *Habeeb Md.* v. *State of Hyderabad,* (1953) S.C.R. 661 (674).
32. Cf. *Gopi Chand* v. *Delhi Administration,* A. 1959 S.C. 609 (616, 217).
33. *Bhagwati Saran* v. *State of U.P.,* A. 1961 S.C. 928 (932-33).
34. *Harnam Singh* v. *R.T.A.,* A. 1954 S.C. 140; *Manubhai* v. *Union of India,* A. 1961 S.C. 21; *Tika Ramji* v. *State of U.P.,* A. 1956 S.C. 676 (711); *D.S. Mills* v. *Union of India,* A. 1959 S.C. 626 (632).
35. *Kailash Nath* v. *State of U.P.,* A. 1957 S.C. 790 (791).
36. *State of Bombay* v. *Balsara,* (1951) S.C.R. 682 (718-19).
37. *R.* v. *Henderson,* (1898) A.C. 720 (729) P.C.
38. *Irvin* v. *Askew,* (1870) L.R. 5 Q.B. 208 (211).
39. *Richards* v. *A.G. of Jamaica, (1848) 6 Moo. P.C. 381 (398).*

terms of the latter.[40] It must not impose conditions not warranted by the statute.[41] In other respects a rule is to be interpreted by the same principles of construction as are applicable to statutes.[42]

On the other hand,—

An *intra vires* rule made by Court has the force of a statute and may override an earlier statute.[43]

In *India,* such power is conferred by the Constitution itself. So far as the Supreme Court is concerned, the relevant provision is Art. 145(1), which says—

India.

"(1) Subject to the provisions of any law made by Parliament, the Supreme Court may from time to time, with the approval of the President, make rules for regulating generally the practice and procdure of the Court including,—

(a) rules as to the persons practising before the Court ....."

Supreme Court.

I. In exercise of this power, the Supreme Court has made the Supreme Court Rules, 1950.[44]

The rule-making power of the Supreme Court is subject to twofold limitations:

(i) Since these rules come within the ambit of Art. 13(3)(a) of the Constitution, it is evident that, though made by the Constitution itself, they are subject to the Fundamental Rights, e.g., Art. 14,[45] or Art. 32.[46] The Supreme Court has, in fact, struck down a rule framed by itself, requiring security for costs to be furnished for moving a Petition under Art. 32, holding that such a condition retards or obstructs the individual's right to move the Supreme Court under Art. 32, which is itself a guaranteed right.[46]

(ii) Apart from constitutional limitations, the Rules made by the Supreme Court are also subject to the doctrine of *ultra vires* inasmuch as the rule-making power under Art. 145(1) may be exercised only for the purposes specifically enumerated in sub-clauses (a)—(j) of that clause. The question, accordingly, may arise whether a particular rule comes within the ambit of the relevant sub-clause or sub-clauses. In determining the question of *vires* in this context, the relevant sub-clause must be given a liberal interpretation inasmuch as, apart from Rules, a superior Court has the inherent power to regulate proceedings before it.[45]

Further, if a rule is inconsistent with any Act of Parliament, the latter shall prevail, e.g., where the period prescribed by the Rules is different from that prescribed by the Limitation Act.[47] This is ensured by the words 'subject to the provisions of any law made by Parliament' at the beginning of Art. 245(1) of the Constitution.

High Court.

II. As regards the High Courts, there is no provision exactly corresponding to Art. 145(1). Their rule-making power is derived from various sources. Thus, Cl. 10 of the Letters Patent of the Calcutta High Court empowerrs the High Court to make rules "for the qualification and admission of proper persons" to practise before it. Sec. 14 of the Indian Bar Councils Act, 1926,

40. *Davis, ex parte,* (1872) L.R. 7 Ch. App. 526 (529).
41. *R.* v. *Bird,* (1898) 1 Q.B. 349 (355).
42. *Danford* v. *McAnulty,* (1883) 8 App. Cas. 453 (460).
43. *Garnett* v. *Bradley,* (1878) 3 App. Cas. 944 (950).
44. See C5, Vol. 6, pp. 309 *et seq.*
45. *Sant Ram, in re,* A. 1960 S.C. 932.
46. *Prem Chand* v. *Excise Commr.,* A. 1963 S.C. 996 (1001, 1003); *Lal Ram* v. *Supreme Court of India,* (1967) II S.C.A. 88; (1967) 2 S.C.R. 14 [constitutionality upheld].
47. *Partha Sarathy* v. *State of A.P.,* A. 1966 S.C. 38.

similarly, preserved the power of the High Court to make rules to determine the persons entitled to plead and act in its Original Side.[48] Sec. 106(1) of the Government of India Act, 1915, preserved the power of the High Courts to make rules "for regulating the practice of the court, as are vested in them by letters patent". This power was continued by s. 223 of the Government of India Act, 1935, and it has been further continued by Arts. 225 and 327(1) of the Constitution.[49]

The continuance of the rule-making power under the Constitution is, however, subject to two limitations :

(a) the provisions of the Constitution.

(b) legislation by the appropriate Legislature, under Entries 78, 95 of List I; 3 of List II,[50] 46 of List III.

In exercise of its legislative powers conferred by the Constitution, Parliament has enacted the Advocates Act, 1961, s. 34 of which empowers the High Courts to make rules "laying down the conditions subject to which an advocate shall be permitted to practise in the High Court and the courts subordinate thereto". The corresponding provisions of the Letters Patent and the Indian Bar Councils Act, 1926, are repealed by this Act.

Since the rule-making power of the High Court derived from the pre-existing law is subject to legislation by the appropriate Legislature under the Constitution, it is obvious that any pre-existing rule which is inconsistent with a law made by Parliament, e.g., the Supreme Court (Practice in High Courts) Act, 1951,[51] such rule will be void.

(VI) SCHEME

I. A scheme framed under statutory power is another form of subordinate legislation. A scheme works out the ways and means for implementing the object of a law, particularly, relating to welfare measures.[52] Thus, the Coal Mines Provident Fund and Bonus Schemes Act (XLVI of 1948) empowers the Central Government to frame a scheme for the payment of bonus to employees in coal mines and provide for the matters specified in the Schedule to the Act. Though a 'scheme' is not mentioned in Art. 13(3) of *our* Constitution nor defined in s. 3 of the General Clauses Act, it is a species of subordinate legislation and, as such, is referred to in s. 20 of the General Clauses Act. It is treated as a rule or regulation, and interpreted in the same manner,[53] subject to the rule of *ultra vires*.[52,54] It would also be invalid as vitiated by *mala fides* if it is made not according to the statutory requirements but under the influence of an extraneous authority, e.g., the Chief Minister.[55]

When a statute is declared unconstitutional, a scheme framed thereunder falls with it.[56] But it has been held that when a State Act becomes void owing to

48. *Aswini* v. *Arabinda*, (1952) S.C.R. 1 (9, 27).

49. *Seshadri* v. *Prov. of Madras*, A. 1954 Mad. 543; *Mahendra* v. *Darsan*, A. 1952 Pat. 341.

50. *Pramatha* v. *Chief Justice*, A. 1961 Cal. 545 (553). [The effect of this decision has, however, been nullified by amending Entry 78 of List I itself, by the Constitution (Fifteenth Amendment) Act, 1963.]

51. This Act has been repealed by the Advocates Act, 1961.

52. *Trust Mai Lachmi* v. *Improvement Trust*, A. 1963 S.C. 976 (para. 2, p. 10).

53. *R.* v. *Minister of Health*, (1929) 1 K.B. 619.

54. *Prescott* v. *Birmingham Corpn.*, (1954) 3 All E.R. 698 (C.A.); *Yaffe's case*, see *ante*.

55. *Rowjee* v. *State of A.P.*, A. 1964 S.C. 962 (970).

56. *Sadasib* v. *State of Orissa*, (1956) S.C.R. 43 (59).

repugnancy to a Central law, schemes framed under the State Act prior to the moment when the repugnancy took place, remain valid as regards past transactions.[57]

There are circumstances under which the function of framing a scheme may have to be classified as *quasi-judicial*[58] e.g., where it would affect the civil rights of individuals and the statute requires it to be made only after giving interested parties a reasonable opportunity of being heard.[59]

Scheme under Motor Vehicles Act.

In *India*, an instance to the point is offered by s. 68C of the Motor Vehicles Act, 1939, which empowers a State Transport Undertaking to prepare a scheme where it is of opinion that it is necessary, in the public interest,[60] to run any transport service by the State Transport Undertaking to the exclusion, complete or partial, of private operators. It can take up a part or whole of an existing route[61] or a new route[62] and this should be specified in the scheme. The scheme has to be published in the Official Gazette and any person affected by the scheme has the right to file objections thereto before the State Government under s. 68D and the latter must hear the objections *quasi-judicially* and in consonance with the principles of natural justice,[59] because sub-sec. (2) of s. 68D provides—

"The State Government may, after considering the objections and giving an opportunity to the objector or his representatives and the representatives of the State Transport Undertaking to be heard in the matter, if they so desire, approve or modify the scheme."

'Hearing of an objection may involve personal hearing[63] and the taking of evidence if any party desires to introduce evidence and the State Government may decide as to its relevancy.[64]

A scheme would also be vitiated where it constitutes a fraud on the statute,[65] or a *mala fide* exercise of the statutory power.[66]

II. In this context, it is to be noted that even though a non-statutory scheme has no legislative scheme, it has been legally enforced on various grounds, such as estoppel,[67] beneficial object of the scheme,[68] fundamental right being involved.[69]

---

57. *Deep Chand* v. *State of U.P.*, A. 1959 S.C. 648 (667-69).
58. *See R.* v. *Electricity Commrs.*, (1924) 1 K.B. 171 (C.A.).
59. *Nageswara Rao* v. *A.P.S.R.T.C.*, A. 1959 S.C. 308; *Narayanappa* v. *State of Mysore*, A. 1960 S.C. 1073.
60. *Samarth Transport* v. *R.T.A.*, A. 1961 S.C. 93 (97).
61. *Srinivasa* v. *State of Mysore*, A. 1960 S.C. 350 (353).
62. *Kondala Rao* v. *A.P.S.R.T.C.*, A. 1961 S.C. 82 (93).
63. *Nageswara Rao* v. *A.P.S.R.T.C.*, A. 1959 S.C. 308 (320, 322, 327).
64. *Malik Ram* v. *State of Rajasthan*, A. 1961 S.C. 1575 (1578); *Rowjee* v. *State of A.P.*, A. 1964 S.C. 962 (970, 972); *Saraswati* v. *State of U.P.*, A. 1981 S.C. 660 (para. 9).
65. *Aswathanarayan* v. *State of Mysore*, A. 1965 S.C. 1848.
66. *Kondala Rao* v. *A.P.S.R.T.C.*, A. 1961 S.C. 82 (88-90).
67. *Steel Authority* v. *S.S.S.S.*, (1994) 1 S.C.C. 274 (para. 8); *Fernandez* v *State of Karnataka*, A. 1990 S.C. 958 (para. 16).
68. *Narayanan* v. *U.B.I.*, A. 1990 S.C. 746 (paras. 10-11); *Surja* v. *Union of India*, (1991) U.J.S.C. 366 (paras. 5, 7).
69. *Harjit* v. *Union of India*, (1994) 1 S.C.J. 1 (paras. 2, 9, 12, 14); cf. *Narendra* v. *Union of India*, A. 1989 S.C. 2138 (para. 64).