The Problem of Delegation of Legislative Powers in India

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and

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New worshippers at the temple of constitutional liberties sometimes wonder why some of the ancient deities are still retained in conspicuous places even though not washed, garlanded and worshipped every day. The new devotees would think that these gods and goddesses have become anachronisms by the side of the more young ones like self-incrimination or double jeopardy, who attract the crowd and the offerings. Then, one day, the new worshipper is surprised to find a great celebration before one of those ancient niches and he finds to his great surprise that the god in question is the great grandfather or grandmother of many of the new and younger gods who were the recipients of the interim adulation.

The doctrine of separation of powers is one of these ancient gods in the temple of constitutional liberties. What I mean is expressed in telling words by Professor Nathanson:

“When the writer was first formally exposed to American Administrative Law under the then Professor Frankfurter, we seemed mainly concerned with the principle of the separation of powers, informed of course by history and tempered by the judgments of experience. It seemed an obviously misguided emphasis upon ancient and irrelevant dogma, until dramatic vindication came shortly thereafter in the Schechter decision (A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495 (1935) holding

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the N. R. A. invalid partly on the ground of delegation of legislative power, and a good many years later in Youngstown (Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579 (1952) holding President Truman’s seizure of the steel mills an unlawful usurpation of legislative power.”. 1

The doctrine of non-delegation of legislative power which is the direct corollary of the doctrine of separation of powers is based on the eternal truth that concentration of political power in the hands of very few public authorities is a danger to the individual liberty of the inhabitants. The following words of Professor Jaffe is worthy of frequent repetition:

“It has been fashionable to deride Montesquieu’s observation as logically indefensible and not in fact practised in England…… Living in the shadow of the bulky Bourbon despotism he was seeking a constitutional frame-work for “political liberty” … He wrote: “Miserable indeed would be the case, where the same man or the same body whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions and that of judging the crimes or differences of individuals.” And was he not right then and is he not right today?” 2

It was the great truth underlying the above statements that persuaded the first Supreme Court of India to accept in the case of In re Delhi Laws Act and restate in the case of Raj Narain v. Chairman, Patna Administration (A.I.R. 1954 S.C. 569 at 574), that under the Republic, India has parted with Queen v. Burah (1878) 5 I.A. 178) and adopted the American view that somewhere in the background there is a limit to the power of the legislature, to delegate lawmaking to the executive. The recent trend shown in a few judgments to return to the generally accepted doctrine of Queen v. Burah is so grave that in the following pages a detailed survey of the jurisprudence built up by the Supreme Court with great care and labour in this area is attempted.

Let us here briefly look at the law laid down by Queen v. Burah. The following are, according to the present writer, the three key passages of the judgment:

“The Indian Legislature has powers expressly limited by

2. Jaffe and Nathanson, Administrative Law; Cases and Materials (3rd Ed.) p. 34.
the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.” (p. 193)

“The Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Council’s Act.” (p. 194)

“(In this case) the proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation, is now absolute... .. [It cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it.” (p.195)

The sum total of the three ruling observations in the case given above really do not lay down anything except permitting conditional legislation and prohibiting general and total legislative abdication. But on the practically important question of delegating power to make substantive law to other bodies short of general total self-effacement but without any standard or safeguard, the privy council did not seem to have expressed any opinion. However, the judgment has been taken to permit such kind of delegation, that is power to give permission to the administration to promulgate what rules it deems proper on a subject matter without its basic principles being previously enunciated or safeguards against abuse of power being assured.

When the Supreme Court was called upon to give

3. At least one very learned judge had the fortitude to admit the ambiguity of the privy council opinion. Referring to the decision in Queen v. Burah, Patanjoli Sastri J. has observed: “But neither in this, which is the leading case on the point, nor in the subsequent decisions already referred to, is any clear indication discernible as to the true dividing line between a “limited discretion” whose delegation is permissible and a legislative power which cannot constitutionally be delegated.” Jatindranath v. Province of Bihar A. I. R. 1949 F. C. 175 at 180.
its advisory opinion on the validity of delegation of legislative power by the Indian Legislature, in the first reference under Act. 143 of the constitution, it had before it the pronouncements of the Privy Council on the subject in Queen v. Burah and King v. Benaorilal. Whenever the question regarding the power of the Indian Legislature to delegate legislative powers was raised before the Judicial Committee, it should be said looking at certain statements that it had repudiated the suggestion in each case but had attempted to uphold the impugned statute by categorising it as conditional legislation. By conditional legislation the Board meant to say that the powers conferred were not powers of legislation but powers to carry out the enactment into operation and effect. In Burah's case, the court had conceded that the Indian Legislature was not an agent or delegate of the Imperial Parliament, that it had plenary powers to legislate on the subjects falling within its powers which power it could exercise either absolutely or conditionally, but did not pass any opinion as to whether the Indian Legislature had power to delegate its legislative powers to any outside authority. There is no trouble at all, in the Indian Federal Court decision in Jatindra Nath's case because the impugned delegation in that case was found to amount to abdication and the creation of a parallel legislature. The court therefore invalidated the impugned provision on the ground that the power conferred on the executive to extend the life of the Act was delegation of legislative power and not conditional legislation. It was this decision that had necessitated the reference in the Delhi Laws Act case. The question directly involved in the reference case was whether the Indian Legislature could delegate its legislative powers and if so what were the permissible limits of such delegation. The case was concerned with three separate enactments relating to three separate stages in the constitutional development of India, conferring on the executive authority the


5. (1878) 5 I. A. 178

6. A. I. R. 1945 P. C. 48


9. S. 7 of the Delhi Laws Act, 1912; S. 2 of the Ajmer-Merwara, (Extension of Laws) Act, 1947 and S. 2 of the Part C States (Laws) Act, 1950 were the statutes referred for opinion. The last mentioned Act had empowered the executive to repeal or amend any corresponding law existing in the area to which a new law was extended.
power to extend to particular areas laws which were in force in other parts of India with such restrictions and modifications (involving repeal of corresponding laws in certain cases) as they thought fit. The court by a majority upheld the provisions relating to the delegation of power to extend the laws with modifications, but held *ultravires* the power granted to the executive to repeal or amend any corresponding law on the ground that the latter power amounted to delegation of essential legislative power.

The apparently inconsistent attitude taken by the majority in upholding the provision dealing with the power to extend laws to a certain area and at the same time invalidating the provision dealing with the power to repeal the corresponding law existing in the same area would, create some confusion. It would be practically impossible for two separate statutes dealing with the same subject-matter having inconsistent provisions to operate simultaneously in the same field. The dissenting view expressed by Fazl Ali J. would amply illustrate the position. The learned judge points out: "If a new law is to be made applicable it may have to replace some existing law which may have become out of date or ceased to serve any useful purpose and the agency which is to apply the new law must be in a position to say that the old law would cease to apply." 10

The views of the various judges were divergent and even among the majority there were considerable differences of opinion on different points. However, the consensus of opinion seems to have centred round the point that the Indian Legislature could validly delegate its legislative powers subject to its exercising essential legislative functions "which consist in declaring its policy and making it a binding rule of conduct." If the legislature declared its legislative policy and laid down the standards for the guidance of the executive, then it could leave the task of subordinate legislation to outside authorities, the extent of such delegation being within the discretionary power of the legislature.

The above rule against delegation of essential legislative functions has been accepted as settled as one of the essential 

principles in determining the permissible limits of delegation in India.11

The attempt of the majority in the Delhi Laws Act case, it appears, was to free the Indian Legislature from the artificial shackles put on it by the Privy Council through its pronouncement in Queen v. Burah.12 They wanted to part company with English doctrine on this point and adopt the American view expressed in the "Hot Oil"13 and the "Sick chicken"14 cases. The court conceded that Burah's case was correctly decided but impliedly declared that it was not applicable to India. The privy council had, instead of expressly declaring its opinion whether the Indian Legislature could validly delegate its legislative function, evaded the question and decided the issue on the ground of conditional legislation. The varied opinions of the judges in the reference case although "tended to become diffused", have become successful in laying down the basic principle of the limits of delegation in our country.

Regarding the power conferred on the executive to make modifications, the majority seems to have arrived at an agreement on the point that the power to modify did not mean the power to make essential changes.15 This view was accepted by the court in Raj Narain's case. This case is a typical example of abuse of delegated power by the delegate. Here section 3(1) of the Patna Administration Act empowered the state government "to extend to Patna the provisions of any section" of the Bihar and Orissa Municipalities Act, 1922 "subject to such restrictions and modifications as the government may think fit." The government picked out one particular

13. Panama Oil Refining Co. v. Ryan 293 U. S. 388 (1935)
15. The core of the decision has been explained by Bose J. in Rajnarain Singh v. Chairman, Patna Administration, thus: "In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy." A. I. R. 1954 S. C. 569 at 574.
section of the Act and applied it in its modified form to Patna by notification without adopting the safeguards provided therein. The notification introduced the taxation section and withheld the provisions for creating representative local body. In other words the old tyranny of taxation without representation was attempted. Bose J. for a unanimous court upheld S.3(1)(f) of the Act on the ground that the power to select any section did not effect any change in policy if the “restrictions and modifications” were taken to have the meaning adopted by the majority in the Delhi Laws Act case i.e., in the restricted sense so as not to make essential changes in the policy laid down by the legislature. The Court, however, invalidated the notification which omitted to adopt the safeguards and this effected an essential change of policy.

The observation of the court that a modification which effects a radical change in the legislative policy cannot be delegated to a non-legislative body is only a part of the rule that essential legislative functions cannot be delegated.

In Harishankar Bhagla v. State of Madhya Pradesh the court considered the scope of the Delhi Laws Act case and unanimously adopted the principle laid down therein. Explaining the meaning of essential legislative function as one consisting “in the determination or choice of the legislative policy and of formally enacting that policy into a binding rule of conduct”, the court upheld the impugned provision by discovering the policy in the preamble of the Act. Here Ss. 3 and 6 of the Essential Supplies (Temporary powers) Act, 1946 and the Cotton Textiles (Control of Movement order) 1948, issued thereunder were challenged on the ground of excessive delegation of legislative powers. Mahajan C. J. speaking for a unanimous court held that the preamble and the body of the sections sufficiently formulated the legislative policy viz., the maintenance or increase in supply of essential commodities and of securing their equitable distribution and availability at fair prices and this accorded sufficient guidance to the executive in exercising its powers.

Regarding S. 6, the court held that its effect was not to

17. S. 6 of the Act provided “Any order made under S. 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or any instrument having effect by virtue of any enactment other than this Act.”
repeal or abrogate existing laws but only to by-pass them where they were inconsistent with the orders made under S. 3 of the Act and as such was not ultravires. The obiter dicta of the learned chief justice expressed in the subsequent paragraph is note-worthy. He said that conceding for argument’s sake that the existing laws stood repealed by implication, the repeal was not by any act of the delegate but was by the legislative act of parliament itself and hence there was no delegation. This view, it is submitted, was inconsistent with the view taken by the same learned judge in the Delhi Laws Act case. While under S. 6 the executive was in effect authorised to pass orders inconsistent with the existing laws having the effect of impliedly repealing them, in the Delhi Laws Act case under S. 2 of the Part C states (Laws) Act, power was given to the government to repeal any corresponding law which was inconsistent with the law extended to the new area. In both cases the effect was the same in the sense that the executive was given power to repeal existing laws. In the Delhi Laws Act case, the provision could have been upheld on the ground that the power to repeal corresponding laws was only collateral to the power to extend the laws. Or the same argument that the repeal was not by any act of the delegate but was by the legislative act of Parliament itself could have been applied. But probably the court did not fully realise the logical reach of such an argument. If stretched it would mean that even if the legislature declared its will to delegate its essential legislative function that would be a valid delegation.

In subsequent cases the court seemed to strive hard to find out the policy in order to validate the impugned legislations. Thus in Bhatnagar & Co. v. Union of India the court had to make a search through the repealed predecessor Act to discover the policy. In this case it was contended that S. 3 of the Imports and Exports (Control) Act, 1947 authorising the government to make provisions “for prohibiting, restricting or otherwise controlling” exports from and imports into India of certain commodities, had left the implementation of the statutory provisions to the executive without laying down any principle or guidance to the delegate and as such suffered from the vice of excessive delegation.

Rejecting this contention, Gajendragadkar J. for the court,
pointed out that since the material provision in the Act was a continuation of the previously existing provisions in the Defence of India Act and its rules, it was legitimate to look into the preamble and relevant provisions of the predecessor Act to find out the policy. The policy thus discovered was the maintenance of supplies essential to the life of the community and relying on Bhagla's case the court upheld the impugned provisions. Like the smile of the Cheshire cat in Alice in Wonderland which remained even after the disappearance of the cat, the policy of the previous Act remained even after the repeal of that Act!

The next case where the doctrine progressed a step was Edward Mills (o. v. State of Ajmer. Here also the attack was that there was no policy to be found in the Act. Here S.27 of the Minimum Wages Act, 1948 whose object as stated in the preamble was "to provide for fixing minimum rates of wages in certain employments", authorised the "appropriate government" to add to the schedule any other employment in respect of which "it is of opinion that minimum wages shall be fixed," after giving three month's notice. It was contended that no policy or standard was laid down for the guidance of the executive for the selection of employments to be included in the schedule. Mukherjea J. speaking for the court held that "the legislative policy is apparent on the face of the enactment", the policy being fixation of minimum wages with a view to obviate the exploitation of labour. The learned judge observed that it was for carrying out effectively the purpose of the enactment that such a power was delegated to the executive and as such there was no excessive delegation.

The court, it is submitted, was right in upholding the provision but it gave the formal reason for the decision as the existence of a visible policy in the legislation. The Act said "whereas it is expedient to provide for the fixing of minimum rates of wages in certain employments". It is sheer political propaganda and not legitimate judicial discovery to state that the legislative policy apparent on the face of the enactment is the object of obviating the exploitation of labour. The fixing of minimum wages is as much useful to the employer as it is to the employee. It protects the former from the allegation of paying a pittance even if his wages are reasonable, simply

because no minimum is fixed. But the court, it is suggested, had narrated correct grounds for upholding the delegation in the judgment itself. But it could have made that reasoning more articulate. Instead of strenuously searching for the policy from the vague provisions of the statute, they could have upheld the Act on the ground of the clear safeguards provided under it. S. 5 of the parent Act had provided for two alternate methods. The first was for the appointment of an advisory committee adequately representing the affected interests viz., equal number of employers and employees and independent members not exceeding one third of the total membership of the committee one of whom shall be the chairman to enquire and advise the government in the selection of the employment. The second was to publish in the official gazette its proposals for the information of those whose interests would be affected thereby to fix the rate after considering the representations. Infant industries which had not the time to crystallise its wage structure were excluded by the Act. These provide for adequate safeguards. It is felt that the Supreme Court was well-aware of these safeguards and had discussed them. It is suggested that but for these built-in safeguards the Supreme Court would not have blessed the delegation in this case. The court’s invalidating a similar grant of power to the government ‘to specify any other disease’ in Hamdard Dawakhana v. Union of India20 where no such safeguards had been provided, lends support to this view, even though in this case the value involved was more precious, viz., a form of freedom of speech.

In Hamdard Dawakhana's case S. 3 of the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 prohibited the advertisement of drugs for treatment of certain diseases and disorders specified in the section and "or any other disease or condition which may be specified in the rules made under the Act." S. 16 of the Act had empowered the executive to make rules for the purposes of the Act and to specify the conditions or diseases falling within the mischief of S. 3. Kapur J. held that the words "or any other disease or condition which may be specified" in cl. (d) of S. 3 suffered from the vice of excessive delegation. The reasoning of the court was that "the words impugned are vague" and the parliament without prescribing any standard or principle had conferred "uncanalised and uncontrolled power to the

executive,” This decision is based on the same principle that the legislature could not delegate unguided power to a subordinate body.

The reasoning of the learned judge, it is submitted, does not seem to be in consistency with the ruling in Edward Mill’s case which, of course, was not cited in the present case. There is no material difference in the facts of the two cases. The preamble of the statutes involved in both the cases are worded on the same lines, and the power conferred on the executive was also the same. The court could have upheld the impugned provision on the ground that such a conferment of power was necessary for carrying out the purpose of the Act effectively. Or else, the court could have applied the principles of *ejusdem generis* in validating the Act, for S. 16 of the Act had specified certain diseases.

It is, however, felt that the reluctance of the court in upholding the provision was due to the absence of a provision in the statute for consultation with affected interests. This view finds support from the fact that not much later, the same learned judge had upheld a statutory provision conferring power on a municipality to specify goods for the purpose of imposing taxes on them in *Bangalore Wollen Cotton and Silk Mills Co. Ltd. v. The Corporation of the City of Bangalore* on the ground of conditional legislation. In this case S. 97 of City of Bangalore Municipal Corporation Act, 1949 empowered the municipality to tax various goods and enumerated certain goods. In the schedule certain articles on which octroi could be levied by the municipality were specified and a residuary head in the schedule empowered the municipality to impose octroi “on other articles which are not specified but which may be approved by the corporation”. Relying on the ruling in *Hamdard Dawakhana’s case*, the last mentioned provision was challenged on the ground of excessive delegation. Kapur J. rejected the contention and upheld the provision saying that it was more in the nature of conditional legislation. The court observed:

“All that the legislature has done in the present case is that it has specified certain articles on which octroi duty can be imposed and it has also given to the Municipal Corporation the discretion to determine on what other goods and under what conditions the tax should be levied. That, in our opinion is
not a case which falls under the rule laid down by this court in *Hamdard Dawakhana v. Union of India.*”

It is submitted that in the *Hamdard Dawakhana* case there was positively the area of freedom of speech involved and negatively the delegate was not a representative local self government unit both of which indicated a rigorous judicial scrutiny. The court could legitimately feel in the *Bangalore City Corporation* case that the representative character of the corporation would be an adequate safeguard against arbitrary imposition of taxes on the inhabitants.

*D. S. Garewal v State of Punjab* is another example where the court identified another area where a lenient scrutiny of delegated legislation is legitimate, viz., government employment. Of course what the court said was that they found out the policy from the rules which were in existence at the commencement of the impugned Act. The case was concerned with the validity of S. 3 of the All India Services Act, 1951 which empowered the government to make rules for the regulation of recruitments and conditions of services of persons appointed to the All India Service. Wanchoo J. held that S. 4 of the Act which provided that “the existing rules will govern the two All India Services in the matter of regulation of recruitment and conditions of service” determined the legislative policy and set up a standard for the central government.

The learned judge further observed that the requirements to consult the state governments before making the rules and of laying the same before parliament with power to modify, provided adequate vigilance and control over the delegate by the legislation. It is submitted that these built-in safeguards could have been made the articulate basis of the judgment instead of searching for the dormant policy hidden in the Act and outside it.

The criticism that the so-called policy contained in the existing rules could be validly altered fundamentally by the government by framing new rules does not seem to be valid in the light of the principles enunciated in *Raj Narain’s* case that

22. Ibid p. 1266.
the power to modify does not envisage a change of policy. It is, however, felt that the view propounded in Raj Narain’s case has a justification from the draftsman’s point of view also. The exercise of power given to modify a particular provision in a statute will sometimes throw the entire law out of gear. Every piece of delegated legislation, like a statute, looked from the draftsman’s angle, is an artistic whole and a piecemeal modification of the same could be often like throwing a spanner into the works. It is suggested, therefore, that when a power to make modifications in the rules is given to the legislature, the legislature should send back the rules as a whole to the government so that the concerned draftsman can rework the rules on the basis of the required modification. In England power to modify is rarely given while in India it is a common feature of statutes providing for delegated legislation. One has a sad feeling that in India this provision is put simply as a sop to disarm objections in the legislature.

In Shri Ram Narain v. State of Bombay S. 7 of the Bombay tenancy and Agricultural Land (Amendment) Act of 1956 which empowered the state government to vary the ceiling area and the economic holding fixed by the legislature “if it is satisfied that it is expedient so to do in the public interest,” was challenged on the ground of excessive delegation of legislative power. The court upheld the provision on the ground that the broad principles and policies laid down by the legislature in the relevant provisions of the statute afforded sufficient guidance to the executive. This ‘mantram’ that “policy has been discovered” by the Supreme Court through its crystal ball invisible to others sometimes smacks of an esoteric mystery. Courts deal with social facts. A piece of delegated legislation is validated on grounds analogous to those on which original legislation is reckoned superior to delegated legislation. Laws should be based on the genuine consent of those who are to be subjected to them. Free men can be subjected only to laws in the making of which they have participated either directly or indirectly through their chosen representatives as is now done in representative democratic legislatures. When laws are based on consent it cannot be to the detriment of those who consented to have them; no better method is conceivable, their enforcement will be the

24 See the point thoroughly argued in Morrison, Government and Parliament, 3rd Ed. 165.

easiest and since everyone will feel a sense of freedom under such a regime it will be conducive to release the best in each. Thus the superiority of legislation by the legislature elected by the people to other forms of law-making is supported by principle and utility. This ideal of the legislature enacting all rules of conduct fully is difficult to be realised even in normal matters and at normal times.

The main difficulty is scarcity of legislative time. The next best therefore is for the legislature to lay down the fundamental principles on the subject and authorize a proper delegate to fill up the details. But sometimes, because of the utter novelty of the subject (atomic energy or space travel), emergency of the occasion (war, flood, epidemic) or prolixity or technicality of the matter or rapid fluctuation of surrounding circumstances (international tariff war), it may not be practical to lay down any meaningful policy at all. In such cases it is enough to provide built-in safeguards against abuse or arbitrariness. Now what are such acceptable safeguards? The same which makes original legislation superior to the delegated variety? Thus constitution of committees to advise the rule-maker on which the interests to be affected are represented, or consultation of such interests by notification and receipt of representations as in the Edward Mills’ case would be the best. If the delegate is himself a local legislature as in the Bangalore City Corporation case it is probably better than the general legislature making the law. In matters of great national importance, alternatively or cumulatively, the principal may retain a power of supervision of the finished product of the delegates’ work before it is brought into force or after it has come into force. If the matter involved is one of those preferred freedoms adumbrated in the famous foot-note four of justice Stone in U. S. v. Caroline Products Co; [304 U. S. 144, 152, Note 4 (1938) ] the judicial scrutiny will be jealous while if the matter involved is one of public employment or poisonous drugs or intoxicating liquors, the courts might permit more leeway for the free play of the police power of the state. These rules and principles are sociological and functional. The twin rules for the validity of delegated legislation are the presence either of clear policy, or built-in safeguards. One might say that the presence of built-in safeguards might in many cases be the clear policy discoverable in the legislation. But for all practical purposes
it is better to recognise the above two as two independent rules. If the built-in safeguards are not adequate and the policy is not effectively specific and reducible into rules of conduct the piece of delegated legislation should be struck down so that the executive all over our land is both educated to draft valid laws and compelled to be law-abiding.

The Bar in India has to help the Bench formulate the principles as inferences to be drawn from the socio-legal facts permitted by the constitution.

In *Vasantlal Maganbhai Sanjanwala v. State of Bombay*, the court was, however, divided in its opinion on the validity of S. 6 (2) of the Bombay Tenancy and Agricultural Lands Act, 1948 authorising the provincial government to fix a lower rate of maximum rent payable by the tenants of lands situate in any particular area or to fix such rate on any other suitable basis as it thought fit. Speaking for the majority, Gajendragadkar J. accepted the principle that the legislature should lay down the policy and principles for the guidance of the delegate and observed that the policy had been laid down in the preamble and other relevant provisions of the statute.

Subba Rao J. dissenting, held that in this case the delegation amounted to an abdication by the legislature of its essential functions since no policy or guidance could be seen to have been laid down by the legislature. The warning note of the learned judge against taking too liberal an attitude towards the construction of a statute "to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on the executive authorities" is an attractive feature of this decision.

In *Union of India v. Bhana Mal Gulzari Mal* the court upheld the validity of an order made by the government under S. 3 of the Essential (Supplies) Temporary Powers Act, 1946, reducing the price at which steel could be sold, on the ground that the policy and necessary guidelines were


27. This most confusing expression 'a lower rate of maximum rent' is criticised by Chagla C. J. in the Bombay High Court; cf. A. I. R. 1954 Bom. 397 at 403 (Para 16).

provided in the statute. The court relied on the ruling in Bhagla's case in upholding the notification. In a matter of fixing prices of commodities in short supply, or essential for the life of the community, periodical adjustment is unavoidable and the appropriate government authority is the most qualified to be the recipient of necessary delegated power. The order can be special and individual victimisation is possible; but the government or the official would have to care for general success of the price-scheme and could not have any interest antagonistic to the entire class of wholesale steel traders of the nation. This is sufficient safeguard to sustain the delegation. But, if any violation of the above mentioned canon of administrative fairness and impartiality and devotion to the public interest can be proved, the entire order could be struck down and the officers responsible exemplarily dealt with. It is necessary to point out that when wartime laws are extended into peacetime, suitable advisory bodies or appellate machinery are desirable. It is also not helpful to brush aside the more specific conditions laid down to guide the law-making of the delegate in the corresponding legislation both in England and the United States by observing, "whether or not some other matters also should have been included in the legislative decision must be left to the legislature itself." It is also too late in the day to be anything more than confusing to picture the legislature in a modern parliamentary system of government as anything essentially different from the executive in the drawing up of the "policy" in legislation. It is the executive that draws up the legislation and which is responsible for the policy. If the legislature can throw it out, the government resigns. Hence the judiciary has to scrutinise the legislative scheme to see that the executive does not, as is natural to any institution of human beings, get legislation passed which does not have sufficient standards of built-in safeguards. It is to the eternal credit of the Indian judiciary that they have compelled the incorporation of many a beneficial doctrine in the area of delegated legislation beginning with the adoption of the American doctrine of the possibility of excessive delegation rather than the Queen v. Burah doctrine, as it is generally understood, of plenary powers of legislatures. But the face of the Indian

subordinate legislation has not sufficiently lifted to reflect the light of our independence. The Imperial government's rule-making for a conquered dependency is still very much evident in the Defence of India Rules, Orders and other law-making documents as well as in ordinary laws delegating rule-making powers. A deliberate tightening of standards for drafting detailed and precise conditions governing the exercise of rule-making powers is needed. The habit of two hundred years and the inherent inertia of human beings have created in the Indian bureaucracy very sloppy draftsmanship which always errs on the side against individual freedom. The laconic concurrence of Subba Rao J. to the majority judgment is a pointer to the low credit to which this decision is entitled. The utter laziness to duties on the part of the administration shown by the next following case, *Mohammed Hussain v. Bombay* is one of many such examples. The state government did not start the machinery to establish and the Market-Committee which had been given the power to establish the market in pursuance of the state government direction did not so establish the market. The state government had by rule to prescribe the maximum fee leviable by the Market Committee. This it did not do but the rule empowered the Market committee, by bye-laws to levy fees. The Supreme Court declared each of the above provisions illegal. However in this case, as far as the attack on the statute for giving the principal power to the state government, the Supreme Court observed that "the guidance is writ large in the various provisions of the Act itself." Here S. 29 of the Bombay Agricultural Produce Markets Act, 1939 empowering the government to add to, amend or cancell any of the items of the agricultural produce specified in the Act was challenged on the ground that it gave unregulated power to the state government to include any crop without any guidance. Following the decision in Edward Mills' case the court observed that the scheme of the Act was to deal with only wholesale trade and this provided ample guidance to the government. It is not understandable how Edward Mills' case was perfectly persuasive unless the representative machinery built into the Act there against abuse is available in the *Mohammed Hussain* case also. Not a word is said about how the constitution of the Market Committee is provided for in

the Bombay Act. If that is a democratic representative body the whole complexion of the case alters. On the other hand in the second sentence in the fourth paragraph of the judgment the constitution of market committees is thrown aside as an irrelevant point in the case. Until and unless the Bar leads the court to the matters of substance rather than play semantics with “policy being writ large” over the Act, the government will not even know to draft statutes and subordinate laws responding functionally to our constitutional demands.

In Mohammadali v. Union of India31 where S. 1 (3) (b) of the Employee’s Provident Fund Act, 1952 which empowered the central government to bring within the purview of the Act by notification such establishment as it thought fit was questioned on the ground of excessive delegation. Sinha C. J. upheld the provision saying that the legislature had indicated clearly the principles underlying the legislation and the standard to be applied. There is nothing noteworthy in the attack of the petitioners in this case and the power to exempt (S. 17) as well as the general exceptions to the Act (S. 16) did not disclose any undesirable aspects. But regarding the observation of the Supreme Court32 that whenever a discretion is conferred on the government “it will be presumed that the discretion so vested in such a high authority will not be abused” one needs to look hard. Another variant of the same theme is incorporated in the maxim commia presumentur rite esse acta - that it will be presumed that all public authorities perform their duties properly unless the contrary is clearly established. This maxim has to be very sparingly used in the modern “administrative state”. In any case where a citizen complains of violation of his fundamental rights it is not for the courts to protect the executive under the shelter of this maxim. In fact the two sentences in that judgment are neither needed nor appropriate there.

Similarly, the power given to the central government under S. 16 of the Forward Contracts (Regulation) Act, 1952 to fix the prices, was held by the court to be not vitiated by excessive delegation in Raghubar Dayal v. Union of India.33 The

32. 1964 S. C. J. 329 at 332.
provision (Ch. II) for a Forward Markets Commission of independent experts to advise government and the conditions for the recognition of recognised associations of traders to conduct forward trading in specified commodities (Ch. III) are sufficient safeguards against abuse. The court observed regarding the price-fixing provision that the only guidance the parliament could have given in such cases was to direct that the price fixed be reasonable and this was "implicit in the provision in S.16 of the Act."

*Ishar Ahmed Khan v. Union of India* is yet another instance where the court discovered the policy in the scheme of the Act and in the principles enunciated in its relevant sections. In this case, the validity of S. 9(2) of the Citizenship Act, 1955 which conferred power on the central government to make rules of evidence to determine when or how a person had acquired foreign citizenship, was challenged on the ground that it conferred on the executive uncanalised and arbitrary power to make rules without any guidance and therefore suffered from the vice of excessive delegation. Gajendragadkar J. upholding the impugned provision pointed out that the principle of the Act was to prevent an Indian citizen from claiming a dual or plural citizenship and these principles were writ large on the various provisions of the statute giving ample guidance to the government in making the rules. Since on the substance the minority judgment (of Das Gupta and Sarkar JJ.) is more acceptable this case does not deserve more attention on the score of delegation.

In *Swadeshi Cotton Mills Co. v. State of U. P.*, the constitutionality of S. 3 of the United Provinces Industrial Disputes Act, 1947 was challenged on the ground that it delegated essential legislative functions to the government in so far as cls. (c) (d) and (g) were concerned. These clauses empowered the government *inter alia* to appoint industrial courts, to refer any industrial dispute for conciliation or adjudication in the manner provided in the order and to make any incidental or supplementary provisions which might be necessary or expedient for the purposes of the order. The court through Wanchoo J. discovered the policy in

S. 3 of the Act\textsuperscript{36} which provided the conditions that were required to be satisfied before passing an order by the government, and held that there was no excessive delegation. "All that has been left to the government by that section is to provide by subordinate rules for carrying out the purposes of the legislation". Indeed for limiting the possibility of arbitrary action the statutes sometimes provide for strange bed fellows. Along with the word "necessary" which has normally a very strict connotation we have the word "expedient" which can embrace anything under the sun!

Still later in \textit{State of Madhya Pradesh v. Champalal},\textsuperscript{37} the court found the policy in the preamble and the title of the statute. Under S. 4 (1) of the Bhopal Reclamation and Development of Land (Eradication of Khans) Act, 1954, the government was empowered by notification to declare an area as infested by a weed known as 'Khans' to be called 'Khans area' "if it is of opinion that any area is infested with Khans". This provision was challenged on the ground of excessive delegation. Ayyangar J. speaking for the court held that the policy of the Act, as was clear from the preamble and the long title of the Act was "the reclamation and development, of lands by eradication of Khans weed in certain areas of the state" and what was left to the executive was "to give effect to the law so as to achieve the purposes of the Act." This provided guidance to the government in declaring an area to be 'Khans area'. The parliament is not to be engaged to look up and fix the area of the weed.

In \textit{Basant Kumar Sarkar v. Eagle Rolling Mills Ltd};\textsuperscript{38} the court upheld the impugned provision on the categorisation of it as conditional legislation. In this decision there is a clear advance in the thought on the subject. The question involved here was the validity of S. 1 (3) of the Employee's State Insurance Act, 1948 which empowered the central government to determine the dates of coming into force of the Act in

\textsuperscript{36} S. 3 of the Act provided that such order was to be made "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 supplies and services essential to the life of the community or for maintaining employment."


different areas and the challenge was on the ground of excessive delegation in the grant of this power. The court, realistically accepting that there was an element of delegation, justified such delegation in the following words:

"Assuming that there is an element of delegation, the plea is equally unsustainable. In the very nature of things it would have been impossible for the legislature to decide in what areas and in respect of which factories the Employee’s State Insurance Corporation should be established. It is obvious that a scheme of this kind, though very beneficial, could not be introduced in the whole of the country all at once. Such beneficial measures which need careful experimentation have sometimes to be adopted by stages and in different phases, and so, inevitably the question of extending the statutory benefits contemplated by the Act has to be left to the discretion of the appropriate government. The course adopted by modern legislatures in dealing with welfare scheme has uniformly conformed to the same pattern. The legislature evolves a scheme of socio-economic welfare, makes elaborate provisions in respect of it and leaves it to the government concerned to decide when, how and in what manner the scheme should be introduced. That in our opinion cannot amount to excessive delegation."

Thus the court found legislative powers of a general nature distinguishable from normal operations of administration when discretion has to be granted to those authorities who have to carry them into effect and boldly included in this group three of its previous decisions.39

_Caltex India Limited v. Presiding Officer, Labour Court,_ 40 is a case where the policy was inferred by the court rather than discovered. Here the proviso to S. 26 (1) of the Bihar Shops and Establishments Act, empowered the state government to specify the nature of the misconducts which would eliminate the necessity of a notice in dispensing with the services of an employee. It was contended that this provision suffered from the vice of excessive delegation in as much as it gave arbitrary and naked power to the government to specify any misconduct on proof of which notice could be dispensed with. Rejecting

39. Edwards Mill’s case; A. I. R. 1955 S. C. 25. Bhikusa Yamsa v. Sanyamner Akila Taluka Bidi Kamgar Union, A. I. R. 1963 S. C. 806 and Bhikusa Yams Kshatriya [p] Ltd. v. Union of India A. I. R. 1963 S. C. 1591. In the last mentioned case the power granted to the executive under S. 35 of the Factories Act, 1948 to extend the benefits of the Act to persons to whom the provisions of the Act were not applicable before, was held to be valid.

the contention, the court observed that when the power was
given to the state government to specify the kinds of mis-
conduct “it was clearly indicating to the government to include
in its list of misconducts such of them as are generally under-
stood as major misconducts which justify the dismissal or dis-
charge of an employee.” This was held to be sufficient guidance
to the executive in the matter and the case is authority for the
proposition that the validity of a delegation is to be tested in
the light of the entire scheme of subordinate legislation imple-
menting the parent Act.

In Arnold Rodricks v. State of Maharashtra,41 S. 3 (3) and
(4) of the Bombay Commissioners of Division Act, 1957 were
challenged as conferring excessive delegation of power to the
state government amounting to abdication of power by the
legislature. C1 (3) of S. 3 empowered the government by noti-
fication to amend or delete any entry in the schedule for the
purpose of imposing any condition or restriction on the powers
and duties of the commissioners or to withdraw them and cl. (4)
to confer and impose on the commissioner power and duties
under any other enactments for the time being in force and for
that purpose to amend that enactment. Accordingly the state
government conferred certain powers under the Land Acquisi-
tion Act and amended the relevant section in the latter Act.
Upholding the impugned provisions, the majority42 held that
Ss. 6 and 7 of the Act indicated the kinds of powers which
could be conferred on the commissioners. Further the state
government because of its administrative experience would be
better suited to ascertain the power that could be conferred on
the commissioners.

Wanchoo J. dissenting held that the power conferred on
the government to withdraw the powers of the commissioner
was not delegated legislation, but was “a transfer by the legisla-
ture of its own power to make law to the executive” and as
such was ultravires. Further, if it was delegated legislation, it
suffered from the vice of excessive delegation in as much as it
gave a power to the executive to the extent of repealing a part of
the law made by the legislature. It is submitted that the majority

42. The majority consisted of Gajendragadkar C. J.; Hidayatulla and Sikri
Jj., Wanchoo and Shah JJ. dissenting.
view that since the whole object of the Act was to enable the state government to run the administration smoothly and since the kinds of powers to be conferred on the commissioner were laid down in the Act, there was no excessive delegation, appears to be correct.

Wanchoo J. speaking for the minority, distinguished Edward Mill's case on the ground that there the power conferred was to add to the schedule while here it was to amend it. It is submitted that the same learned judge had upheld a power granted to the executive to add to, amend or cancel any items specified in the Act in Gulam Mohammed's case on the ground that the guidance was writ large on the various provisions of the Act.

In Kambhalia Municipality v. State of Gujarat again, absence of legislative policy was the ground for attack. Here the validity of the Gujarat Panchayat Act, 1961, S. 9(1) of which empowered the state government to declare any area to be a nagar or gram and S. 9(2) of which gave power to alter the limits of any nagar or gram or “to declare that any local area shall cease to be a nagar or gram”, was challenged. To exercise the power of creation of local self-government units enquiries were to be conducted, to alter the boundaries of existing units consultation with the existing units was provided. Still the state government was technically i.e., in the bare words of the law, left in full control of the life of the entire local government units of the state. As the previous Gujarat Chief Justice, Shelat, J. who was a sole dissenter on the Supreme Court Bench of three judges that heard this appeal observed, “such a power leaves every panchayat whether it is a nagar or a gram panchayat or a local area where there is a municipality duly constituted at the mercy of the government for its continuance as such panchayat or municipality.” The majority allayed this fear by declaring that “it will be an abuse of the power under S. 9 (1) if by declaring such small fragments of such a municipal borough into separate grams or nagars, the government seeks to achieve indirectly what it cannot do directly. If the government abuses its power under S. 9 (1) its action will be struck down.” But one has to remember that the government had

45. Ib. p. 1057
46. Ib. p. 1052.
in its policy decision of February 12, 1963 drawn a coach and four through the statutory provisions and the pendency of the petition corrected some patent illegalities.\textsuperscript{47} In the light of these weaknesses of the government and the great danger of gerrymandering possible by rearrangement of territorial boundaries of local self-government units, was not a grant of power to the government to initiate a general reorganisation at convenient intervals of five or ten years a better alternative than this grant of power, at any time, to do almost anything after “making such enquiries as may be prescribed” or after “consultation” with the panchayats concerned? The majority, however, upheld the legislation stating that the legislature has determined the legislative policy and formulated it as a binding rule of conduct\textsuperscript{48} and “having laid down the legislative policy the legislature may confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the frame work of the policy.”

The articulation of the distinction between delegation of legislative powers with specification of policy and formulation of it in concrete rules of conduct on the one hand and legislative grant of administrative discretion to implement the legislative policies on the other has now become more crystallised.

In \textit{Jalan Trading Co. v. Mill Mazdoor Sabha}\textsuperscript{49} the powers conferred on the Central government under Ss. 36 and 37 of the Payment of Bonus Act, 1965 were challenged \textit{inter alia} on the ground of excessive delegation. S. 36 empowered the government to exempt certain establishments from the operation of the Act, “having regard to the financial position and other relevant circumstances of the establishments.” The court said that the legislature had clearly laid down the principles to be followed by the government in the implementation of the provision but upheld the provisions as conditional legislation. By using the word conditional legislation in this context the court has completely deprived

\begin{thebibliography}{99}
\bibitem{}\textsuperscript{47} Ib. pp. 1052-53.
\bibitem{}\textsuperscript{48} See S. 9 (2) (a) and (b) for the creation of new units and S. 9 (2) for altering existing boundaries read with R. 2 of the Gujarat Panchayats (Declaration of Nagar or Gram) Inquiry Rules, 1962 prescribing the inquiry to be made.
\bibitem{}\textsuperscript{49} A. I. R. 1967 S. C. 691.
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that term of any meaning. In strict analysis, as has already been demonstrated, there is no qualitative difference between the power to select the time to introduce or extend an Act to a place, or to classes of people. By intelligently exercising that power a law can be made a failure or success. They are the essence of legislative policy. But to state that "the power to exempt an establishment or a class of establishments from the operation of the Act, provided the government is of the opinion that having regard to the financial position and other relevant circumstances of the establishment it would not be in the public interest to apply all or any of the Act," to be conditional legislation is, to repeat, to divest the term conditional legislation, of all identifiable meaning. On the other hand having shown that where the entire country is industrially at the developing stage, infant industries which are of national importance could not be saddled with the payment of bonus, the law has conferred a discretion on the administration to implement that policy. What has occurred is a normal legislative grant of administrative discretion to be subjected to the usual controls on each exercise of that discretion. One has to agree with the last sentence of Hidayatullah, J. on this point: "The section cannot rightly be regarded as a piece of delegated legislation."51

Regarding the validity of S. 37, the court was divided in its opinion. The section authorised the central government to provide by order, not inconsistent with the purposes of the Act, as may be necessary or expedient for the removal of any difficulty or doubt in giving effect to the provisions of the Act and the order is made final.

The majority52 speaking through Shah J. held that the provision delegated essential legislative power to the executive, which was not permissible. According to the learned judge the power to remove the doubts or difficulties by altering the provisions of the Act would amount to the exercise of

50. Ib. at 703.
51. Ib. at 718. The word printed in the A. I. R. report is 'lightly.' We think it is 'rightly.'
52. The majority consisted of Shah, Wanchoo and Sikri JJ, Hidayatullah & Ramaswami JJ. dissented.
legislative authority and that could not be delegated to the executive authority.

This view might appear to be inconsistent with the view taken by the Supreme Court in *Income-tax Commissioner v. Ramgopal Mills Ltd.*\(^5^3\) Because of a mistake in the terminology of the law when the Indian Income-tax Act was extended to Hyderabad the depreciation allowed for a succeeding year increased in amount to what was allowed in the previous year violating the fundamental principle of depreciation. The removal of difficulty power reserved to the central government in S.12 of the Finance Act, 1950 was used to overcome this obvious anomaly and was upheld by the Supreme Court. On the actual facts of the case the decision is unassailable. Such power to remove difficulties may be needed when the entire country is to be brought under one fiscal law for income-tax purposes. Similarly when a whole legal order at the constitutional level is made to give way to a new one it is not humanly possible to conceive of all points where contradictions might lurk. Therefore both the Government of India Act, 1935, S. 310 and Article 392 of the Constitution of India gave power to remove difficulties. But here there is a fundamental difference between the Sovereign English Parliament or Indian Constituent Assembly directly giving power to a donee which can go even against the very Act in which the power is given and power given by a controlled legislature like the Indian Parliament to remove difficulties not inconsistent with the purposes of that Act as was done by S. 37 of the Payment of Bonus Act, 1965. In this enactment it was not at all necessary to have given such a power. It is one thing to give such a power at the level and on occasions like the Government of India Act, 1935 or the Constitution Act, 1950; it is quite another to give it in an Act like the Finance Act, 1950. In the latter case, the donor is itself a limited legislature. However in the Finance Act, the occasion justified the conferment of power. But to adopt this legislative device as a matter of right to cover slip-shod legislation in normal law-making, is what the Supreme Court has now declared to be illegal. If the exercise of this "removal of difficulty power" cannot be inconsistent to the Act, one has to agree with the

\(^5^3\) A. I. R. 1961. S. C. 338, Shah I, who delivered the majority opinion in the 1967 case was one of the judges, who constituted the bench in the 1961 case
minority in this decision that it really did not deserve to be considered as involving abdication of essential legislative power. It can properly be deemed to be a grant of discretion of an administrative nature.

However, one has to welcome the view reflected in the majority decision of this case. Hereafter governments might hesitate to incorporate as an invariable part of each law a "removal of difficulty" clause. Except for exceptional cases it will be, it is suggested, struck down as either redundant or illegal, being excessive delegation of legislative power. Entire elections are done under this clause even to university bodies when no difficulty can be observed by reasonable men to initiate the normal election process.

In Kalawati Devi v. Commissioner of Income-Tax\(^54\) S. 298(1) of the Income Tax Act, 1961 empowering the central government, if any difficulty arises in giving effect to the provisions of the Act, to pass orders which appears to it to be necessary or expeditious for the purpose of removing difficulty, was challenged, relying on Jalan Trading Co's case. The court relying on Commissioner of Income Tax v. Dewan Bahadur Ramgopal Mills Ltd.\(^55\) where similar orders of the Taxation Laws (Part B States) Removal of Difficulties Order, 1950 made under S. 12 of the Finance Act, 1950 was upheld, held the impugned section valid. As already observed, the difference in the grant in the normal fiscal Act like the Income-tax Act should have been brought out.

Regarding Jalan Trading Co's case, the court observed thus: "Furthermore, the terms of S. 37 of the Payment of Bonus Act, 1965 are different and the Bonus Act is not a taxing law." It seems that the court was of the view that in taxing statutes such a provision was necessary for the implementation of the Act. This reasoning is certainly not acceptable. Other things being equal, in taxing statutes more care should be bestowed to avoid the grant of such exceptional powers to the executive. It is submitted that the dissenting view expressed by Hidayatulla J. in Jalan Trading Co's case that such a provision was necessary for the smooth functioning of the Act especially in the initial

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54. A. I. R. 1968 S. C. 162. The bench consisted of Shah, Sikri and Ramaswami JJ; Sikri J. delivered the opinion of the court.
stages is a more persuasive argument. Further, this view will make a distinction between taxing and non-taxing statutes unnecessary.

In *Anand Prakash Saxena v. Union of India*, the vires of Rule 4 (3) of the Indian Administrative Service Rules under which the Central Government framed the special recruitment regulations, was challenged on the ground of excessive delegation. The rules were made under S. 3 of the All India Services Act, 1951 which was held valid in *Garewal’s case.* The court upheld the provision on the ground that in making the rules the central government were to be guided “by the exigencies of the service and the advice of the state governments and the Union Public Service Commission” who were the best judges of the appropriate regulations to be made in the matter. The court, it is felt, upheld the provision on the basis of the safeguards provided under the Act, rather than the policy laid down therein.

*Ayodhya Prasad v. State of U. P.* is one of the recent cases where the court discovered the policy within the four corners of the parent Act. Here Ss. 3 and 8 of the U. P. Kshetra Samities and Zilla Prishads Adhiniyam (33 of 1961) which conferred on the state government, inter alia, power to divide the rural area of each district into Khands, to change the name of a Kshetra Samiti, to make modifications in the areas and limits of the Khands and to create new Khands, were challenged on the ground of excessive delegation. Hidayatullah C. J., relying on *Champalal’s case* held the provisions valid, on the ground that the legislative policy was stated in clear terms in the Act which “speaks for itself and is self-contained.” The legislative will, the court observed, was sufficiently expressed in the provisions of the Act, for the guidance of the government in implementing it.

In *Banarsidas v. State of M. P.*, the court for the first time held that fixation of rates of tax was not an essential feature of legislation and as such could be delegated to a non-legislative body. The question to be decided in this case was

whether the notification issued under S. 6 (2) of the Central Provinces and Berar Sales Tax Act, 1947 amending certain items in the schedule of the Act relating to exemption, was valid. Venketarama Iyer J. speaking for the court observed that "the authorities are clear that it is not unconstitutional for the legislature to leave the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be paid, the rates at which it is to be charged in respect of different classes of goods and the like." This sweeping observation was modified by the court in subsequent cases so as to mean that in cases where the power to fix the rate of tax is to be delegated to outside authorities it should be done with proper guidance and subject to safeguards and controls.

In Western India Theatres v. Municipal Corporation, Poona, a statutory provision empowering the municipality to "levy any other tax" was upheld by the court. The impugned provision was S. 59 of the Bombay District Municipal Act, 1901 conferring on the municipality power to levy "any other tax" subject to the prior approval of the Governor-in-Council. Rejecting the contention that the power delegated to the municipality was "unguided, uncanalised and vagrant", Das C. J. upheld the provision on the ground that the tax could be levied only "for the purposes of the Act" and this furnished sufficient guidance. The court observed that the taxes could be levied only for implementing the obligations and functions cast upon the municipality and for no others and delegation on that account was not unguided. Further, since the taxing power was specifically made subject to the prior approval of the Governor-in-Council, there was no excessive delegation.

It is submitted that delegating power to the municipality to levy any other tax even for implementing the purposes of the Act would amount to broad delegation. The court could have

60. Ib. at 913 One wonders what is the fundamental of taxation if the rate, the poor fellows who are to pay 't are all details. Wanchoo C J. considered them fundamental in the Delhi Municipality case, (A I. R. 1968 S C. 1232 at 1241-42) but Hidayatullah J. thought otherwise. ib. at 1252.
set out more clearly in its reasoning the built-in safeguard in delegating the power to a body consisting of elected representatives of the people and the checks and controls vested with the Governor in Council whose prior approval was made a condition precedent for the imposition of the tax. This would presumably be to prevent discriminations and preferences of a local nature. Further, the expression “any other” which normally draws in the *ejusdem generis* rule of interpretation also will work as a limitation on the power.

In *Orient Weaving Mills (P) Ltd. v. Union of India*, it was contended that rule 8 (1) of the Central Excise Rules, 1944 framed by the central government in exercise of its powers under S. 37 of the Central Excise and Salt Act, 1944, vested the government with unguided power to exempt any goods from the duty leviable under the Act and as such suffered from the vice of excessive delegation. The court rejected the contention and upheld the provision on the ground that there should be a great deal of flexibility in the incidence of taxation which “must vary from time to time and also in respect of goods produced by different processes and different agencies.”

In *Jyoti Pershad v. Administrator for the Union Territory of Delhi*, the court improved the dicta in *Banarsidas’ case* in the sense that once the legislature indicated in the operative sections of the statute the policy and purpose of the enactment, the following up of details could be left to a subordinate body without offending the rule against delegation.

In *Corporation of Calcutta v. Liberty Cinema*, the validity of S. 548 (2) of the Calcutta Municipal Act, 1951 which empowered the corporation to levy fees “at such rates as may from time to time be fixed by the Corporation” was challenged on the ground of excessive delegation as it provided no guidance for the fixation of the amount. The majority upheld the provision relying on *Banarsidas’* decision that the fixation of rates of tax being not an essential legislative function could be

validly delegated to a non-legislative body, but observed further that when it was left to such a body, the legislature must provide guidance for such fixation. In the present case the court found the guidance in the monetary needs of the corporation for carrying out the functions entrusted to it under the Act. It was further observed that the power to collect taxes was limited by "the expenses required to discharge those functions." The entire portion of the judgement of the majority on this point is a sublime surplusage except in one sentence that "in the case of a self-governing body with taxing powers a large amount of flexibility in the guidance to be provided for the exercise of that power must exist." It is a pity that the non-discriminating habit of citing a case decided on the grant of power to control steel price of private parties given to the union government, in another case where the dispute is about the grant of power by the local legislature to another unit of self-government to impose taxes, has not yet stopped. The minority, however, held that no guidance could be discovered from the provisions of the Act. According to them if the monetary needs of the corporation could afford any guidance, applying the same principle it would have to be held that the monetary needs of the state or the union would provide sufficient guidance in case a similar power to fix the rate of tax was delegated to the government by the legislature.

It is submitted that the argument of the majority that in the case of a self-governing body with taxing powers, a large amount of flexibility in the guidance is to be provided for the exercise of that power, appears to be sound; but to hold that the monetary needs of the corporation would provide sufficient guidance for fixing the rates is the weakest part of the judgement. The position could be explained by saying that there is not only one rule for valid delegation of legislative power, but two rules. One is the provision of sufficient standards and reducing them into actual rules of binding conduct in the Act itself. The second is the presence of safeguards against abuse of the power. In a local self-governing Act there is the second when no tax or fee can be

68. Ib. at 1118-1119
69. I.b. at 1119
imposed without the legislature of the corporation passing it. No better safeguard is there for the parent Act itself. Therefore, without entering into any other part of the controversy with such formidable jurists that compose the minority in this case, one is content to follow the majority in considering as a normal rule delegation of rule-making powers to local government units as a class by itself. It is suggested that both the majority and the minority judgements adopt this point of view in the next case; viz. Municipal Board, Hapur v. Raghuvendra Kripal. The validity of the U. P. Municipalities Act, 1916 was involved in this case. The Act had empowered the municipalities to fix the rates of tax and after having enumerated the kinds of taxes to be levied, prescribed an elaborate procedure for such a levy and also provided for the sanction of the government. S. 135 (3) of the Act raised a conclusive presumption that the procedure prescribed had been gone through on a certain notification being issued by the government on that regard. This provision, it was contended, was ultravires because there was an abdication of essential legislative functions by the legislature with respect to the imposition of tax in as much as the state government was given the power to condone the breaches of the Act and to set at naught the Act itself. This was an indirect exempting or dispensing power.

Both the majority and the minority upheld the provisions dealing with the delegations of power to the Municipal Board to imposed taxes. They however, differed in their views regarding the validity of S.135 (3) which sought to raise the conclusive presumption. The majority upheld the provision on the ground that it was only regarding non-essential matters that the government was given power to condone the departure and that there was no possibility for abusing such a power by the government unless the government colluded with the Municipal Board to disregard deliberately the provisions for the imposition of the tax. According to them “there is no warrant for such a supposition.”

The minority, however, felt that the impugned section should be struck down because it took away with one stroke

73. Gajendragadkar C J., Hidayatullah, Shah and Sikri JJ. Hidayatullah J. delivered the judgement for the majority.
74. Wanchoo J.
all the safeguards provided by other sections in the statute with the result there was delegation of essential function of fixing the rate of tax to subordinate authority without any safeguard. Such a delegation, according to the minority, would be excessive delegation and would be bad.

The observations made by the learned judges regarding the delegation of taxing powers to municipal bodies are noteworthy. Hidayatullah, J. speaking for the majority pointed out that "regard being had to the democratic set up of the municipalities which need the proceeds of these taxes for their own administration, it is proper to leave to these municipalities the power to impose and collect these taxes. The taxes are, however, pre-determined and a procedure for consulting the wishes of the people is devised." Apart from the fact that the Board was a representative body of the local population on whom tax was levied, there were other safeguards by way of checks and controls by government which could veto the action of the Board in case it did not carry out the mandate of the legislature. Similarly the minority observed that the legislature could in the case of taxation by local bodies delegate the authority to fix the rate to local bodies "provided it has taken care to specify the safeguards in the form of procedural provision or such other forms as it considers necessary in the matter of fixing the rate."76

In *B. Shama Rao v. Union Territory of Pondicherry* 77 one enters a very interesting area in the problem of delegated legislation. Here the validity of the Pondicherry General Sales Tax Act (10 of 1965) which extended the Madras General Sales Tax Act (1 of 1959) as it stood immediately before the date on which the Pondicherry Act was to be brought into force in the territory of Pondicherry, was questioned. The extension was to be by a notification issued by the government as provided under S.1(2) of the Act. The contention was that the effect of S.1(2) and 2(1) of the Pondicherry Act as originally enacted in 1965 was that the Madras legislature had the option of amending the Madras Act at any time before the commencement of operation

76. lb. at 702 The Act was of 1916-a creature of a Provincial regime of dependent status under an Imperial power. The minority view at least would have enabled the government to scrap the Act and bring in a fresh Act.
of the principal Act under the notification issued by the Pondicherry government and this amounted to delegation by the Pondicherry legislature of its powers of legislating on the subject for Pondicherry to the Madras legislature. The majority held the Act to be "void and still-born", the reason being that the Pondicherry legislature in enacting the Act in that manner had totally abdicated its legislative functions in the matter of sales tax legislation and had surrendered it in favour of the Madras legislature. The court pointed out that in adopting a statute enacted by another legislature even with future amendments by the latter legislature would tantamount to a total surrender of legislative functions in favour of that legislature because the legislature adopting it was not and could not be aware of the provisions of the amended Act. The Delhi Laws Act case was distinguished on the ground that unlike in that case where there were no proper legislative machinery in the areas to which the new laws were sought to be extended, in Pondicherry a legislature was already functioning and it was in the purported exercise of its legislative functions that it sought to extend the Madras Act. The minority, however, did not decide this point but upheld the subsequent amending Act passed by the Pondicherry legislature. Buttressing the majority decision it has to be said that technically it is abdication pure and simple and substantially it is highly objectionable, nay a suicidal practice, to extend the fiscal law of one state to another. When it is the law of a state like Madras where the Acts reflect the special interests of that state as found in Firm Mehtab Majid & Co. v. State of Madras, where the government (through rules in this case) attempted to attract outside raw-hides to that state and treat preferentially their tanning industry, the danger is greater. The point is that Madras is too clever a state to have its fiscal laws extended to one's own state. The only built-in safeguard is that the Madras Act has been passed by a popular legislature and therefore, provided there are no interstate preferences and discriminations or interstate protective measures, it may be taken to contain no tyrannical measures either in the levy or in the collection of the tax.

In fact the judgments upholding the laws referred to the Supreme Court have their weakness in not going into the substance of the matter. All the three statutes to be extended to the new areas referred to the Supreme Court in the Delhi Laws

78. Subba Rao C. J. Shelat and Mitter JJ.
Act case were passed by public authorities more progressive than those in the areas to which they were to be extended. In the case of Delhi a law passed, for example, by the U. P. legislature might be harmless, U. P. being to a great extent territorially homogenous with Delhi. Still Delhi has its own problems and great care is to be taken in the acceptance by one area of laws passed by authorities of other areas. A land-locked state like Madhya Pradesh would have different problems from that of a seashore state like Bombay. While Bombay is industrialised and urbanised, Madhya Pradesh is neither. Therefore the extension of the laws of the latter to the former or vice-versa will be unscientific and injurious. The Supreme Court has done much patient and gracious educating in the 'constitutionalising' of legislatures when states have in their anxiety to favour certain castes, passed laws that violated both the letter and the spirit of the constitution. It is useful to remember that other subjects also need this technique.

In Devi Das Gopal Krishnan v. State of Punjab, S.5 of the East Punjab General Sales Tax Act, 1948 empowered the state government to fix sales tax at such rates as it thought fit. The court struck down the section on the ground that the legislature did not lay down any policy or guidance to the executive in the matter of fixation of rates. Subba Rao C. J. speaking for the court pointed out that the needs of the state and the purposes of the Act would not provide sufficient guidance in the fixation of rates of tax. It was further contended that S.5 as amended only prescribed the maximum rate and did not disclose any policy giving guidance to the executive for fixing any rate other than the maximum. The court rejected this contention on the ground that the discretion granted to the executive to fix the rate between one pice and two pice in a rupee is insignificant and did not exceed the permissible limits.

In this case the learned Chief Justice reiterated his views about the permissible limits of delegation, expressed in his

82. Per Subba Rao C. J. "We cannot hold that whenever a statute define the purpose or purposes for which a statutory authority is constituted and empowers it to levy a tax that statute necessarily contains a guidance to fix the rates. It depends upon the provisions of each statute" Ib. at. 2900.
83. By the amendment the maximum rate that could be levied by the government was fixed at 2 pice in a rupee.
dissenting judgment in Vasantlal's case. He pointed out the danger inherent in the process of delegation thus:

"An overburdened legislature or one controlled by a powerful executive may unduly over-step the limits of delegation. It may not lay down any policy at all; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation." 85

Subba Rao C. J. clearly disapproved the tendency of some judges always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. 86

The Municipal Corporation of Delhi v. Birla Cotton Spinning and Weaving Mills is the latest and one of the most important decisions on delegated legislation. In this case the main question involved was the constitutionality of delegation of taxing powers to Municipal Corporations.

The Delhi Municipal Corporation Act (66 of 1957) by S. 113 (2) had empowered the corporation to levy certain optional taxes. Under S. 150, power was given to the corporation to define the maximum rate of such tax to be levied, the classes of persons and the descriptions of articles and properties to be taxed, the systems of assessment to be adopted and the exemptions if any to be granted. The delegation made to the corporation in the matter of imposing the optional taxes was said to suffer from the vice of excessive delegation.

The majority of the court held the delegation to be valid. Wanchoo C. J. 88 observed that there were sufficient guidance, checks and safeguards in the Act which prevented excessive delegation. The learned Chief Justice observed that statements in certain cases to the effect that the power to fix the rates of taxes were not essential features was too

84. A. I. R. 1961 S. C. 4
86. Ib. at 1901
88 Shelat. J. agreeing
broadly stated. It is to be noticed that words ‘limits’ and ‘safeguards’ have now entered the literature of judgements on delegation along with the word ‘guidance.’ Sikri J. in his concurring judgement held the view that there was “adequate guide or policy in the expression "purposes of the Act in section 113” and “it is not necessary to rely on the safeguards mentioned by the learned Chief justice to sustain the delegation.” He said:

“ Apart from authority, in my view, parliament has full power to delegate legislative authority to subordinate bodies. This power flows, in my judgement, from Art. 246 of the Constitution. The word “exclusive” means exclusive of any other legislature and not exclusive of any other subordinate body. There is, however, one restriction in this respect and that is also contained in Art 246. Parliament must pass a law in respect of an item or items of the relevant list. Negatively this means that Parliament cannot abdicate its functions. It seems to me that this was the position under the various Government of India Acts and the constitution has made no difference in this respect. I read (1883) 9 A. C. 117 and (1885) 10 A. C. 282 as laying down that legislatures like Indian legislatures had full power to delegate legislative authority to subordinate bodies. In the judgements in these cases no such words as “policy”, “standard” or “guidance” is mentioned.”

Hidayatullah, J. in his separate judgement upheld the provision but declared that “while the provisions which have been characterised as safeguards (where found necessary) are desirable, the proper test to apply is not the existence of safeguards but whether the legislative will to impose the tax is adequately expressed so as to bind those who have to pay the tax”.

Shah and Vaidialingam JJ., dissented and held the section invalid on the ground that “the Act discloses by

89. Ib. at 1242.
90. Ib. at 1245.
91. It is very difficult to see how this inference follows from the previous premise.
92. Ib. at 1266
93. Ib. at 1250. It is feared that the above statement is an ingenious preface to his propositions on the subject in paragraph 89 (p. 1261) of the judgment. His first proposition is that "under the constitution the legislature had plenary powers within its allotted field." His second proposition is: "Essential legislative function cannot be delegated by the legislature, that is, there can be no abdication of legis-
express enactment no standard, no principle and no policy laid down by the Parliament to guide the corporation in levying and collecting the optional taxes.” Regarding the requirement to obtain prior sanction of the government as well as the power of the central government to supersede the corporation for certain acts of misgovernment, the learned judge said that they were not substitutes for guidance.94

Wanchoo C. J. was showing a new path in the area of delegation, namely, the functional approach when he stated that “the nature of the body to which delegation is made is also a factor to be taken into consideration in determining whether there is sufficient guidance in the matter of delegation.”95 According to the learned judge the fact that the delegation was made to an elected body responsible to the people including those who paid taxes provided a great check on the elected councillors imposing unreasonable rates of tax. Again guide or control on the limit of taxation could be seen in the expression “purposes of the Act” in S. 113. The power to tax was circumscribed by the need to finance the functions which were made incumbent on the corporation to perform. The necessity of adopting budget estimates each year as provided under the Act afforded another limit and guide-line in the matter. Further, the fact that the government was made the watchdog to control the actions of the corporation in the matter of fixing the rates provided another check against arbitrarily exercising the power of taxation vested with the corporation. Lastly, relying on

94. If this part of Shah J.'s judgment (Ib. at 1264 para 101) is to be taken to mean that no safeguard against abuse will make delegated legislation valid unless guidance or policy or standard is set up in the parent Act itself, to begin with, it is not acceptable. But it means only that the two safeguards mentioned in that paragraph are insufficient.

95. Ib. at 1244.
Kruse v. Johnson, the learned judge pointed out that in the case of subordinate public representative bodies, such as municipal boards, the reasonableness of their action could be reviewed by the courts. Thus the majority relied on the safeguards inherent in delegating the power to an elected body and guidelines provided under the various provisions of the Act for upholding the delegation. They observed the power from the angle of its exercise and gauged its propensity for abuse functionally. For the first time a law was tested on proper principles instead of chanting the magical formula: "the determination of policy and its formulation as a binding rule of conduct."

The emphasis on the "legislative will" by Hidayatullah J. is important. The learned judge stated that "once it is established that the legislature itself has willed that a particular thing be done and has merely left the exercise of it to the chosen instrumentality (provided that it has not parted with its control) there can be no question of excessive delegation. If the delegate acts contrary to the wishes of the legislature, the legislature can undo what the delegate has done." While appreciating the reasoning of such a view, it is submitted, if stretched too far it would mean that the legislature could, by expressing clearly its legislative will, delegate even the essential legislative functions to subordinate authorities. In a country where the legislature is controlled by a powerful executive, the courts should be ever conscious of such a danger. In municipal government with universal adult suffrage the 'have-nots' taking the power is probable and since they might not be burdened with much property, their sense of restraint in the matter of taxation of property will be very little and therefore the national or state legislature has to be careful in the matter of safeguards.

The very ambiguous statement of the law by Hidayatullah J. and the very strong declaration of Sikri J. in effect means

96. (1898) 2 Q. B. 91. It has, however, to be pointed out that this is a decision which has been misunderstood from its very birth. In Kruse v. Johnson itself the bye-law was approved. The court there was really advocating more lenient treatment of legislation by local government units compared to bye-laws of corporations like railway companies.

97. Ib. at 1253.

98. Ib. at 1266. (See supra p. 137)
that the boat of thought of the Supreme Court on the doctrine of delegated legislation is still moored to the rickety pole of 1878 called Queen v. Burah. Are we not left wondering whether the entire labour of the Supreme Court during the last twenty years has been spent in vain? Surely Queen v. Burah is no reliable guide to expound the Republican Constitution of India of 1950.

The dissenting judges took the opposite view. They stated that “the delegation cannot be upheld, merely because of the special status, character, competence or capacity of the delegate or by reference to the provisions made in the statute to prevent abuse by the delegate of its authority.” This view is not helpful because in the case of delegation of legislative powers to a body which represents the very persons who are to be affected by the exercise of the power by the delegate, there is adequate safeguard against its misuse except in cases where the complexion of the electorate creates in the state or national legislature, as the case may be genuine fear of abuse of the power to the extent of overstepping constitutional boundaries.

The Delhi Municipality case would stand as a milestone in the history of delegated legislation in India. It is the first case where safeguards have been relied on to save a delegation of legislative power from the attack on the ground of absence of policy. It is, however, felt that the court could have enunciated this as an independent condition for a valid delegation. Either the enunciation in the parent Act of the legislative policy and its incorporation as a binding rule of conduct or the existence of built-in safeguards in the body to which delegation is made or in the statute making the delegation or in the statutory scheme of subordinate legislation implementing the directives in the parent Act, should be enough to validate exercises of rule-making powers by public authorities. The time to test the existence of standards or safeguards is when the piece of subordinate legislation is enforced against the petitioner.

100. Ib. at 1262.