

DISSERTATION

ON

**The Power of Delegated Legislation and its Constitutional
Parameters: A Critical Analysis**

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DECLARATION

I hereby do solemnly declare that the work presented in the dissertation has been carried out by me and has not been previously submitted to any other institution. The work I have presented does not breach any copyright. I further undertake to indemnify the University against any loss or damage arising from a breach of the foregoing obligations.

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List of Abbreviations

FPSP- Fundamental Principles of State policy

FR- Fundamental Rights

BMDC-Bangladesh Medical and Dental Council

BTRC-Bangladesh Telecommunication Regulatory Commission

GNI-Global Network Initiative

TIB-Telecommunication and Information Broadcasting

BRTA-Bangladesh Road Transportation Authority

SAT-State Acquisition and Tenancy

PIL-Public Interest Litigations

FAP-Flood Action Plan

BELA-Bangladesh Environmental Lawyers Associations

SRO-Statutory Regulatory Order

NBR-National Board of Revenue

ASK- Ain O Shalish Kendro

ABSTRACT

The main aim of this paper is to analyze the constitutional Parameters of delegated legislation, which discusses the consistency of delegated laws per the constitution. In Bangladesh, the executive branch of the Government is empowered to legislate rules, regulations and by-laws for better administration and governance. As Bangladesh follows the supremacy of the Constitution, these secondary laws are subject to constitutional scrutiny. Moreover, the doctrine of severability and the doctrine of eclipse are also embodied in the constitution. Even though unconstitutional secondary laws can dominate the legal arena in Bangladesh if their vires are not challenged in the High Court. The recent trend shows that nowadays the government prefers to govern the state through delegated laws and as a result they are enacted in an alarming rate. Most of the time, the authorities making these laws do not maintain the constitutional obligations which sometimes leads to the violation of the constitutional parameters of the law-making. This paper argues that the excessive law-making through delegated legislation causes grave unconstitutionality in day to day activity of the government. The paper also argues that the law-making process through delegated legislation remains outside the ambit of proper check and balance. To substantiate the paper depicted the law-making process through delegation and pointed out the unconstitutionality in the process. Hence, the paper concludes that the constitutional dream of establishing rule of law will remain impossible if the law-making process remains unconstitutional at the secondary stage.

CHAPTER: 1

INTRODUCTION

Parliament has an essential role in the creation of laws and delegated legislation is a law which allows bodies below the parliament to formulate their own. Delegated legislation has three main forms such as By-laws, orders in the council and statutory instruments.¹ Generally, the legislature enacts a law and makes provisions fixing the necessities and area of operation. Sometimes, the legislatures after enacting laws leave it to the executive branch of the government to determine the commencement time or the area of operation of the enactments which is called conditional legislation and these are where the scope of discussion of the research topic begins.² Sometimes the legislature enacts the skeleton laws and leaves the detailed laws to be made by the secondary authority. Simply saying, a law-making power which is vested upon the secondary authority is called 'Delegated legislation'.³ According to Salmond, legislation has two parts, either supreme or subordinate. Supreme legislation proceeds from the sovereign power in the state which cannot be repealed, annulled or controlled by any other legislative authority. On the other hand, the subordinate legislation proceeds by an authority other than the sovereign.⁴ The delegated law shall be made with the permission of parliament where the makers are some entity or body that is not a member of parliament. It must follow the standards of the parliamentary parent act to create a new law or to make detailed law in an area. This legislation can also be referred to as secondary legislation as parliamentary laws are supreme sovereign power. Next it flows to a delegated authority other than the sovereign power.

¹ The Constitution of People's Republic of Bangladesh, Article 65

² Delegated legislation and its control <<https://blog.ipleaders.in/delegated-legislation/#:~:text=There%20are%20three%20forms%20of,in%20council%20and%20by%2Dlaws.>>accessed on 4 April,2022.

³ Mahmudul Islam-Interpretation of statutes (Mullick Books,1st edition 2015)[.216]

⁴ V.D Mahajan- Jurisprudence & Legal Theory(fifth Edition) [159]

Therefore it is dependent on superior or supreme authority for its continuance and existence. This law can be formed such as rules, orders, bye-laws, schemes and notifications.⁵

Although there are necessities of this power, it's not beyond criticism. It creates a way of lack of scrutiny in parliament. Moreover, it creates a lack of democracy and leads to inconsistency of law. In addition, delegated legislation has the same legal standing as the act of parliament if there is no inconsistency with the parent act.⁶ It is well accepted that parliament possesses legislative power as an inherent and original power delegated by the constitution. The parliament cannot delegate this power as its choice. Rather it needs to be entrusted with the conscience of constitutional obligations. In C.T Carr's opinion, the delegated legislation shall be made by a trustworthy authority. The power which is beyond the concerned authority to exercise shall be declared by the court's discretion as an 'ultra vires' legislation.⁷ Observing the whole legislative semiotic, it would perhaps be more factual to say that the government makes laws subject to prior parliamentary consent. Although its existence and continuance staple wisely depends on legislators, many past and recent issues show that legislative power merely manifested rather than delegated legislative power. There is a hazy outline between the two fundamental powers of legislation and administration. As well as it reflects a precarious form of power being misled.⁸

1.1: Scope, Limitation and Objectives of The Research paper

Scope

The research paper has shown the theoretical and jurisprudential discussion about the power of delegated laws in Bangladesh and its constitutional parameters. It has shown delegated legislation's legitimacy in different countries. The paper is more focused on Bangladesh delegated law makings where different

⁵ Delegated Legislation <<https://www.lawteacher.net/free-law-essays/constitutional-law/delegated-legislation-is-law.php>> accessed on 28 March, 2022.

⁶Control over delegated legislation<<https://www.lawyersnjurists.com/article/the-control-over-delegated-legislation-is-the-most-critical-aspect-of-administrative-law-as-otherwise-subordinate-can-easily-be-drafted-arbitrarily/>>accessed on, 28 march 2022.

⁷ Pear and shield (n.4) [160]

⁸ C.K Takwani, Lectures on Administrative Law ;(Eastern Book Company, fifth edition,2012) [41]

delegated laws in Bangladesh have been targeted to define their legitimacy. The paper analyzes some cases related to problems of delegated laws in Bangladesh. This research paper has addressed the constitutional parameter and interpretation of statutes in delegated law-making..

Limitations

There was a time limitation for this research as it is related to delegated laws, the research couldn't arrange more examples and a depth discussion about it. Another limitation was the limited information access to the sites as important articles required a subscription for it. So it has become quite difficult to research qualitatively. The research did not address any contradictory and biased views in any opinionated part as for a better discussion it is necessary not to make any biased view.

Objective

The objective part of this research paper is to find out the constitutional limitations or the parameters while making this law. Another objective is to find the necessity to control this power by the controlling authority and the main purpose of this research paper is to question the power of delegated legislation and its constitutional parameter.

1.2: Research Question:

The relevant research questions arise for this research paper are:

- What are the constitutional perimeters of delegated legislation?
- Why is it necessary to control delegated legislation power?

1.3: Research Methodology:

This research will be based on a critical and analytical study. The nature of this research study is descriptive as well as suggestive. This research study mainly includes primary resources such as the Constitution and parent acts, instruments and secondary resources, consisting of books, newspaper articles, and journal articles from the national and international levels. Internet sources have also been used for research. The findings of the study are written in a qualitative manner rather than in quantitative terms and the recommendations are written both in qualitative and quantitative terms.

CHAPTER 2:

Background and Historical Growth of Delegated Legislation

There is no doubt that the 20th century has witnessed the rapid growth of delegated legislation in almost all the countries of the world. But this power has been frequently exercised when kings ruled, for example, the existence of delegated laws in England was accepted by the Scholar Dicey in his famous book *Law and the Constitution*⁹ published in 1915. He opined that, during the last 30 years, the delegated legislation increased in England. It means the existence of delegated legislation was there before and gradually its necessity increased. In the 19th century¹⁰ delegated legislation became more “common, increasing” the social and economic reforms.¹¹

It has been devised by the administrators rather than the legislators since this greatest formulation of delegated laws ruling over the people.¹² In the modern era, it is true that this law-making power is being broadly used by the authorized body of delegated power or the administrators, that's why some scholars have given contradictory opinions about this power and Cooley is one of them who has set a critical view explaining the Latin maxim “*Delegatus non potest delegari*”, he explained that it is a settled principle that the legislature cannot confer the law-making power to anybody or authority. However, this power's necessity could not be denied although it creates a contradiction with this maxim.¹³ In this chapter, the research paper will show how this power has evolved historically and what became its legal standard of it in different countries while focusing on delegated legislation in Bangladesh and other South Asian countries

⁹ Dicey Albert Venn, *Law of the Constitution*(Published in 1915)

¹⁰ Pear and shield (n.8) [67]

¹¹ *ibid*

¹² Delegated legislation, Reason For growth, Classification <<https://www.lawnn.com/delegated-legislation-definition-reasons-for-growth-classification/>>accessed on 29 March, 2022.

¹³ Delegated legislation, Development and parliamentary control <<http://www.legalservicesindia.com/article/2421/Delegated-Legislation-Development-and-Parliamentary-Control.html>>accessed on 29 March, 2022.

2.1: Reasons for Growth of this Power:

In a welfare state, there are many issues related to citizens that need to be looked after by the government such as health, education, commerce and employment which result in the propagation of delegated legislation on the administrative functions. It is necessary to take any immediate action policymaking for a welfare state. Again, it has been mostly assumed that parliamentary members may be the best politicians but they are not experts in dealing with highly technical matters. That's why granting legislative power has been frequent to deal with these technical issues. Moreover, the delegation of law-making power saves the time and overload of the parliament. Thus its necessity began to grow for every modern democratic state.¹⁴

In most Asian countries implications and growth of delegated legislation have been noticeable.

2.1.1: Delegated Legislation in India:

The historical backdrop of the Indian delegation of power has been followed from the Charter Act of 1833¹⁵, in the period when the East India Company was capturing the political impact. The act vested the administrative power in the hand of the official body, such as the Governor-General in the council who was empowered to make laws, modify or correct. Delegated legislation in India wholly originated under British rule at that time. In "Queen vs. Burah"¹⁶, the case principle says that the 'Council of Governor General' is the supreme legislature, which are entitled to transfer certain law-making powers to the provincial executors. The concept was accepted at the time of the passing of the "New Delhi Act of 1912".¹⁷

¹⁴ Growth of Delegated Legislation <https://thefactfactor.com/facts/law/civil_law/administrative-law/growth-of-delegated-legislation/4262/> accessed on 30 March, 2022.

¹⁵ The Charter Act, 1833

¹⁶ Queen vs. Burah (1878) 5 I.A.178

¹⁷ Delhi Laws Act, 1912

The Indian constitution has included the concept of delegating laws in article 312.¹⁸ In “Panama Refining Co. V. Rayan” the supreme court of India held that congress can delegate power to the executives under two conditions. Firstly, the policies shall be laid down by the statute. Secondly, the body shall make a standard and within certain limits of administration the power of making subordinate rule shall be given. In, “M.p High court Bar Assn. V. Union of India” the settled principle says that, once the power of making laws and policies is used by the legislature, it opens the door to delegate ancillary and subordinate powers for policymaking in an effective and useful way. This case law equally anticipated the unlimited delegation of legislation. It says the power to make laws cannot be delegated by the legislature to the executive as a legislature cannot create a parallel legislature nor destroy its legislative character. Principle or supreme legislation power must be retained by the legislature itself.¹⁹ Although the power has grown historically, the history itself says the limits about delegation of lawmaking power and case of the Indian constitution doesn’t expressly say about appointing any authoritative power, rather in the legal sight it says that the power shall be assigned to establish the constitutional flexibility in needs of time.²⁰

2.1.2: Delegated legislation in Pakistan:

Lawmaking authority in Pakistan usually rests with parliament or the national assembly and senate. The law made by an authority other than the parliament shall be made with the permission of the parliament. So it can be said that with the act of parliament delegated legislation is allowed to be passed as well as it must have consistency with the parent act, like the parent act is the framework of the subordinate laws. In Pakistan constitution Part V, article 141 and 142 says about federal and provincial laws. Here the Pakistan constitution has clearly mentioned that the parliament makes federal laws and delegates some of its power to make provincial laws to the authorized body.²¹ A reputed judgment PLD 1991 SC 14 has

¹⁸ Article 312 in The Constitution Of India, 1949

¹⁹ Pear and shields (n.4) [84]

²⁰ Delegated Legislation in India <<https://blog.ipleaders.in/delegated-legislation-in-india/>> accessed on 30 March, 2022.

²¹ Delegated Legislation : A case study of Pakistan <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847989> accessed on 1 April, 2022.

provided its principle about delegated law that to utilize this power the law shall not be arbitrary; in discretionary use of this power the basis of this case law shall be followed. The summary of this judgment is that "structuring discretion amounts to organizing, regularizing and producing order in it. By this, the settlement will attain a higher quality of justice."²²

The constitution of 1973, states that the sovereign power belongs to ALLAH and in article 2A clearly stated that the sovereign delegated the lawmaking power to the state of Pakistan in accordance and obeying the injunctions of the Quran and Sunnah. In article 270(4) of the Pakistan constitution, the validity or legal standing of the delegated legislation has been explained and in article 270A (3) the competent authorities of that power have been crystal clearly described.²³ Because of parliamentary loads, technical necessity, for flexible enforcement of laws, delegated legislation became a part of Pakistan's good governance.²⁴

2.1.3: Delegated Legislation in Nepal:

Under the Interim constitution of Nepal 2007²⁵ Nepal has a unicameral parliament and it has three main committees such as i) Thematic committee, ii) Procedural committee, iii) Constitutional committee.²⁶ Each committee performs its responsibilities. In any law-making process, the bill may be introduced in the house by any member of the parliament. Under The Nepal constitution, part 8, article 84-88²⁷ serially says about, the authority to introduce bills, the procedure of passage of bills, withdrawal of bills and certification of bills. It clearly mentions the exercise of delegated legislation. Under those following, articles delegated laws are procedurally controlled by consultation, recommendation or approval and publication. Delegated legislation is formed as per Legislature-

²² Ibid

²³ The Constitution of Islamic Republic of Pakistan, 1973

<http://www.na.gov.pk/uploads/documents/1333523681_951.pdf> accessed 1 April, 2022.

²⁴ Pear and shields (n.20)

²⁵ Interim constitution of Nepal, 2007

²⁶ Ibid

²⁷ Ibid, article 84-88

Parliament Regulation 2007. The concerned committee checks whether the subordinate legislation is made in accordance with the aim of the constitution or any other Acts. The concerned committee amends if any provision seems unconstitutional or if new things to be added. After the parliament's discussion in detail through question and answer the provisions are granted and amended as per regulation. Thus delegated legislation is made in the parliament of Nepal.²⁸

2.1.4: Delegated Legislation in Bangladesh:

Since the British rule, delegated legislation has been familiar in Bangladesh. The Constitution's Article 65(1)²⁹ has expressly allowed delegated legislation by the parliament. By this section, it is now a well-settled principle that the administrator or the concerned authority has been empowered to make legislation with the approval of parliament.³⁰ The empowered proviso 65(1) says that, the parliament is free to delegate to any authority to make rules, regulations, orders, and by-laws by the act of parliament.³¹

In “Bangladesh & Other 15 vs. M/S. Eastern Beverage Industries Ltd.23 BLD(AD) 68”³² the court declared that, Under Article 65(1)³³, the delegated legislation making power can be delegated by the parliament to a body other than the parliament.³⁴ Rule of law is a prerequisite for a better democracy and for the solution of many problems of a country to ensure the citizens’ rights of a civilized society. Delegated laws in Bangladesh have an interesting feature where delegated laws are the product of superfluous power granted by the primary laws.³⁵

Beyond the provision of Article 65(1)³⁶ The constitution has allowed the President extensive powers to make rules, regulations and orders “until so made by the act of parliament”. In Bangladesh, the exercise

²⁸ Md. Ershadul Karim and Sirjana Sharma Pokhrel, Research Guide of the Legal System of Kingdom of Nepal <<https://www.nyulawglobal.org/globalex/Nepal.html>> accessed on 2 April, 2022.

²⁹ The Constitution of People’s Republic of Bangladesh, Article, 65

³⁰ Md. Mostafizur Rahman, The role of legislature in upholding rule of law in Bangladesh

³¹ Pear and shields (n.20)

³² Bangladesh V M/S Eastern Industries (BD)Ltd, V ADC (2008) 785; Case No Civil Petition for leave to appeal No 1468

³³ Supra note, 32

³⁴ Prof. Md. Altaf Hossain-The constitution of Bangladesh,(Five Jewel Publications,5th Edition 2015)[68]

³⁵ Md.Rizwanul Islam’ Delegated Laws in Bangladesh”, *The Daily Star* (2006)<<https://www.thedailystar.net/law-our-rights/delegated-laws-bangladesh-576271>> accessed 2 April, 2022.

³⁶ The Constitution of People’s Republic of Bangladesh, Article 65

of rule-making powers by the executive in the name of the President has been frequent. Again an ordinance can be made in pursuance of article 93³⁷ by the president where the President also can delegate the power of making rules, by-laws or regulations.³⁸

The parliament of Bangladesh generally enacts the skeleton laws and leaves the essential legislative aspects in favor of the delegated legislation. It must have a standard to guide rulemaking policy instead of declaring “the policy of law and fix legal principles”. It is evident that almost 90 per cent of Acts and ordinances are provided to the executive or the administrative rulemaking power through delegated legislation in Bangladesh. So the largest portion of laws is made by delegated legislation.³⁹ Thus the delegated legislation in Bangladesh is more practicable, which is noticeably undermining the legislative supremacy of Bangladesh.⁴⁰

³⁷ Ibid Article, 93

³⁸ Abdul Halim - Constitution, Constitutional law and Politics: Bangladesh perspective (CCB foundation, fifth edition, 2012)[251-252]

³⁹ Ibid

⁴⁰ M. Shamsur Rahman, 'Delegated Legislation and the Cause of Institutionalization of Democracy in Bangladesh: A Synoptic View' <<https://dokument.pub/delegated-legislation-and-the-cause-of-flipbook-pdf.html> > accessed on 4 April, 2022.

CHAPTER 3:

Constitutional Parameters of Delegated Legislation in Bangladesh

The Bangladesh Constitution is the supreme law of the land.⁴¹ The legislation derives all the legislative power from the constitution.⁴² In the preamble, it has been declared that the people are the source of the power of this constitution. The constitution is the basis of the law and order of the state. In this chapter the research paper will show the constitutional standards and limitations for making laws as well as delegated legislation and some case principles to establish those constitutional standards of lawmaking.⁴³

3.1: Rule of Law:

Rule of law is a structure which protects the citizen from abusive and arbitrary use of the government's power. The term rule of law is from the French term '*La Principale de Legality*' (the principle of legality) which refers to a government based on law, and it is opposed to arbitrary power.⁴⁴

In 1885 professor A.V Dicey defined the rule of law with three concepts:

- Except breaches of law established in the ordinary courts of the land, no man can be punishable by authorities.
- Every man is equal before the law in subject to the ordinary law of the land.
- The Constitution is the result of the ordinary law of the land.⁴⁵

Bangladesh's constitution imposes obligations to follow and maintain rule of law through primary and delegated laws. It has reflected the ideology of rule of law in some articles given below

- Article 27⁴⁶ guarantees all the citizens are equal before the law.

⁴¹ The Constitution of People's Republic of Bangladesh, Article 7

⁴² Ibid, Article 65

⁴³ The significance of preamble of Bangladesh <<https://www.lawteacher.net/free-law-essays/administrative-law/term-paper-the-significance-law-essays.php> > accessed on 4 April, 2022

⁴⁴ Rule of law in context of Bangladesh <<https://www.lawteacher.net/free-law-essays/constitutional-law/rule-of-law-in-context-of-bangladesh-constitutional-law-essay.php> > accessed on 5 April, 2022.

⁴⁵ Dicey, A.V, Law of the constitution, [202]

- Article 31⁴⁷ guarantees equal protection of the law.
- Part III (article 26-47)⁴⁸ guarantees the fundamental rights and their effective enforcement in articles 44⁴⁹ and 102.⁵⁰
- Article 7⁵¹ and 26⁵² impose limitations on the legislature not to make inconsistent laws with constitutional provisions.
- Right to make a representative body answerable to the people, guaranteed in articles 7(1)⁵³, 11⁵⁴, 55⁵⁵, 56⁵⁶, 57⁵⁷ and 65(2).⁵⁸

Still, the problems remained because some provisions in the constitution, such as emergency, preventive detention, ordinance-making power of the president, involvement of the executives in the judiciary, and Comptroller and Auditor General's dependence on the executive are amounting to block against rule of law. Rule of law is the mandatory part of the constitution to operate any other laws.⁵⁹

3.2: Constitutional Supremacy:

The provision of constitutional supremacy means that not only the legislative functions but also the judiciary and the executive activities are guided and regulated by the constitution.⁶⁰

- Article 7(2)⁶¹ & article 26⁶² mention that, any laws inconsistent with Part III (the fundamental rights) of the republic shall extend to be void.

⁴⁶ The Constitution of People's Republic of Bangladesh, Article 7

⁴⁷ Ibid, Article 27

⁴⁸ Ibid, Part III

⁴⁹ Ibid, Article 44

⁵⁰ Ibid, Article 102

⁵¹ Ibid, Article 7

⁵² Ibid, Article 26

⁵³ Ibid, Article 7

⁵⁴ Ibid, Article 11

⁵⁵ Ibid, Article 55

⁵⁶ Ibid, Article 56

⁵⁷ Ibid, Article 57

⁵⁸ Ibid, Article 65

⁵⁹ The Significance of Preamble of Bangladesh <<https://www.lawteacher.net/free-law-essays/administrative-law/term-paper-the-significance-law-essays.php>> accessed on 7 April, 2022.

⁶⁰ Talukdar Rasel Mahmud, 'Judicial role in constitutional supremacy, *Daily Stars* (21 April 2015) <<https://www.thedailystar.net/judicial-role-in-constitutional-supremacy-6730>> accessed on 7 April, 2022

- Article 65⁶³ mentions that the legislative powers of the republic are the subject to the provisions of the constitution being vested to the parliament.
- Constitutionality of the actions taken by the legislative and executive organs is implicitly pre-supposed to be examined under articles 94 and 95 as these articles ensure an independent judiciary. The Supreme Court under article 102 is enabled to scrutinize governmental actions if the actions are violative to the fundamental rights. Again, Supreme Court by judicial review examines the constitutionality of any law passed by the parliament under articles 7⁶⁴ and 26⁶⁵ of the constitution.⁶⁶

A glaring example of constitutionality is “Anwar Hossain Chowdhury V. Bangladesh” ⁶⁷ case or the historic eight amendment case which expressly speaks about

- Supremacy of the people's will and the government’s character as republican.
- The solemn expression of the will of the people is the supremacy of the constitution,
- Voidability of other laws inconsistent with this supreme law
- Three organs performing their functions by and under the constitution is the supremacy obligation of the constitution.⁶⁸

These conditions of constitutional supremacy shall be ensured while making any other laws.

3.3: Basic Structure of Constitution:

In the substantive meaning of this doctrine of the basic structure are those fundamental principles and objectives of the constitution which are presumed as its structural pillars. Violating these principles will destroy its original and inherent identity and character. So if it is found that any constitutional amendment

⁶¹ The Constitution of People’s Republic of Bangladesh, Article 7

⁶² Ibid, Article 26

⁶³ Ibid, Article 65

⁶⁴ The Constitution of People’s Republic of Bangladesh, Article 7

⁶⁵ Ibid, Article 26

⁶⁶ Pear and shield (n.38) [60-61]

⁶⁷ Anwar Hossain Chowdhury V. Bangladesh 1989 B.L.D. (SPL) 1, 41 D.L.R. (AD) 165 (1989)

⁶⁸ 1989 BLD(sol) 1. At o. 28

or law is likely to destroy any of these basic features then the amendment or law should be declared void.⁶⁹

In “Kesavananda Bharati V State of Kerala”⁷⁰ the Indian Supreme Court considered the following feature as the basic structure of the Indian constitution:

- Constitutional supremacy
- Republican and democratic forms of government
- Separation of powers between the executive, legislative and judiciary
- Federal character of the constitution⁷¹

In “Anwar Hossain Chowdhury V Bangladesh”⁷² the Supreme Court of Bangladesh accepted the doctrine for the first time and declared that the constitution stands on certain fundamental principles which are the structural pillar of the constitution. These basic features are:

- Supremacy of the constitution in article 7.⁷³
- Democracy in the preamble.
- Republican government in article 1⁷⁴ of the constitution.
- Independence in judiciary under article 22⁷⁵ of the constitution
- Unitary state in article 9⁷⁶ of the constitution
- Separation of power in article 22⁷⁷ of the constitution
- Fundamental rights in from article 26 to 47A⁷⁸ of the constitution.⁷⁹

Article 7A, 7B were inserted after article 7 in a bid to end the takeover of power through extra-constitutional means. Also, some basic provisions of the constitution were made unamendable and any

⁶⁹ Md. Razidur Rahaman; The Basic Structures of the constitution of Bangladesh.

⁷⁰ Kesavananda Bharati V State of Kerala AIR 1973 SC 1461

⁷¹ Ibid

⁷² Supra note 67

⁷³ The Constitution of People’s Republic of Bangladesh, Article 7

⁷⁴ Ibid, Article 1

⁷⁵ Ibid, Article 22

⁷⁶ Ibid, Article 9

⁷⁷ Ibid, Article 22

⁷⁸ Ibid, Articles 26-47A

⁷⁹ Supra note 69

laws and order against this part is presumed to be ultra vires according to the doctrine of the basic structure⁸⁰

These features were held that the structural pillar of the constitution cannot be amended by its amending power as if these pillars are demolished or damaged, then the whole constitutional edifice will fall down.⁸¹

3.4: Fundamental rights:

Bangladesh's constitution has guaranteed Fundamental rights (hereinafter, FR) in part III (article 26-47), which says all the past laws inconsistent with this part will be void. Article 26(1)⁸² ensures that no law existing in Bangladesh from the commencement of the constitution of Bangladesh shall be allowed to remain in force if it is found to be inconsistent with any fundamental rights mentioned in the constitution. Article 26(2)⁸³ enjoins that it is the state's duty not to legislate or violate fundamental rights. However, the reasonable restriction on this part shall be imposed. The parliament can impose restrictions on 4 fundamental rights. These are:

- Right to protection of law
- Protection of right to life and personal liberty
- Right to lawful possession
- Protection of property.
- Freedom of association
- Freedom of movement

⁸⁰ Salma Akhter: Amendments to the Constitution of Bangladesh 1973-2011:Background, Politics and Impacts

⁸¹ Ibid

⁸² The Constitution of People's Republic of Bangladesh, Article 26

⁸³ Ibid

The prohibition or restriction imposed by law shall not invoke a violation of any fundamental rights, and shall not be made under malafide exercise of power.⁸⁴ The reasonability restriction will be examined by the court if it does not follow these two rules and the unreasonable one can be declared ultra vires.⁸⁵

Justice Munir held in “Jibendra Kishore V. Province of East Pakistan”⁸⁶ that the conception of fundamental rights is guaranteed by the constitution which cannot be taken away by the law. It is technically fraud to the citizens for the makers of the constitution to say that a right is fundamental but it may be taken away by ordinary law of the land.⁸⁷

In the case “State vs. Dosso”⁸⁸, the same view was affirmed by the court.⁸⁹ In “Golaknath vs. the State of Punjab”⁹⁰ held that the fundamental rights are inalienable rights for the citizens. The constitution enables an individual to successfully oppose the whole community and the state to claim his right.⁹¹ The articles of absolute fundamental rights of the citizens which cannot be restricted are 27-30⁹², 33⁹³, 34⁹⁴, 35⁹⁵,44⁹⁶and the articles upon which restriction can be made are 36-40, 43 which are conditional fundamental rights.⁹⁷ If FR is the cornerstone of the basic structure and supremacy of the constitution is not ensured or hampered by any other law, it will be a violation of the constitution.

⁸⁴ Gursharan Singh v New Delhi Municipal Corp, AIR 1996 SC 1175

⁸⁵ Vidya Dhar Mahajan , Constitutional History of India (S chand & co ,4th ed,1960) 265

⁸⁶ Jibendra Kishore V. Province of East Pakistan ,PLD 1957 SC (PAK) 9

⁸⁷ Ibid

⁸⁸ State vs. Dosso PLD 1958 SC (PAK) 533

⁸⁹ Ibid

⁹⁰ Golaknath V. State of Punjab 1967 AIR 1643, 1967 SCR (2) 762)

⁹¹ Ibid

⁹² The Constitution of People’s Republic of Bangladesh, Articles 27-30

⁹³ Ibid, Article 33

⁹⁴ Ibid, Article 34

⁹⁵ Ibid, Article 35

⁹⁶ Ibid, Article 44

⁹⁷ Fundamental rights in the constitution of Bangladesh <<https://www.lawyersnjurists.com/article/fundamental-rights-in-the-constitution-of-bangladesh-2/>> accessed 10 April

3.5: Fundamental Principles of State Policy:

Articles 8 to 25⁹⁸ (Part II) of the constitution, discuss “Fundamental Principles of State Policy” (hereinafter, FPSP). These principles are fundamental in nature as they oblige the citizens and three main organs of the state- legislature, executive and judiciary. Under the obligation of Article 8(2)⁹⁹ These principles shall be fundamental to the governance in making laws and they shall be a guide to the interpretation of the constitution and of other laws in Bangladesh but these principles are not judicially enforceable like fundamental rights.¹⁰⁰

In “Kudrati- Elahi Panir V Bangladesh”¹⁰¹ the court criticized the standing of the Government and called for reconsideration of FPSP on specific grounds:

- The constitution in article 7(2) includes both ‘Laws’ and ‘Principles’ embodied in it. Article 8(2) requires the state to apply these principles when making laws which include delegated laws.¹⁰²
- Fundamental rights impose a duty on the state not to violate them, so also directive principles impose a duty on the state to apply them in making laws and delegated laws.¹⁰³

To accommodate FPSP’s justifiability and related laws¹⁰⁴ There are two ways. Firstly, as an interpretative tool where the interpretation scope of FPSP can be elaborated and secondly, resorting to Fundamental Rights (hereinafter FR), which says about indirect enforcement of FPSP to FR. It is argued that rights ancillary to or existent within the fundamental rights shall also be fundamental and be protected while making laws.¹⁰⁵

⁹⁸ Ibid, Articles 8-25

⁹⁹ Ibid, Article 8

¹⁰⁰ Kudrat -E-Elahi Panir and others V Bangladesh 44 DLR (AD)319,para 2

¹⁰¹ Ibid

¹⁰² AKM.Shamsul Huda ,The Constitution of Bangladesh Volume 1,1st edition, Rita Court Chittagong [281]

¹⁰³ Mc,Jain Kangi, The Constitution Of India, Vol 2,4th Edition ,India Law House ,2204,[938]

¹⁰⁴ The Constitution of People's Republic of Bangladesh, article 152 defines “law” means any Act, ordinance, order, rule, regulation, bye-law, notification or other legal instrument and any custom or usage, having the force of law in Bangladesh.

¹⁰⁵ Justice Md. Golam Rabbani ,Republic of Bangladesh Constitution [49]

3.6: Interpretation of Statutes:

In the case of delegated legislation, a doctrine '*ut res magis valeat quam pereat*' is acceptable. It says the court should try to illustrate delegated legislation in a manner which will bring the conformity of the constitutional provision and the delegating statute. If there are two interpretations possible and one of those is presumed as ultra vires, the court should adopt the one which will present the legislation as valid. Otherwise, the court will have to declare the delegated legislation ultra vires to the constitution.¹⁰⁶ Rules made under a statute must be read together with the parent statute as there must have a reasonable relation to the scope and object of the parent statute.¹⁰⁷ If the language of the parent statute seems plain and clear, rules must be interpreted for consistency and conformity with the parent statute. If this reconsideration is not possible the rules must give way to the plain terms of the statute.¹⁰⁸ But if the meaning of the words in a section of the parent statute is doubtful and the doubt is sometimes resolved by regulation in the same way by which the parent statute can modify the statute.¹⁰⁹ Section 24 of the General Clause Act provides where two interpretations of law are possible, one shall be avoided which makes the rules unworkable.¹¹⁰

¹⁰⁶ Re Hindu Women's Right to Property Act , AIR 1941 FC 72

¹⁰⁷ Mac Fisheries Ltd V Coventry Corporation (1957) 3 All ER 299

¹⁰⁸ Fazlur Rahman V Bangladesh, 53 DLR 237

¹⁰⁹ Brill V Buckingham C.C (1964) 1 QB 77

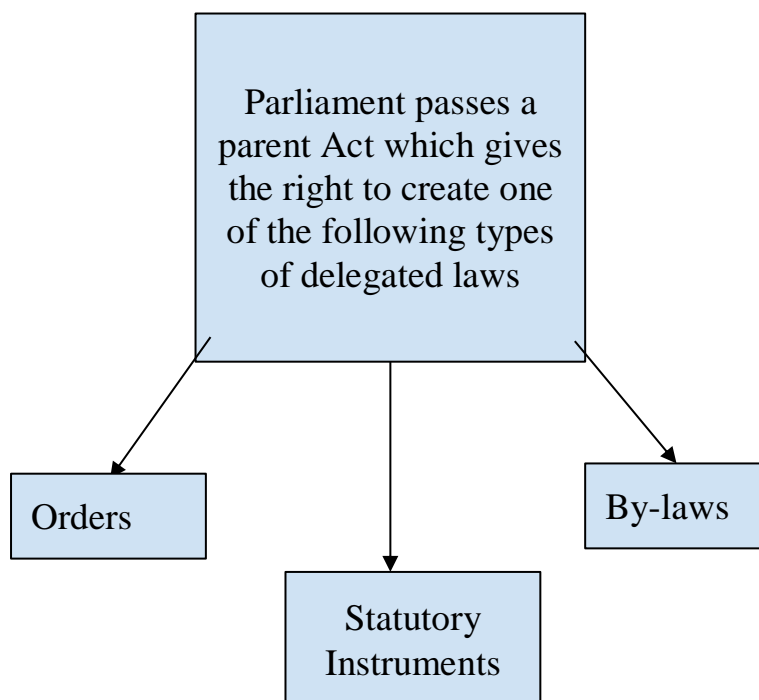
¹¹⁰ NC Singhal v India, AIR 1980 SC 1257

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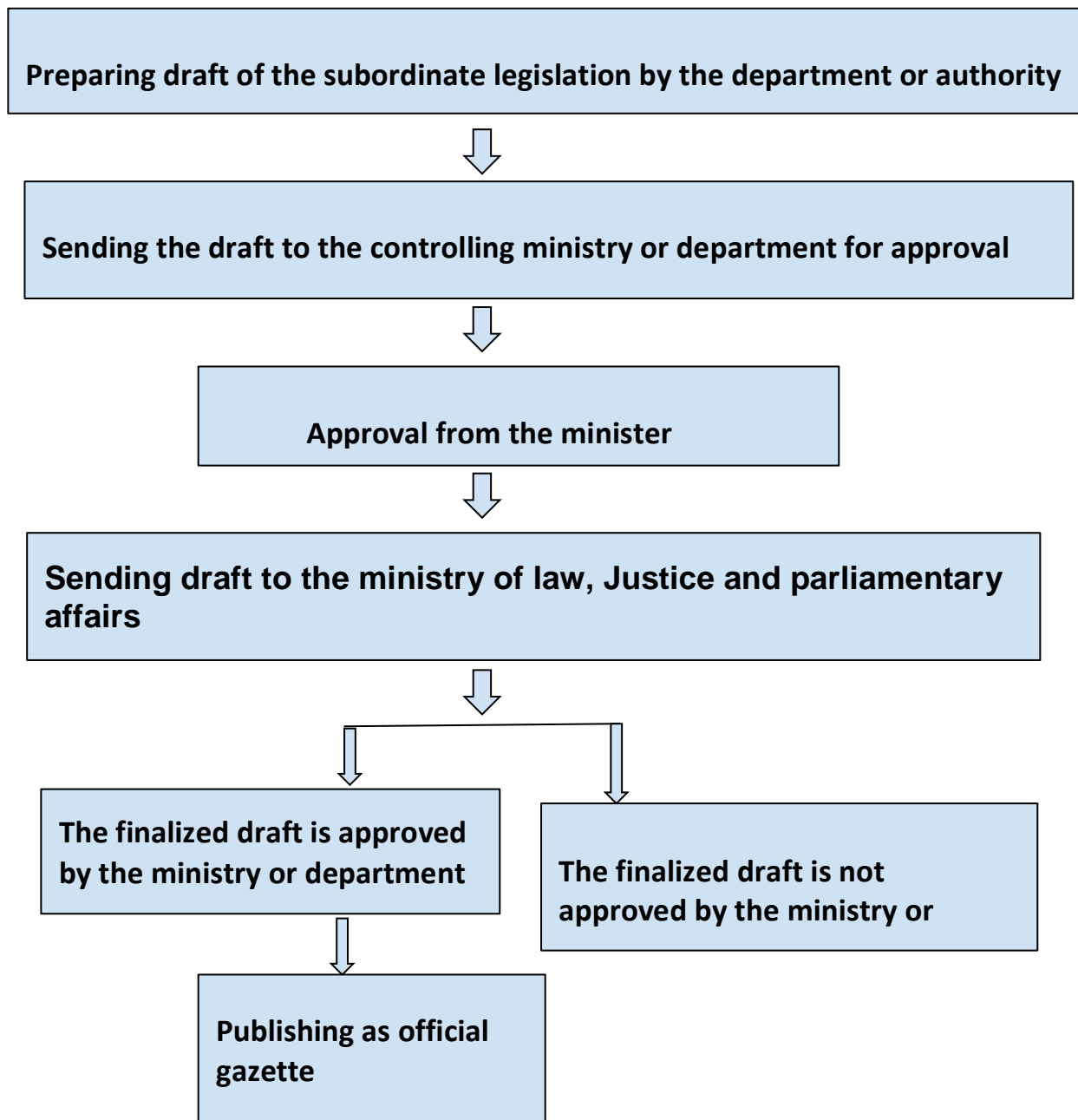
Delegated legislations: Making Process and Arising Problems

4.1: Structure of Subordinate Law:

This diagram shows the first stage to be a subordinate law from the parent act of parliament.



The following diagram shows the making process of a subordinate law.



The subordinate laws proceed by the concerned authority or department of the ministry and are then sent to the ministry having control over the authority or department for preliminary policy approval. The ministry tries to approve the policy at the level of the minister and for further review, it is sent to the Ministry of Law, justice and parliamentary affairs for further review. The legislative drafters examine to give the correct shape and language for the drafted law to ensure that there is no inconsistency with the

provisions of the parent Act. After frequent consultation and being examined by the ministry the finalized draft is approved by the concerned ministry. Once it is accepted the rules and regulations are published as an official gazette.¹¹¹

4.2: Arising Problems:

A defect in laws increases the chance of misuse of power. The following laws are some of those drafted/proposed or passed by particular ministries or lawful authorities having some provisional defects which are the grounds of misuse. The defect of law also can be in the parent act and any subordinate laws under it may inherit the defects.¹¹² That's why this discussion requires us to criticize both the parent act and the subordinate laws. The grounds for misuse from these defective laws are as follows:

4.2.1: Draft Regulation of BTRC, 2021

Under the ministry of Information and Broadcasting, Bangladesh Telecommunication Regulatory Commission (hereinafter BTRC) recently published a draft regulation 2021 which is threatening freedom of speech. Global Network Initiative has made a review in the policy briefing of “content regulations and human rights”. There is ambiguity in the obligations to trace and exchange information of the user. In the part “Media’s Code of ethics” section 11.01,” Publisher of online curator” and “publisher of news and event” have been included. The abusive part of this S.11 is that it may increase self-censorship. It will increase content removal unilaterally. Govt. agents have given too much authority to remove content. It will create confusion and lead to uncertainty as well the company representative will lose their right to freedom of expression and privacy. The Policy also allowed the disclosure of user messages to Govt. surveillance agencies. The agency will be empowered to trace the source of any message and

¹¹¹ Gavin Murphy ;How legislation is Drafted and enacted in Bangladesh

¹¹² Narendra Kumar v Union of India : AIR 1960 SC 430 : (1960) 2 SCR 375

identification. It would violate the privacy of the citizen and freedom of expression according to the article 39 of the constitution.¹¹³

4.2.2: Bangladesh Medical and Dental Council, 1983

Bangladesh Medical and Dental Council (BMDC)¹¹⁴ are empowered by the health ministry to take disciplinary action and to regulate and control the professional conduct of the doctor to take appropriate action if there is any negligence. The problems with BMDC's regulations are-

- In the part “The Code of Medical Ethics” of BMDC's regulation did not make any obligation for the public awareness about their medical rights,
- Provisions do not create strict liability for the doctor's negligence. Very few actions are taken by the council in case of negligence of the doctor. Also, the health ministry rarely exercises their action on that issue.¹¹⁵

If proper action is not taken and people do not know about their health rights by this policy, it may bring suffering for their right to life under **article 32** of the constitution.¹¹⁶

4.2.3: Draft BRTA Rules, 2021

Bangladesh Road Transportation Authority (hereinafter, BRTA) proposed amendment rules of the Motor Vehicle Ordinance by incorporating provisions for Electric Vehicles (hereinafter, EV). Bangladesh has thousands of battery rickshaws, and easy bikes in the name of electric vehicles which do not result in safe vehicles for people.

The rules are acceptable if the EV gets proper expenditure on the development of EV technologies. The draft rules need reconsideration on the ground of-

¹¹³ Prothom Alo, The draft regulation of BTRC is threatening freedom of speech <<https://en.prothomalo.com/topic/freedom-of-expression>> accessed on 22 April 2022.

¹¹⁴ Bangladesh Medical and Dental Council, 1983.

¹¹⁵ S.M. Masum Billah, Law Commission's proposal of making medical negligence law, *The Daily Star*, April 20, 2013 <<https://www.banglajol.info/index.php/NUJL/article/view/25942/17354>> accessed 22 April, 2022.

¹¹⁶ Kenneth J. Evans, *Medico-Legal Handbook for physicians in Canada*, (7th Ed, 2010).

- It is defuncting Motor vehicle Ordinance.
- It will legalize thousands of illegal vehicles allowing EV registration, such as battery rickshaws and easy bikes.
- It will provide illegal human hauliers rather than solving transportation problems in Bangladesh¹¹⁷ as without technical standards these vehicles cause a high risk of accidents.¹¹⁸ It will cause a violation of the right to life according to article 32 of the constitution.

4.2.4: Regulation Published under SAT ACT 1950.

The deputy commissioner of Kushtia during the corona pandemic declared and published a strict regulation under **section 92 of the State Acquisition and Tenancy Act, 1950**.¹¹⁹ That legal action will be taken if the landowners left their land uncultivated, moreover, the government will take away the land.

The publishing regulation has been criticized by a private organization, the association of land reform and development, saying that ownership of land is a fundamental right under **article 42** of the constitution which cannot be put out by the government.¹²⁰ However, the same article empowers the government to acquire land in the public interest but this regulation shows violating or harming issues of fundamental rights of the people without lawful grounds.¹²¹

The following chart shows whether constitutional parameters are maintained while laws are passed, proposed laws or drafted.

¹¹⁷ Munima Sultana, BRTA to amend law for registration of electric vehicles; *Financial Express*, Published 17 January 2021 <<https://www.thefinancialexpress.com.bd/trade/brta-to-amend-law-for-registration-of-electric-vehicles-1610858534>>accessed on 4 may, 2022.

¹¹⁸ Abdus Salam Shawon, Bangladesh on the road to an electric future, *The Daily Star*, Published 20 may, 2021<<https://www.thedailystar.net/tech-startup/news/bangladesh-the-road-electric-future-2180226>>accessed 4 may

¹¹⁹ State Acquisition and Tenancy Act,1950

¹²⁰ Rakib Hasnat, CoronaVirus: If you leave agricultural land without cultivating in Bangladesh, the government will take it, a notification was issued. *BBC News*, published 3 June 2020<<https://www.bbc.com/bengali/news-52912727>>accessed on 24 April 2022

¹²¹ Sakjawat Hossain shamim, Right to land: Is a fundamental right! *The Daily Star*, Published 4 march ,2014<<https://www.thedailystar.net/right-to-land-is-a-fundamental-right-13906>>accessed 24 on April 2022

4.2.5: Chart: Inconsistencies with Constitutional Parameters in the Laws Passed /Proposed or Drafted

Order/ Regulation/Rules	Rule of law	Fundamental Rights	Fundamental Principles of state policy	Constitutional Supremacy	Basic Structure of the constitution
Draft Regulation of BTRC 2021	Not maintained	Article 39 is not ensured	Not followed	FR is not maintained	FR and supremacy of constitution is not maintained
Regulations of Bangladesh Medical and Dental Council 1983		Article 32 is not ensured			
Draft BRTA Rules 2021		Article 32 is not ensured			
Regulation published under SAT ACT, 1950		Article 42 is not ensured			

In most laws, fundamental rights are not being maintained and FPSP is not followed. Laws inconsistent with FR lead to the non-maintenance of constitutional supremacy and the basic structures.

4.3: Cases Concerning Defective Delegated Legislation:

There are many cases, writs and PIL issued against the delegated laws enacted by the ministries. Some case principles are as follows:

4.3.1: Dr. Nurul Islam V Bangladesh¹²²

In this case provision from the parent act which was coupled with a public servant (retirement) rules declared ultra vires with the constitution, subsequently, the ministerial authority's action was held violative. Under s.9 (2) of the Public servant (Compulsory retirement) Act 1974, the petitioner was given retirement.¹²³ In the reason of completing 25 years of service assigned.

The validity of PSA s.9 (2) was challenged on the basis of **articles 27 and 29** of the constitution.

The government's argument was that it is not a discriminatory power rather it is in ex facie discretionary power vested in the government. The court couldn't find any valid reason and held that the following provision coupled with public servant (retirement) rules is void on the ground of being violative of **articles 27 and 29**.¹²⁴

4.3.2: North South University v Govt. of Bangladesh¹²⁵

It was issued that why the Statutory Regulatory Order no.268¹²⁶ -Ain/ Aikor/ 2018 under s. 44(4) withdraw tax exemptions in favor of the petition universities and impose 15% tax on their income. Petitioners' claim was to declare the SRO's demand without lawful authority. It was also a violation of **articles 15, and 17** of FPSP, a violation of **article 32** of FR and because of unreasonable discrimination it is a violation of **articles 27 and 31**. The court declared the SROs tax regulation on the private universities is ultra vires and the income tax ordinance is without lawful authority.¹²⁷

¹²² Dr. Nurul Islam V Bangladesh 1981 1BLD (AD)

¹²³ Public servant Act, 1974

¹²⁴ Ibid

¹²⁵ North South University v Govt of Bangladesh 2017 (2) LNJ 36

¹²⁶ Statutory Regulatory Order no.268

¹²⁷ ibid

4.3.3: BLAST and ASK vs. Secretary, Ministry of Law Justice and Parliamentary Affairs and Others¹²⁸

BLAST and ASK filed the writ petition challenging section 1(2) of Family Court Ordinance 1984¹²⁹. The ordinance bars the applicability of the family court ordinance in three hill tracts of Chittagong.

Under Chittagong Hill Track amended regulations¹³⁰ section 8(2), the joint district judge has all the jurisdiction to try civil and criminal cases except the family laws and customary laws of the tribal people. S. 8(4) empowers the mouza headman to settle family disputes for particular tribal people. But it is silent about non-tribal people. S. 4(1), 4(2) of that ordinance establishes family court under Assistant judge court but being no assistant judge court for the non-tribal people, they are deprived of accessing the judicial remedies for family disputes which brings contradiction with the Constitution, Articles 27 and 31. The HC issued Rule Nisi on the respondent authority to show cause why these provisions should not be amended.¹³¹

4.3.4: BLAST and ASK vs. Bangladesh and others¹³²

BLAST and ASK filed against systematic govt. failure to take action against corporal punishment in schools and Madrasas. The intermediate and secondary education ordinance 1961¹³³ and s.39 (2) (XXIV) of the regulations of 1996 prohibit any sort of punishment for the children. The concerned authority of the Ministry of Board of Education's failure to take action amounts to a violation of FR guaranteed under **articles 27, 31, 32** of the constitution. The HCD ordered Rule Nisi to show cause why the government employees' involvement shouldn't be declared in such a violation of constitutional rights. Besides ordered the Ministry of Education to investigate and punish such incidents of corporal punishment.

¹²⁸ BLAST and ASK v Secretary, Ministry of Law Justice and Parliamentary Affairs and others, w.p no. 2813 of 2009

¹²⁹ Family Court Ordinance 1984 is made by the promulgation of the president. For details Chapter 2 discussed that the president's ordinance making power is also a delegated legislation making power.

¹³⁰ Chittagong Hill Track amended regulations, 2003.

¹³¹ *ibid*

¹³² BLAST and ASK vs. Bangladesh and others Writ Petition No. 5863 of 2009.

¹³³ The intermediate and secondary education ordinance 1961

Besides ordered to instruct secondary and primary institutions to refrain from making any incident of corporal punishment on any child.¹³⁴

4.4: Less Scrutiny and Less Disallowance of Delegated Laws:

The joint select committee on statutory instruments is the scrutiny committee which reviews all the statutory instruments. It draws the attention of the parliament on certain points.

However, the committee does not overlook all the policies of the statutory instrument and the meaning of each provision of a large volume of the delegated laws is not reviewed by them. The scrutiny committee cannot make any alteration to delegated laws rather it only reports its findings.¹³⁵ Then it will be sent to the concerned minister or authority of the department if there is any necessity for amendments. The ministers may allow the proposed amendments or not. The law will be made without amendment and the law will be allowed without scrutiny.¹³⁶ The main problem being identified is the department or ministry having a major authority to make such a law without proper scrutiny. Moreover, the parliament's attention is drawn only to certain points. It leads to less parliamentary control, scrutiny and disallowance of the laws. That's why the problems arise with the particular laws. Although it is impossible for parliament to make detailed laws of a parent act such as these subordinate laws, less publicity or the concomitant public scrutiny than primary laws brings the risk of being made unreasonably and arbitrarily.¹³⁷

¹³⁴ Supra note 132.

¹³⁵The Control over delegated law is the most critical aspect of administrative law as otherwise subordinate can easily be drafted arbitrarily <-<https://www.lawyersjurists.com/article/the-control-over-delegated-legislation-is-the-most-critical-aspect-of-administrative-law-as-otherwise-subordinate-can-easily-be-drafted-arbitrarily/>>accessed on 2 May, 2022.

¹³⁶ Pear and shields (n.111)

¹³⁷Md.Rizwanul Islam, Delegated laws in Bangladesh, *The Daily Star*,Published 26 February 2016<<https://www.thedailystar.net/law-our-rights/delegated-laws-bangladesh-576271>>accessed on 2 May, 2022.

CHAPTER 5:

Findings, Recommendations and Conclusion

5.1: Findings:

In this era, delegated legislation is regarded as inevitable whatever prejudices there might have been in the past against it. The important thing is to establish controls and safeguards subject to which delegated legislation should function in the state. The paper showed that Bangladesh is witnessing the growth and advancement of delegated legislation. In Bangladesh, many laws awfully need proper scrutiny for constitutional validity as the laws impliedly or expressly violate basic provisions of the constitution such as fundamental rights. The paper showed some recent and past draft subordinate laws were not being considered according to constitutional validity while making it, rather being violative with constitutional obligations. The paper also tried to find out why controlling this power is necessary and how the controlling measures can be taken.

5.1.1: Excessive Delegation:

There is no doubt that to some extent the excessive use or practice of delegated legislation results in more dependence on the delegated authorities. The system of delegated legislation noticeably confers the power to the executive which relatively weakens the power of the legislature.¹³⁸

Legislative power is not entrusted by laying down policy inconsistent with the basic concept on which our Constitutional scheme is founded. Our constitution makers have entrusted the power to legislate to the elected representatives of the people which means that the power is exercised not only in the name of

¹³⁸ Aparajita Kumari, Control Mechanism Over Delegated Legislation<<https://www.ijcrt.org/papers/IJCRT1813055.pdf>>Published 2 April, 2018 accessed on 1 May, 2022.

the people but by the people. If the lawmakers do not concentrate on people's rights, this power may be abused by such excessive delegation of lawmaking power.¹³⁹

5.1.2: Maintenance of Constitutional Obligations

In the previous chapter 3, the parameters of delegated legislation have been identified. Now grounds necessary to maintain constitutional parameters are as follows:

- For valid delegation of this power the first requirement is that the parent act shall be valid by which the legislation making power is conferred to the executive.¹⁴⁰
- For consistency of this power, the accepted principle is that the authority must strictly exercise within the authority of law.¹⁴¹
- For a delegated legislation made by any authority cannot bring contradiction to the law of the land.¹⁴²
- For the parent act which has constitutional validity and the delegated law is valid with the parent act yet the laws can be invalid on the ground that it contravenes the provisions of the constitution.¹⁴³
- For delegated legislation shall not be arbitrary¹⁴⁴ and unreasonable with the constitution.¹⁴⁵

Legislative powers can be delegated validly to the executive within permissible limits as there is an inherent danger of abuse of the said power by the executive authorities. The risk of abuse is incidental to it and therefore safeguards are required. Hence today the question is not whether delegated legislation is

¹³⁹ MCD v. Birla Cotton Mills ,AIR 1968 SC 1232,1264:1968 3 SCR (per Shah J)

¹⁴⁰ AIR 1951 SC 118 : 1950 SCR 759

¹⁴¹ United States V Two hundreds Barrels of Whiskey,24 L Ed 491:95 US 571 (1877)

¹⁴² Chester v. Bateson (1920) I KB 829

¹⁴³ Narendra Kumar v Union of India : AIR 1960 SC 430 : (1960) 2 SCR 375

¹⁴⁴ Indian Express News Papers (Bombay) (p) Ltd v. Union of India ,(1985) SCC 642 :AIR 1985 SC 515

¹⁴⁵ Kruse V. Johnson (1898) 2 QB 91: 67 LJQB, 782

desirable or not, but what controls and safeguards can and ought to be introduced so that the rulemaking power conferred on Administration is not misused or misapplied.¹⁴⁶

5.2: Recommendations:

5.2.1: Effective Controlling Safeguards of Delegated Legislation:

The question of control has become crucial. Mainly there can be two types of controlling safeguards of delegated legislation: i) Parliamentary control; iii) Judicial control

5.2.1.1: Parliamentary Control:

The parliamentary control is to keep watch over the rulemaking authorities and also to provide an opportunity to criticize them by their legislative veto power.

It can be effectively exercised by-

- laying on the table and
- scrutiny committees¹⁴⁷

Firstly, it informs the legislators that what has been made by the executive authorities in the exercise of legislative power and secondly, it provides an opportunity for legislators to question or challenge the rule already made or proposed to be made. Through this process of "safety valve", the legislators exercise supervision, check and control over executive rule-making power.¹⁴⁸

¹⁴⁶ Committee on subordinate Legislation (1st Lok Sabha) 1954 (3rd Report) ;16

¹⁴⁷ Pear and Shields (n.8) [118]

¹⁴⁸ M.K Papiiah and Sons v. Excise Commr. (1975) 1 SCC 492 : AIR 1975 SC 1007

5.2.1.2: Judicial Control:

The court can decide the validity of delegated legislation mainly by applying two tests:

- 1) Substantive Ultra vires
- 2) Procedural ultra vires.¹⁴⁹

The purport of the doctrine of ultra vires is that an act has been done in excess of power possessed by a person. Substantive ultra vires mean that the delegated legislation goes beyond the scope of the power of authority conferred on it by the parent statute or by the constitution. Parliament never intends to give authority to make any such rules which are unreasonable and ultra vires.¹⁵⁰ The judicial body can control this power on the ground of substantive ultra vires where the parent act is-

- Unconstitutional
- delegates essential legislative functions

Where delegated legislation is-

- inconsistent with the parent act.
- inconsistent with general law.
- is unconstitutional.
- is arbitrary
- unreasonable
- malafide

¹⁴⁹ Pear and Shields (n.8) [118]

¹⁵⁰ Sitaram Sugar Co. Ltd v. Union of India, (1990) 3 SCC 223 252-252; AIR 1990

- excludes judicial review
- operates retrospectively ¹⁵¹

Secondly, procedural ultra vires are when subordinate legislation fails to obey procedural requirements prescribed by the parent act or by general law. Failure to observe the procedural requirements doesn't always invalidate rules as there are mandatory and directory requirements. Generally, non-compliance with the directory provision does not invalidate but failure to obey a mandatory requirement does.¹⁵² So the judicial body can control the delegated authorities on these two ultra vires grounds.

So considering the above discussion I forward the following recommendations:

- *To maintain constitutional parameters*

Supposing the constitution is a tree, parent acts are its branches and the subordinate laws are the branchlets. If the bracelets exaggerate toxic fruits, it will not bring any benefits to the human life, rather they may cause harm. To establish a country where all the citizens are protected by law, it is mandatory to maintain the basic provisions of the constitution. The democratic order may become eroded if legitimation of unlimited power is given to the executive for making laws. The legitimation of these laws can only be questioned by the constitution. That's why the constitutional Parameters are necessary for the legitimation of any law.

- *To ensure proper scrutiny*

Another aim of this paper is to have proper scrutiny while making delegated laws and proper controls over these laws. These controls will reinvigorate constitutional validity. In the matter of scrutinization of

¹⁵¹ Pear and Shields (n.8) [119]

¹⁵² Raza Buland Sugar Co .Ltd v. Municipal Board Rampur ,AIR 1965 SC 895

the law making the controlling authority over this shall not be prejudiced. The parliament shall take more initiative to control this power. Also, effective judicial control can be a good scrutinizer of these laws.

- *To make accountability to the parliament*

Delegated laws which pretend to be violative shall be accountable to the parliament on the issue. why it should or should not be valid.

- *To ensure the citizens claim*

To justify, whether a delegated law is flexible for a certain locality or for a certain area, there shall be social auditing by the public at large.

- *To control excessive delegation*

Excessive delegation of lawmaking power to the authority is the cause of overruling the legislative power. It is the main reason for the hazardous scope of abuse of this power. It shall be controlled by proper action of the government. To postulate the sovereignty of the people, the rule against excessive delegation of legislative authority is necessary

5.3: Conclusion:

In most the democratic states, delegated laws bear a probability to outnumber the parent acts in terms of their scope and numbers. Bangladesh is not beyond the exception of the global trend of delegated laws which outnumber parent laws. However, these laws are generally a product of very wide powers granted by the primary law. Parliament has been very generous in granting powers to the executive in order to make delegated laws. But without the limitations, it may turn into constitutional ultra vires. From Bangladesh's perspective, it is time to realize that the subordinate laws and the authorities controlling it shall have the boundary to extend its power and the constitution shall be the prime law of the land to fix that boundary. Bangladesh is a Democratic

People's Republic state where the preamble of the constitution states people are the real maker of the constitution and democracy is, a government by the people of the people, for the people. If the laws are such that bring harm to the people's rights, then the aim of the preamble of the constitution and assurance of the democratic state cannot be established. Any laws violating the constitutional obligation cannot make a beneficial impact to the state. To establish a living democratic state and to secure the citizens' right, all the laws shall be in accordance with the constitution which is the supreme law of the land.

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