DELEGATED LEGISLATION

Delegation of legislative power is necessary because of the technical character of modern legislation and to share extreme burden of legislation upon Parliament but at the same time the executive cannot be exempted from Parliamentary oversight. Delegated legislation includes all sorts of subordinate legislation including rules, regulations, bylaws, schemes, warrants, orders, notifications and any other statutory instrument framed in exercise of the powers conferred under the Act or the Constitution. The Rules of Procedure and Conduct of Business in National Assembly, 2007, Rules of Procedure and Conduct of Business in Senate, 2012, Government Rules of Business, 1973, Parliament Joint Sitting Rules, Rules for Council of Common Interests and Rules for Supreme Judicial Council etc. are the examples of delegated legislation framed under the direct authority of the Constitution. It is for this reason that in the "Preface" to Rules of Procedure and Conduct of Business in Senate, 2012, it is specifically mentioned that these are Constitutional rules so are placed at a higher pedestal than the rules framed under an Act of Parliament. Mustafa Impex judgment, PLD 2016 SC 808, also held that Rules of Business are binding on Government and any deviation would render the transaction of business illegal.

There are three main reasons for which delegation has become a normal feature of law-making in Pakistan,

[Taraqiati Bank Limited Vs Said Rehman 2013 SCMR 642(g)]: -

Pressure on parliamentary time,
Technical Character of modern legislation,
Need for flexibility.

Subordinate legislation and delegated legislation are synonymous terms used for the powers delegated by the legislature to the executive. Different nomenclatures are used for subordinate legislation as per their nature and substance. Whether subordinate legislation is to be made by President or Government, it will be termed as delegated legislation. When subordinate legislation is sketched by various Divisions and Departments of Government, it is drafted and vetted by Law Division under Rules of Business, 1973. Rule 14(1)(c) of Rules of Business, 1973 states that Law and Justice Division shall be consulted before the issue of or authorization of the issue of an order, rule, regulation, bylaw, notification, etc. in exercise of statutory powers.

It is the parent law which decides about what nomenclature is to be given and a parent law might contain different nomenclatures under one law. For instance, it might be that rules are to be made by Federal Government, regulations are to be made by some Board, schemes to be made by Executive Committee of the Board and notification to be issued by the Chairman of the Board. Many times, we come across cases where in a piece of subordinate legislation, the referring Division speaks of further rules to be issued. This practice shall not be followed because rules shall not speak of further rules to be issued but this does not apply where under the rules an enabling provision is provided for issuing, notifications, circulars, instructions, etc. One such example is Secretariat Instructions framed under rule 5 (15) of the Rules of Business, 1973. Rule 5(15) of Rules of business, 1973 states that detailed instructions for the manner of disposal of business in the Federal Secretariat shall be issued by the Establishment Division in the form of Secretariat Instructions.

It is always advisable that nothing should be in the subordinate legislation to confer arbitrary powers. Sometimes a notification contains certain requisites for a certain license and it is also written in the notification: "any other requirement for obtaining license to be fulfilled under the direction of the Board.".

This sort of arbitrary requirement is not only illegal but also opens a gateway to corruption. No substantial provision is to be included in the rules. The subordinate legislation can never be inconsistent with and beyond the scope of principal legislation. Provisions like penalties; fines etc. are substantive provisions and cannot be included in the rules unless so authorized by the Act itself. For instance, the Oil and Gas Regulatory Authority Ordinance, 2002 authorizes imposition of fines through rules.

Sometimes, an enabling provision is provided in the Act for previous publication of delegated legislation. The term "previous publication" is explained in section 23 of the General Clauses Act, 1897 and its purpose is to elicit public opinion before issuance of final notification, order, etc. By virtue of section 24 of the General Clauses Act 1897, the rules made under the repealed enactment fall under the umbrella of new enactment except for the inconsistent provisions. Mention of a wrong provision of law cannot be considered fatal to the grant of relief if it is otherwise available under the law to an aggrieved party (1994 SCMR 1555). Order under wrong section or without the mention of section does not vitiate it (AIR 1966 SC 334). Delegated legislation laid is sometimes laid before Parliament if required by law, as is in the case of Income Tax Ordinance, 2001. Section 53 (3) of Income Ordinance reads as below: -
"53 (3) The Federal Government shall place before the National Assembly all amendments made by it in the Second Schedule to the Income Tax Ordinance, 2001 in a financial year".

Rules and Regulations are two of main kinds of delegated legislation. The distinction between the two expressions can only be made on case to case basis as per the language used in various Acts and Ordinances containing provisions of making rules and regulations. This viewpoint is supported by the definition of 'rule" contained in the General Clauses Act, 1897, reproduced below: -

'Rule' shall mean a rule made in exercise of a power conferred by any enactment, and shall include a regulation made as a rule under any enactment.

Whenever in a statute both the, rules making and regulations making powers are given then the distinction and similarity between the two is on the basis that the rule making

authority is different from the regulation making authority; the rules are made for the external working of the organization and regulations are made for the internal working of the organization and for this reason the rule making authority is superior to the regulation making authority, always regulations are made on service matters and not rules because service matters of employees pertain to the internal working of the organization; both the rules and regulations are issued under some enabling power conferred under a statute hence both 'Rules' and 'Regulations' are statutory instruments; rules will be superior to regulations when the Act is silent on this point or expressly states that regulations shall not be inconsistent with the rules; if an Act contains only rule making power then for all purposes of the Act, whether external or internal, rules shall be made; and if an Act contains only regulation making power then for all purposes of the Act, whether external or internal, regulations shall be made.

The powers to be exercised under delegated legislation shall not be arbitrary and where discretion is to be exercised there the principles laid down in a leading judgment reported as PLD 1991 SC 14 shall be followed. The crux of the judgment is that structuring discretion means regularizing it, organizing it, producing order in it, so that decisions will achieve a higher quality or justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open
precedents and fair informal procedure. When legislative bodies delegate discretionary power without meaningful standards, administrators should develop standards at the earliest feasible time, and then, as circumstances permit, should further confine their own discretion through principles and rules.

Keeping in view the immense importance of delegated legislation, Senate rules were amended in the past so as to provide for a Committee on Delegated Legislation. Rules 172 C, 172 D and 172 E of Senate Rules of Procedure, 2012 speak of Committee on Delegated Legislation. The Committee shall inter alia be mandated to see whether the powers to make rules, regulations, bye- laws, schemes or other statutory instruments conferred by the Constitution or delegated by the Parliament have been timely and properly exercised within such conferment or delegation including the retrospectively involved in such exercise of power. This separate Committee for delegated legislation is in addition to the general provision in the Senate Rules empowering every Committee. The provision is reproduced as below: -

"158(2) Each Committee shall deal with the subject assigned to the Ministry with which it is concerned or any other relevant matter referred to it by the Senate."

In National Assembly, there is no separate Committee on Delegated Legislation but delegated legislation is scrutinized under the general provision in the Assembly Rules of Procedure, 2007, which is reproduced as below: -

"201(4) A Committee may examine the expenditures, administration, delegated legislation, public petitions and policies of the Ministry concerned and its associated public bodies and may forward its report of findings and recommendations to the Ministry and the Ministry shall submit its reply to the Committee."

Delegated legislation will normally be declared invalid on the following grounds:

Bad faith, that is to say, that powers entrusted for one purpose, are deliberately used with the design of achieving another, itself unauthorized or actually forbidden.

That it shows on its face a misconstruction of the enabling Act or a failure to comply with the conditions which that Act has prescribed for the exercise of the powers; and that it is not capable of being related to any of the purposes mentioned in the Act.

The removal of difficulty clause also falls under the category of delegated legislation and in most of the Federal statutes; the power to remove difficulty has been vested in the President but in various Federal statutes, the power to remove difficulty vests in the Federal Government. In some of the statutes, this clause is temporary whereas in some it is perpetual. In my view, since this clause has to be invoked in extraordinary circumstances, therefore, a safety valve shall always be provided in the form of proviso limiting the invocation of provision for a period of one year or so from the commencement of the Act. My personal view is that while drafting the removal of difficulty clause, the powers shall not be vested in the Federal Government or Provincial Government, as the case may be. This power shall be vested in the President or Governor, as the case may be. The reason is that although it is also a form of enabling provision containing delegation yet is different from enabling provisions of delegated legislation where the subordinate legislation making powers are given to the Federal or Provincial Governments. Since it is a dangerous delegation therefore closed period of one or two years should also be mentioned in it. This provision shall be very carefully and sparingly used by a body other than the Federal Government or Provincial Government. In other words, this provision will be invoked by the Government when the matter cannot be resolved through delegated legislation,

therefore, a separate body should have this power to ensure that the Government is not overstepping or transgressing from its mandate of delegated legislation. Hence removal of difficulty clause power should vest in the President or Governor, as the case may be.

Bibliography

Crabbe, V. C. R. A. C. "Legislative Drafting Vol I." (2012).
Legislative Drafting (Second Edition) by G.C. Thornton
Fundamental Law of Pakistan by A.K. Brohi
Understanding Statutes (Second Edition) by S.M. Zafar
Statutory Interpretation (14th Edition) by GP Singh
Constitution of Pakistan
Rules of Procedure and Conduct of Business in Senate, 2012
Rules of Procedure and Conduct of Business in National Assembly, 2007
Government Rules of Business, 1973
General Clauses Act, 1897
Income Tax Ordinance, 2001
Oil and Gas Regulatory Authority Ordinance, 2002
Case Laws cited within the Research Paper
Corrigenda of SRO 1125(I)/2009, dated the 21st December, 2009