

Parliamentary Control and Supervision of Delegated Legislation

Strengthening Committee on Delegated Legislation and Governmental Assurances at Nepal's Parliament

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The National Assembly Rules 2018 provides for a Committee on Delegated Legislation and Governmental Assurances at National Assembly, the upper house of Nepal's federal Parliament.¹ It has been assigned to work in the area of delegated legislation, governmental assurances and management of archives of national importance.

Nepal has been experiencing parliamentary traditions since 1950-51. However, the House of Representatives Rules of 1960 was the first instrument which provided for a provision regarding delegated legislation in Nepal. After 1991, under the Constitution of Nepal 1990, this area of work was brought in within the purview of both the House of Representatives and the National Assembly. Similarly, in the Legislature-Parliament under the Interim Constitution of Nepal 2007, the House Rules provided for a Committee dealing with delegated legislation. Despite the existence of these committees, the role of the Parliament on delegated legislation has never been effective in Nepal. The power to make laws have been traditionally delegated to the government, or agencies working under it, and various rules, regulations, guidelines, procedures, directives, have also been made under different Acts of Parliament. However, the parliaments of Nepal over these decades have not been quite effective to carry out parliamentary monitoring and control over the delegation within the limits of the authority. Given the importance, the current federal parliament has made provisions in this regard in its Rules.

Apart from National Assembly Rules 2018 which provides for an exclusive Committee on Delegated Legislation and Governmental Assurances at National Assembly, all thematic committees in the House of Representatives, the lower house of the federal parliament, also have power to look into delegated legislation within their legislative competences.²

¹ Rule 147(1), National Assembly Rules 2018

² House of Representatives Rules 2018

The objective of this research paper is to review the power and activities of the Committee on Delegated Legislation and Governmental Assurances at National Assembly (hereafter 'CDLGA'), locate its strengths and weaknesses, and based on comparative inputs from the practices of some jurisdictions suggest avenues for reform. This paper analyses the parliamentary oversight mechanisms in three countries (i.e. the United Kingdom (UK), the United States (US), and India) to provide insights into the best practices and challenges facing the practice of delegated legislation.

Section I provides the basic concept of delegated legislation as accepted under common law jurisdictions. Section 2 deals with Committee on Delegated Legislation and Governmental Assurances (CDLGA), the principal parliamentary committee responsible for scrutiny of delegated legislation and its Procedures. It analyzes the functions, duties and powers of the Committee, its procedures and limits of its operations. Section 3 takes stock of the activities of the Committee, major decisions it has undertaken, and instruments that it has adopted in order to institutionalize its process and modus operandi. Section 4 generalizes some problems of delegated legislation in Nepal.

Section 5 is the most important analysis of this paper. It reviews the system of delegated legislation in three important democracies in the world: UK, USA and India. It considers the Statutory Instruments Act of 1946 and the overall movement of delegated legislation through the parliamentary process in the UK. In the case of the US, the Section focuses on Administrative Procedure Act (APA) of 1946 and various other statutory instruments available to the American Congress in order to regulate and oversee the rulemaking processes by federal agencies. The case of India focuses on the Standing Committee on Subordinate Legislation in both houses of the Indian Parliament, highlighting the process by which a delegated legislation is brought forth in the Parliament. Finally, Section 6 recommends drafting and promulgation of the Delegated Legislation Act that provides a strong institutional base for the parliamentary control, oversight and supervision of delegated legislation in Nepal. Finally, Section 7 gives the conclusion of this paper and highlights some of the key takeaways for Nepal vis-a-vis the cases analyzed in the main body of the paper.

1. The Basic Concept

John Locke, an English philosopher and political scientist, stated in *Second Treatise of Civil Government* (1690) that “the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the

legislative and appointing in whose hands that shall be. And when the people have said, we will submit to rules and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.”³

As far as the principle is concerned, what John Locke emphasized, remains the basic rule. However, with the increasing need and complexity of legislation to reflect rapidly-changing societies, delegating powers of legislation-making becomes convenient and helpful in assisting the legislature to efficiently address these challenges. Delegated legislation, also known as subordinate or subsidiary legislation, refers to laws that are created not by the legislature itself, but by officials/bodies to whom the legislative body has delegated the authority to make legislations. Clearly, this kind of law is not passed by an Act of legislature, but by the government of the day, a government minister, or a delegated person or entity. It has to be done as directed by the legislature. The delegated legislation’s parameters and procedures are thus detailed and dependent on the parent Act, which also determines the form of the delegated legislation. These forms may include Orders in Council, Rules, Regulations, Orders, Directives, Bye-laws, and Schemes.

A parliament has its own justifications for adopting the system of delegated legislation in order to fulfil its lawmaking objectives. Carr (1878) states that there are three major justifications for the usage of delegated legislation by the Parliament: first, the Parliament does not have enough time to not be able to delegate legislation; second is the limitation of aptitude (this includes regarding technical matters); and thirdly, and most significantly, in the event when crises and emergencies arise, and the Government must act quickly without waiting for the Parliament.⁴ Delegated legislations are used for a variety of purposes, including determining the date on which an Act of Parliament will come into effect, setting fees for public services, and establishing details of an Act of Parliament. The Parliament’s time is also saved through delegated legislation, as matters of technical details may be prepared by those with the relevant expert knowledge.

Adopting a system of delegated legislation is not adopting the excuse for giving up lawmaking power by the parliament. Under the principle of separation of powers, the parliamentary power of law making must not be given up, and as such even when delegated legislation is accepted, it has to stand by the control and supervision of the parliament. When there is no such control and

³ p. 81.

⁴ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at pp. 19-22.

supervision in the exercise of delegated legislation, by the true owner of lawmaking power, the possibility of overstepping by the government or the relevant executive arms of the government becomes eminent. It is because of this that delegated legislation is often subjected to criticisms. Critics argue that despite the provision of parliamentary control and supervision, in many cases, it is subject to lesser parliamentary scrutiny when compared to Acts of Parliament. Matters excluded from parliamentary scrutiny may include those that cause difficulty for the government by designating such matters as “matters concerning detail.” Additionally, because of the growing volume of delegated legislation, the public may have less knowledge about the changes such legislations are to bring. However, there are various statutory instruments that prevent the misuse of delegated legislation.

Typically, delegated legislation contains a preamble, which emphasizes the statutory authority under which it is made and without which it has no effect.⁵ Like an Act of Parliament, the delegated legislation includes a definition clause, short title, commencement of operations provisions, schedule of repeals, and other such respects.⁶ It is more likely that a delegated legislation is amended, due to its temporary character.⁷

In creating safeguards for delegated legislation, there are five things that Carr (1878), an authority of his time, states are necessary.

1. “The delegation of legislative power should be delegated to a trustworthy authority which commands the national confidence.
2. “The limits within which the delegated power is to be exercised ought to be definitely laid down.
3. “In the third place, if any particular interests are to be specially affected by delegated legislation, the legislating authority should consult them before making its laws.
4. “The fourth point to be insisted upon is delegated legislation is publicity.
5. “The fifth and last point is that there should be machinery for amending or revoking delegated legislation as required.”⁸

Significantly, in the present century, there has been immense growth in the legislative powers of the executive across various democratic countries. This power of administrative authorities has increasingly occupied an important part in the study of administrative law. Of course, the

⁵ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at p. 42.

⁶ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at p. 42.

⁷ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at p. 43.

⁸ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at pp. 27-36.

executive is not granted the power to make law, but rather, it supplements the law under the authority of the legislature.

In terms of parliamentary oversight of this process, the parliament is empowered to watch over the agencies making and criticize them in the event of an abuse of authority. The parliament controls the activities of the executive agency because the enabling or parent statute passed by the parliament outlines the framework and parameters within which the delegated legislation is to be made. In India, for example, which is discussed in detail in the following sections, every delegate is subject to the authority and control of the principal and the exercise of delegated legislation may be directed, corrected, or cancelled by said principal. Thus, the understanding is that parliamentary control over delegated legislation is a living continuity as a constitutional remedy. Expectantly, with the broad usage of delegated legislation-making and the generalized standards of control, the judicial control of this process has shrunk considerably, thus increasing the necessity of parliamentary control.

With regard to the control of the legislature over delegated legislation, M.P. Jain states: "In a parliamentary democracy it is the function of the legislature to legislate. If it seeks to delegate its legislative power to the executive because of some reasons, it is not only the right of the Legislature, but also its obligation, as principal, to see how its agent i.e. the Executive carries out the agency entrusted to it. Since it is the legislature which grants legislative power to the administration, it is primarily its responsibility to ensure the proper exercise of delegated legislative power, to supervise and control the actual exercise of this power, and ensure the danger of its objectionable, abusive and unwarranted use by the administration."

Parliamentary scrutiny of delegated legislation embraces many types of standards and approaches established in judicial review and the interpretation of such legislation.⁹ While the nature of litigation driven by economic interests leads judicial review to be selective and commonly *ex post facto*, parliamentary oversight, on the other hand, is more systematic and less commonly *ex post facto*.¹⁰ Additionally, constrained time is another factor in parliamentary scrutiny when compared to judicial review.¹¹

⁹ BATES, T. S. J. (1998). The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives. *Statute Law Review*, 19(3), 155-176, at p. 155.

¹⁰ BATES, T. S. J. (1998). The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives. *Statute Law Review*, 19(3), 155-176, at p. 155.

¹¹ BATES, T. S. J. (1998). The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives. *Statute Law Review*, 19(3), 155-176, at p. 155.

Moreover, the weight of the executive influence may also be another factor effecting the scope of parliamentary scrutiny of delegated legislation.¹² This influence may be exercised through general statutory requirements governing how delegated legislation is made and through standing orders that regulate parliamentary scrutiny itself.¹³ Additionally, this influence may be exercised through the scope of enabling legislation.¹⁴ Courts are also indirectly somewhat constrained by executive influence, for example, through statutory rules on the interpretation of delegated legislation.¹⁵

2. Committee on Delegated Legislation and Governmental Assurances and its Procedures

The present CDLGA at National Assembly has been formed under Article 147 of the Rules of Procedure of the National Assembly. It was formed on August 2, 2018.¹⁶ The first meeting of the Committee was held on August 7 under the chairmanship of Hon'ble Mr. Radheshyam Adhikari, the senior member of the Committee.

2.1 Functions, Duties and Powers of the Committee:

Pursuant to Rule 147 of the Rules of Procedure of the National Assembly 2018, the scope of work of the committee is as follows:

Work related to delegated legislation

Work related to government assurance

Issues related to archive management of national importance

In addition to the work activities within the above jurisdiction, the following issues are mentioned as matters to be kept in mind while performing the work related to delegated legislation as per Rule 153 of the Rules.

¹² BATES, T. S. J. (1998). The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives. *Statute Law Review*, 19(3), 155-176, at p. 156.

¹³ BATES, T. S. J. (1998). The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives. *Statute Law Review*, 19(3), 155-176, at p. 156.

¹⁴ BATES, T. S. J. (1998). The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives. *Statute Law Review*, 19(3), 155-176, at p. 156.

¹⁵ BATES, T. S. J. (1998). The Future of Parliamentary Scrutiny of Delegated Legislation: Some Judicial Perspectives. *Statute Law Review*, 19(3), 155-176, at p. 156.

¹⁶ The current members of the Committee are Agam Prasad Bantawa Rai, Chandra Bahadur Khadka, Durga Prasad Upadhyay, Narapati Luwar, Nanakala Ojha, Balramprasad Banskota, Ram Narayan Bidari (chairperson), Radheshyam Adhikari, Binda Devi Ale (Rana), Bina Pokharel, Shanti Kumari Adhikari G.C., Suman Raj Pyakurel, and Hari Ram Chaudhary.

- (A) whether the Government of Nepal has made rules, directives, procedures, regulations and orders etc. to be made under the authority delegated by the Act,
- (B) whether rules, directives, procedures, regulations and orders etc. have been made in accordance with the objectives of the Constitution or the Act,
- (C) whether the matters as prescribed by the Act are covered by rules, directives, procedures, regulations or orders,
- (D) whether any tax levied or raised is subject to rules, directives, procedures, regulations and orders, etc.
- (E) whether the rules, directives, procedures, regulations and orders made in accordance with the provisions delegated by the Act directly or indirectly interfere with the jurisdiction of the court;
- (F) whether the rule is retrospective in respect of any provision which is not explicitly provided by the Constitution or the Act;
- (G) whether or not to incur any expenditure on rules, directives, procedures, regulations and orders, etc. from the reserve fund or other government funds,
- (H) Whether there are rules, directives, procedures, regulations and orders etc. within the limits of the powers conferred by the Constitution or the Act.
- (I) Whether or not there has been undue delay in publishing such rules, directives, procedures, regulations and orders, etc., and submitting them to the Secretariat of the Federal Parliament, and
- (J) Whether clarification is required or not required to clarify the intent of such rules, directives, procedures, regulations and orders etc.

When the Committee submits its report to the National Assembly, it will have to recommend in full or in part the repeal or amendment of any rules, directives, procedures, regulations and orders in addition to its findings and recommendations on the above issues. There is a provision in the regulations to study what steps have been taken by the Government of Nepal and report including the instructions given to the concerned bodies.

2. 2 Procedure of the Committee

In order to carry out the work of the Committee effectively, it prepares guidelines, working procedures, concept papers as required. It has power to form sub-committees to meet its work requirements. Similarly, as per the need, field study may also be conducted, discussions held with the concerned ministry officials, interactive programs done, and workshops and seminars

organized. It can also seek expert assistance. It also has the power to issue directives when needed.

2.3 Limits of the Committee

The Committee's jurisdiction which includes matters related to delegated legislation, government assurance and management of archives and records of national importance, covers a vast area when compared with its size. It has limited human power and resources to study the delegated legislation created under all ministries, state organs, constitutional bodies and bodies established by law. This is especially an uphill battle because these institutions have created so many delegated legislation, which have not been properly archived and verified internally.

3. Activities of the Committee on Delegated Legislation and Governmental Assurances

Ever though the Committee started working in August 2018, it has tried to work in some important areas as far as delegated legislation is concerned. The recent report of the Committee summarizes its activities as follows:

- A public notice has been published on 26-27 September 2018 on behalf of the Committee requesting the general public to inform the Committee in writing about the rules, formation orders, directions, procedures, regulations, standards, circulars, orders / notices issued which are inconsistent or in violation of the provisions of the parent Act.
- The Committee level study has been started on delegated legislation by demanding details of rules, regulations, directives, orders etc. made under delegated legislation from all Ministries of the Government of Nepal, Supreme Court, constitutional bodies, autonomous institutions, and other public institutions.
- While studying the delegated legislation so far, it has been found that many rules, regulations, procedures, directives, etc. issued by various Ministries and bodies of the Government of Nepal were in conflict with the Constitution or their Parent Act, the delegated legislation has been issued beyond the limit of the enabling Act, and many delegated legislations contained provisions that otherwise should have been in the parent Act itself. In this regard, the Ministries of the Government of Nepal, constitutional bodies and other relevant public institutions were instructed henceforth to comply with the Directives on

Delegated Legislation in accordance with the provisions of Rule 53 of the National Assembly Rules.

- All the Ministries, constitutional bodies, institutions and entities, Boards or Development Committees of the Government of Nepal have been directed by the Committee to send the delegated legislation to be issued in the coming days in accordance with clause (i) of Rule 153 of the National Assembly Rules, within fifteen days of their promulgation and to publish them as soon as they are issued.
- The Committee found the directives issued by the Ministry of Land Management, Cooperatives and Poverty Alleviation on various dates regarding plotting of arable land have not been issued by amending the Land Rules, 2021 or by publishing a notice in the Nepal Gazette to that effect. Therefore, in the coming days, the Committee has directed the Ministry to issue orders, circulars and directives only in accordance with the valid principles of delegated legislation within the scope of the authority given by the parent Act.
- The Committee has started scrutinizing delegated legislation of Ministry of Agriculture and Livestock Development, Ministry of Labor, Employment and Social Security, Ministry of Energy, Water Resources and Irrigation, and Ministry of Communications and Information Technology and Ministry of Home Affairs to see whether the delegated legislation produced by those ministries so far are compatible with the Act or not, or whether the delegated legislation made by the delegated authority have re-delegated their power or not, or whether the delegated legislation thus issued been made public or not? After studying the sample, the officials of the concerned ministry were invited to the meeting and discussed.
- A letter has been written to the Ministry of Agriculture and Livestock Development asking it to clarify whether Organic and Bio Fertilizer Registration Regulation Procedure, 2011 is duly formulated under the delegated authority provided by any parent law? In order to make the grants, concessions and facilities provided by the state to the farmers transparent and predictable, the Ministry of Agriculture and Livestock Development was instructed to formulate and submit a separate bill on the distribution of agricultural grants. In addition, Committee also directed the Ministry to allow for the establishment of organic and bio fertilizer factories by specifying the geographical area in advance and by extending subsidy to the farmers by adhering to the voucher system adopted under the Agriculture Development Strategy being implemented by the Government of Nepal.

- The Ministry of Communications and Information Technology has been directed to introduce a bill related to mass media in the current session of Parliament including the provisions of the Online Media Directive 2073 issued by the Ministry as it is not in line with the delegated legislation and is in line with the Good Governance (Operation and Management) Act, 2008.
- The Committee in response to the complaint regarding a letter issued to the Office of the Registrar of the Companies by the Private Secretariat of the Hon'ble Minister of the Ministry of Industry, Commerce and Supplies on July 11, 2018 invited the Minister, Secretary of the Ministry and Companies Registrar to its Secretariat, and following discussion with them, on July 13, 2019, required to answer whether the order issued by the private secretariat of the Minister had any legal basis, and if so, using which legal authority. The Committee found that not only that the principle of delegated legislation has been breached, but even the decision had not been made in a stepwise manner from the point of view of administrative order. The Committee thus instructed the Ministry and the Office of the Registrar of the Companies to act only in accordance with Rules 147 and 153(b) of the National Assembly Rules.
- In the meeting of the Committee held in the presence of the Hon'ble Minister of Labor, Employment and Social Security on July 22, 2019, the Committee found the provision of Rule 52 (a) added by the first amendment of the Foreign Employment Rules, 2008 made in accordance with the Foreign Employment Act, 2008 did not meet the basic principle of delegated legislation. The Committee decided to send the information to the Ministry and include it in the annual report of the Committee.
- In the presence of Hon'ble Minister of Agriculture and Livestock Development on 2076-04-07 the Committee advised that Sub-rules (3) and (4) of Rule 17 and Rule 33A of Food Rules 2027 made in accordance with Article 13 of the Food Act, 2023, and Rules 21(1) and 22 of Plant Protection Rules 2066 made under Section 35 of the Plant Protection Act, 2064 are not compatible with the principle of delegated legislation. The Committee advised the Ministry in writing to correct the inconsistency.
- The Ministry of Home Affairs has been instructed to formulate the necessary rules and regulations for the implementation of the Acts passed by the Parliament, which have not been done for long, as soon as possible and to formulate the directives and procedures only in accordance with the power and principles delegated by the parent Act.

- The Committee also directed the Ministry of Home Affairs to immediately form the structures including the councils up to the provincial level and the executive committee to be formed at the national level as per the Disaster Risk Reduction and Management Act, 2074.

One of the major works that the Committee did so far was the adoption of a *Directive on Delegated Legislation* on 2075/5/18. It includes general principles of delegated legislation, the contents to be included by rules, sub-rules and directives, the issues that should not be dealt with by the delegation legislation, and rules of monitoring and supervision. Meanwhile, the Committee has also passed its Procedures for Committee Operations on 2075/5/28. Apart from this the Committee also passed A Concept Paper on 2075/7/15 on how to fulfill the Committee scope and responsibility, how to define their issues, how to prioritize them, and monitor, evaluate and report. All these documents were important to get the Committee going as a parliamentary Committee.

An agreement was reached between the Committee and the Supreme Court Bar Association on 2075-11-01 for mutual cooperation, and a roster of experts has been prepared for this purpose. The lawyers on the roster have started working based on the Committee decision of 2075-10-28.

4. Generalization of Some Problems of Delegated Legislation in Nepal

The efforts of the Committee on Delegated Legislation and Governmental assurances to institutionalize the parliamentary control and supervision of delegated legislation suffer from various difficulties.

To this day, many rules, regulations, directives and procedures that have developed or enacted in Nepal have not been consistent with the principles of delegated legislation. Many legislations that have been enacted as delegated legislation do not have any parent act to rely on for their validity. They have not even mentioned under which Acts they have derived their power from as rules and regulations. Some Acts that have been mentioned as relevant parent Acts happen to be irrelevant to the contents of the so called delegated legislation. Procedures and directives are not disclosed which section of the Act is made in accordance with the authority delegated by the subsection. There are cases of further delegation of delegated power. Acts like providing crores of grants have also been provided throughout the delegated legislation. The criteria of the directive are changed after the change of leadership of the Ministry. Many Bills introduced in the Parliament do not mention the subjects for which rules and regulations could be worked out in accordance with the principle of delegated legislation.

The report of the Committee has recommended the following tips to the Government of Nepal and its agencies:

- Rules and directives should be formulated only to the extent delegated by the Act in accordance with the principle of delegated legislation while formulating delegated legislation as required.
- Rules, regulations, directives, procedures, etc. to be made under the delegated legislation should clearly state which of the provisions of which Act has been exercised.
- Delegated legislation should be drafted under the relevant Act. Delegated legislation should not be formulated by mentioning other unrelated Acts.
- Delegated legislatures should not be formed by re-delegating delegated powers.
- Guidelines and procedures have been formulated for the implementation of government policy programs and budget grants every year. It is advisable to implement these programs by including them in the Act and Rules to be made thereunder.
- Conditions, criteria, etc. should not change with the change of political or administrative leadership in the ministry.
- When making provision for delegated legislation in the newly drafted bills, it should be clearly stated that the power has been delegated for this purpose by the Act and clear comments related to the delegated legislation should be attached.

The Directives on Delegated Legislation 2018 issued by the Committee, which has detail arrangement about the management of delegated legislation, accepts that as it is not possible to complete the important work to be done in the running of the state only through the parliamentary statutes, it has been the practice to formulate the constitution order, rules, regulations, working procedures and directives under the delegated legislation. However, it thinks it is necessary to prepare and implement this Directive for the purpose of monitoring the non-compliance of the prescribed limits and principles of delegated legislation.

5. Country Analysis: UK, USA & India

The review of the system of delegated legislation in three important democracies of the world - UK, USA and India may help Nepal to improve upon its present performance.

A. The UK

The Statutory Instruments Act of 1946 addresses the matter of delegated legislation in the UK. It states:

- (1) Where by this Act or any Act passed after the commencement of this Act power to make, confirm or approve orders, rules, regulations or other subordinate legislation is conferred

on His Majesty in Council or on any Minister of the Crown then, if the power is expressed—

(a) in the case of a power conferred on His Majesty, to be exercisable by Order in Council;

(b) in the case of a power conferred on a Minister of the Crown, to be exercisable by statutory instrument,

any document by which that power is exercised shall be known as a “statutory instrument” and the provisions of this Act shall apply thereto accordingly.¹⁷

In the English context, Carr (1921) states that “[w]hen the King in Parliament, our supreme law-making authority, expressly allows some other authority to undertake [a] kind of supplementary law-making, the result of what we call ‘delegated legislation.’”¹⁸ English law may be divided into *lex scripta* and *lex non scripta*, wherein the former is the written law which is further divided into three parts: the first is made by the Crown under what is his/her prerogative, the second and weightiest is made by the King in Parliament and is known as the Acts of Parliament, and the final and bulkiest is the part made by persons or bodies that the King in Parliament entrusts with legislative authority.¹⁹ An Act of Parliament (sometimes referred to as a statute) is a law made by the UK Parliament and also known as “primary legislation,” as they do not depend on the legislative authority of another body/person.²⁰

Secondary legislation, then, is law created by ministers or other bodies under the legislative powers given to them by an Act of Parliament.²¹ Secondary legislation is also known as “delegated” or “subordinate” legislation in the UK, and often takes the form of a statutory instrument (SI). SIs are documents that make changes to the law and are typically published with an explanatory memorandum, outlining the purpose of the SI and why the addressed change is necessary.²² They usually have rule, order, or regulation included in their titles.²³ Usually, a Minister of the Crown is given the power to make a SI, and the Minister creates the law using the parliamentary procedures outlined in the Act.²⁴

¹⁷ <https://www.legislation.gov.uk/ukpga/Geo6/9-10/36/section/1>

¹⁸ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at pp. 1-2.

¹⁹ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at p. 2.

²⁰ <https://www.parliament.uk/site-information/glossary/acts-of-parliament/>

²¹ <https://www.parliament.uk/site-information/glossary/secondary-legislation/>

²² <https://www.parliament.uk/about/how/laws/secondary-legislation/>

²³ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

²⁴ <https://www.parliament.uk/site-information/glossary/statutory-instruments-sis/>

SIs may be created through an affirmative or parliamentary procedure, or without any procedure, as determined by the Act.²⁵ An affirmative procedure (capturing 20 percent of SIs) describes the type of scrutiny that the SI receives from Parliament; with this procedure, the SI must be actively approved by both Houses of Parliament, while certain SIs on financial matters may only be considered by the Commons.²⁶ The SI may be stopped in this process if either House votes against or rejects the motion calling for its approval.²⁷ The House of Lords may propose an amendment to the government motion by formally stating that the House declines to approve the SI.²⁸ Additionally, in emergencies, certain Acts may allow to bring a SI into effect immediately while giving Parliament a set time to approve it.²⁹ If the Parliament fails to approve the SI within the given timeframe, the SI stops being law.³⁰ The emergency procedure is allowed by only a few Acts when it's vital that the government act fast, like in the face of a terrorist organization or disease outbreak.³¹

A negative procedure, on the other hand, determines that the SI becomes law on the day that a Minister signs it and remains law unless a motion to reject it is agreed upon by either House within 40 sitting days.³² These negative SIs do not require the approval of the Parliament.³³ These SIs automatically come into law unless either House of Parliament stops them within a fixed period of time after they have been laid.³⁴ It is more likely that negative SIs are debated in the House of Lords, and the House of Commons too if there is significant opposition to the SIs.³⁵ A motion to stop is rarely successful, however.³⁶

Parliament can approve or disapprove a SI, but isn't able to amend it.³⁷ There exists a Joint Committee on Statutory Instruments (JCSI) that ensures that SIs are clear and follow the powers that the parent Acts have prescribed.³⁸ The JCSI will identify issues and public its recommendations on the SI.³⁹ The House of Lords, in considering affirmative SIs, cannot debate the SI before the JCSI makes its recommendations.⁴⁰ Additionally, the JCSI usually only takes

²⁵ <https://www.parliament.uk/site-information/glossary/statutory-instruments-sis/>

²⁶ <https://www.parliament.uk/site-information/glossary/affirmative-procedure/>

²⁷ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

²⁸ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

²⁹ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

³⁰ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

³¹ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

³² <https://www.parliament.uk/site-information/glossary/negative-procedure/>

³³ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

³⁴ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

³⁵ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

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³⁹ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

⁴⁰ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

evidence from the government department that wrote the SI, and while it does consider the public's submissions, it limits those submissions to points of law.⁴¹ Similarly, members of the public may not table a motion to object to or stop a SI and must ask a member of either House to do so on their behalf.⁴²

Carr argues that citizens have a duty to know delegated legislation just in the same way that they do Acts of Parliament. The Parliament sometimes states that a delegated legislation has the same force as the Act that authorizes it. He states: "The direct legislation of Parliament cannot be treated as something separate and self-contained; the statute book [i.e. all Acts in force] is not only incomplete but even misleading unless it be read with the delegated legislation which amplifies and amends it."⁴³ Regarding the effect of delegated legislation on the statute book, Carr states that there are three ways in which it complicates matters: "firstly, direct amendment of an Act, secondly, the creation of some additional machinery affecting the commencement, duration or application of an Act; and, thirdly, the elaboration of detail--especially in matters of procedure or of minor importance--to facilitate the objects or working of an Act."⁴⁴

Delegating powers of legislation are justified because they allow the Parliament to focus on more important matters, policy frameworks, and primary legislation, while allowing the Government the flexibility to deliver its policy, and adjust its operation as circumstances change, through a less onerous scrutiny process.⁴⁵ However, this process is still subject to various criticisms in the UK. One of the challenges facing the UK in terms of secondary legislation is that the inclusion of delegated power in a bill is determined by whether or not the Parliament will accept the delegation, rather than a point of principle.⁴⁶ Thus, it becomes increasingly important to ensure that a robust parliamentary scrutiny of delegated powers is ensured so that broad powers are not granted to ministers and constitutional standards are upheld.⁴⁷ Additionally, there is also a practice of Henry VIII powers, wherein changes to primary legislation are allowed through secondary legislation-making and which is considered to be a departure from constitutional principles; as primary legislation is subject to lengthy and detailed parliamentary scrutiny and should not be amended by lighter processes of secondary legislation, except in exceptional circumstances.⁴⁸ Additionally, there is a continued issue of the Parliament in the UK, and other

⁴¹ <https://www.parliament.uk/about/how/laws/secondary-legislation/>

⁴² <https://www.parliament.uk/about/how/laws/secondary-legislation/>

⁴³ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at p. 6.

⁴⁴ Carr, C. T. (1921), *Delegated legislation; three lectures*, Cambridge University Press, at p. 8.

⁴⁵ https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22503.htm#_idTextAnchor000

⁴⁶ https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22503.htm#_idTextAnchor000

⁴⁷ https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22503.htm#_idTextAnchor000

⁴⁸ https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22503.htm#_idTextAnchor000

such countries, of delegating broad, open-ended powers, while parliamentary scrutiny committees continue to lack the exclusive power to invalidate delegated legislation.⁴⁹

Summarily, “[f]or secondary legislation processes to work, the Government must take account of the scrutiny of statutory instruments and respond promptly to remedy any deficiencies. Where it does not do so, in exceptional circumstances Parliament may use its existing powers to block such instruments. The Government should recognize that parliamentary defeat on a statutory instrument need not be considered momentous or fatal. It does not prevent the Government subsequently tabling a revised SI having listened to and acted on parliamentarians’ concerns.”⁵⁰

B. The US

According to the US Constitution and its separation-of-powers provisions, laws are enacted by the legislature, administered by the executive, and interpreted by the judiciary. The nondelegation doctrine restricts the Congress from delegating its legislative powers to other entities, although in practice, the US Congress continues to delegate agencies the power to promulgate legislations that carry the same weight and force of law as statutes do. Scholars argue that the US Constitution’s structure or language contains no specific provisions that ban delegation of legislative powers, and that the nondelegation doctrine and its corollaries for statutory interpretation are dead.⁵¹ Scholars instead call to the courts to recognize rulemaking in the US as an exercise of delegated legislative power so that the focus may shift to shaping central doctrines that govern rulemaking in the US cohesively around the notion that rulemaking flows from delegated legislative power.⁵²

In the United States, an Act of Congress is the primary legislation created at the federal level. The authorizing statute or delegation of rulemaking authority is the statute that delegates the authority to make secondary legislation. As the matter of delegated legislation varies by state, there are three general groups under which states fall:

1. strict standards and safeguards: states permit delegated legislation only if the statute delegating the power provides definite standards or procedures,
2. loose standards and safeguards: states view delegating as acceptable if the statute includes general legislative statement of policy or a general rule to guide the recipient of the power, and

⁴⁹ <https://sci-hub.tw/https://www.jstor.org/stable/4491659> p. 624

⁵⁰ https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22503.htm#_idTextAnchor000

⁵¹ Posner, E. A., & Vermeule, A. (2002). Interring the nondelegation doctrine. *The University of Chicago Law Review*, 1721-1762.

⁵² Watts, K. A. (2014). Rulemaking as Legislating. *Geo. LJ*, 103, 1003, at p. 1059.

3. procedural safeguards: states permit delegated legislation as long as recipients of the power themselves have adequate procedural safeguards in place.⁵³

Delegated legislation falls under regulatory or administrative law in the US. Regulatory law deals with the procedures established by federal, state, and local administrative agencies, and these laws can relate to many activities of the executive branch, including application of licenses, oversight of environmental laws, and administration of social services (e.g. welfare).⁵⁴ In the US, lawmaking by unelected administrative officials is known as rulemaking, which occurs when Congress delegates legislative authority to such agencies.⁵⁵ Bureaucratic institutions, which produce rules, are entrusted by the Congress with the implementation, management, and administration of laws and public policies.⁵⁶ Such rules, issued by departments, agencies, or commissions are laws and carry the weight comparable to congressional legislation, presidential executive orders, and judicial decisions.⁵⁷

As such, the US Supreme Court has allowed the delegation of legislative power in some cases. For example, in the 1825 *Wayman v. Southard* case, Chief Justice John Marshall explained that a general provision may be created and the power may be given to those who are to act under such general provision to fill out the details, thus distinguishing between “important subjects” and “mere details” of a piece of legislation.⁵⁸ Then, in the 1989 *Mistretta v. United States* case, the US Supreme Court applied the “intelligible principle” test, stating that it would be constitutionally sufficient for the Congress to clearly determine the general policy, the public agency that would apply it, and the boundaries of the delegated authority.⁵⁹

The process of rulemaking is as follows: firstly, the agency to whom the legislative power per the authorizing statute is delegated develops a draft of the proposed rule.⁶⁰ The OIRA then reviews the draft, and the agency publishes the proposed rule.⁶¹ The agency receives feedback and comments and makes changes to the proposed rule, after which the OIRA reviews

⁵³ <https://www.ncsl.org/research/about-state-legislatures/delegation-of-legislative-power.aspx>

⁵⁴ <https://www.hg.org/regulatory-law.html>

⁵⁵ Kerwin, C. M., & Furlong, S. R. (2018). *Rulemaking: How government agencies write law and make policy*. Cq Press. p. 9.

⁵⁶ Kerwin, C. M., & Furlong, S. R. (2018). *Rulemaking: How government agencies write law and make policy*. Cq Press. p. 5.

⁵⁷ Kerwin, C. M., & Furlong, S. R. (2018). *Rulemaking: How government agencies write law and make policy*. Cq Press. p. 5.

⁵⁸ <https://www.ncsl.org/research/about-state-legislatures/delegation-of-legislative-power.aspx>

⁵⁹ <https://www.ncsl.org/research/about-state-legislatures/delegation-of-legislative-power.aspx>

⁶⁰ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁶¹ <https://fas.org/sgp/crs/misc/IF10003.pdf>

the draft final rule.⁶² Then, the agency publishes the final rule, after which there is both a judicial and a congressional review procedure.⁶³ The Administrative Procedure Act (APA) of 1946, an important statutory requirement, governs the process through which federal agencies develop and issue regulations, unless an agency's authorizing statute itself provides different procedures to promulgate rules.⁶⁴ The APA define rule as “the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.”⁶⁵ The procedures for rulemaking apply whenever an agency creates, amends, or repeals a rule.⁶⁶

Section 553 of the APA contains requirements for publishing notices of the proposed as well as finalized rulemaking in the *Federal Register* (i.e. the official, federal government journal containing government agency rules, proposed rules, and public notices) and allows the public opportunities to comment on notices of the proposed rulemaking.⁶⁷ This first notice must contain the following information: (1) the time, place, and nature of the rulemaking proceedings, (2) reference to the legal authority under which the rule is proposed, and (3) the terms or subject of the proposed rule.⁶⁸ The public has 30 days for issuing comment and feedback, and the agency is required to review such comments and respond to any significant comments received, thus making any changes on the proposal based on such comments.⁶⁹ The agency may publish the final rule in the *Federal Register* alongside a general statement about the rule's basis and purpose.⁷⁰ The APA states that most rules have to have a 30-day delayed effective date, with some exceptions.

In some cases, the agency is not required to follow notice and comment procedures, including in the case of interpretive rules, general statements of policy, and rules affecting only agency management or personnel.⁷¹ An agency may also forgo these procedures if it is impracticable, unnecessary, or contrary to the public interest.⁷² Additionally, the APA's definition of rules allows agencies the rulemaking power to fill in the vacuum left by Congress, the president, or the

⁶² <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁶³ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁶⁴ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁶⁵ Kerwin, C. M., & Furlong, S. R. (2018). *Rulemaking: How government agencies write law and make policy*. Cq Press. at p. 4.

⁶⁶ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁶⁷ <https://www.epa.gov/laws-regulations/summary-administrative-procedure-act>

⁶⁸ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁶⁹ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁷⁰ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁷¹ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁷² <https://fas.org/sgp/crs/misc/IF10003.pdf>

courts in the formulation of public policy or law.⁷³ Moreover, it provides the standards for judicial review if an individual has been adversely affected or aggrieved by an agency's actions.⁷⁴

Additionally, Congress maintains ultimate control over federal agencies' actions and can pass statutes that expand or contract such agencies' authority, repeal existing rules, or compel an agency to issue certain rules.⁷⁵ In drafting legislation, Congress is precise about the provision to ensure that the agency acts as Congress intends.⁷⁶ In addition to the APA, the Congress may use the a variety of other statutory requirements for the purpose of oversight, including the Congressional Review Act (CRA) of 1996 to overturn rules by enacting a joint resolution of disapproval.

The CRA is one of the oversight tools, a law, that Congress may utilize to overturn rules that are issued by federal agencies.⁷⁷ The CRA obligates the federal agencies to report its rulemaking processes and activities and provides Congress with a special set of procedures under which it may consider legislation to overturn those rules.⁷⁸ More specifically, all agencies are required to submit a report regarding the covered rule to each House of Congress and to the Comptroller General (CG) that contains the rule itself, a general description of the rule (including if the rule is to be deemed a major rule), and the proposed effective date of the rule.⁷⁹ Without the report, the covered rule cannot take effect.⁸⁰

Moreover, the responsible agency also needs to submit the following the CG: a complete copy of any cost-benefit analysis, the agency's actions pursuant to the requirements of the Regulatory Flexibility Act (i.e. require regulatory flexibility analyses for the proposed and final rules that have a significant economic impact on a substantial number of small entities)⁸¹ and the Unfunded Mandates Reform Act of 1995 (i.e. added requirements for agencies to analyze costs resulting from regulations containing federal mandates upon state, local, and tribal governments and the

⁷³ Kerwin, C. M., & Furlong, S. R. (2018). *Rulemaking: How government agencies write law and make policy*. Cq Press. p. 7.

⁷⁴ <https://www.epa.gov/laws-regulations/summary-administrative-procedure-act>

⁷⁵ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁷⁶ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁷⁷ <https://fas.org/sgp/crs/misc/R43992.pdf>, Summary.

⁷⁸ <https://fas.org/sgp/crs/misc/R43992.pdf>, Summary.

⁷⁹ Rosenberg, M. (2008, May). Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act after a Decade. Congressional Research Service, the Library of Congress, at p. 3.

⁸⁰ Rosenberg, M. (2008, May). Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act after a Decade. Congressional Research Service, the Library of Congress, at p. 3.

⁸¹ <https://fas.org/sgp/crs/misc/R43056.pdf> at p. 3.

private sector),⁸² and any other relevant information required under any other act or executive order.⁸³ Ultimately, Congress has the power to approve or reject the rule.⁸⁴

Moreover, the CRA gives the Congress 60 days to review and annul any rules that have major financial impact on the US economy, that increase costs, and that have adverse effect on markets.⁸⁵ The CRA created a category of rules known as “major” rules, which are those that the OIRA determines has or is likely to result in the following:

- (A) an annual effect on the economy of \$100,000,000 or more;
- (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
- (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.⁸⁶

There are two major requirements for such rules. The first is that agencies are required to delay the effective date of “major” rules until 60 days after the rule is submitted to Congress or published in the *Federal Register*, whichever is later.⁸⁷ Secondly, the CG must also provide a report on each of the major rules to the appropriate congressional committees of jurisdiction within 15 days of when the rule is submitted/published, and this report must include a summary of the agency’s compliance with various rulemaking requirements (e.g. regulatory impact analyses that agencies may be required to perform while undergoing rulemaking action).⁸⁸

However, the CRA has also been criticized for not being appropriately utilized. Firstly, the CRA procedure contains no expedited consideration in the House of Representatives, and there is a lack of a screening mechanism to identify rules that require special congressional attention.⁸⁹ Additionally, “that a disapproval resolution of a significant or politically sensitive rule is likely to

⁸² <https://fas.org/sgp/crs/misc/R43056.pdf> at p. 3.

⁸³ Rosenberg, M. (2008, May). Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act after a Decade. Congressional Research Service, the Library of Congress, at p. 3.

⁸⁴ Bedi, P. and J. Kakkar (2012), “Parliamentary Scrutiny of Executive Rule Making: Background Note for the Conference on Effective Legislatures,” *PRS Legislative Research*, Center for Policy Research, at p. 4.

⁸⁵ Bedi, P. and J. Kakkar (2012), “Parliamentary Scrutiny of Executive Rule Making: Background Note for the Conference on Effective Legislatures,” *PRS Legislative Research*, Center for Policy Research, at p. 4.

⁸⁶ 5 USC. §804(2).

⁸⁷ <https://fas.org/sgp/crs/misc/R43056.pdf>

⁸⁸ <https://fas.org/sgp/crs/misc/R43056.pdf> p. 9.

⁸⁹ <file:///C:/Users/Bipin/Downloads/18670.pdf> p. 1.

need a supermajority to be successful if control of the White House and the Congress are in different political hands."⁹⁰ Other issues pertaining to the CRA are "the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule."⁹¹

In addition to the CRA, the Paperwork Reduction Act (PRA) of 1980 is another instrument that established a process under which agencies have to consider the paperwork burden associated with certain regulatory and other actions; per this Act, agencies must receive approval from the OIRA when collecting information from 10 or more individuals.⁹² Other oversight mechanisms that the Congress uses for delegated legislation include traditional tools aside from the Congress's power to legislate. For example, this may include holding committee hearings or gathering information regarding an agency's rulemaking activities.⁹³ The Congress may also use the power of the pursue to oblige agencies to act in a certain way. To prevent an agency from undertaking a certain rulemaking proceeding, the Congress may prohibit said agency from using any appropriated funds to develop or finalize such a rule.⁹⁴

With increasing usage of administrative rule-making powers, there is an increased emphasis on the safeguards that are necessary to combat any abuse of authority by the party to which the powers are delegated. Therefore, rather than questioning the act of delegation legislation itself, the focus has shifted to address the issue of control.⁹⁵ From citizens' perspective, the primary safeguard becomes the formulation of rules and regulations, which has largely been a matter for administrative agencies in the US⁹⁶ One such method is to hold conferences and consultations with groups whose interests are effected by administrative rules and regulations and also get the views of the industry that is effected as well.⁹⁷ Moreover, there are also judicial review of agency action, including a statute in the APA that provides judicial recourse for a person who is

⁹⁰ <file:///C:/Users/Bipin/Downloads/18670.pdf> p. 1.

⁹¹ <file:///C:/Users/Bipin/Downloads/18670.pdf> p. 1.

⁹² <https://fas.org/sgp/crs/misc/R43056.pdf> at p. 3.

⁹³ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁹⁴ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁹⁵ Schwartz, B. (1948), "Delegated Legislation in America: Procedure and Safeguards," *The Modern Law Review*, 11.1, p. 449-465, at 449.

⁹⁶ Schwartz, B. (1948), "Delegated Legislation in America: Procedure and Safeguards," *The Modern Law Review*, 11.1, p. 449-465, at 449-50.

⁹⁷ Schwartz, B. (1948), "Delegated Legislation in America: Procedure and Safeguards," *The Modern Law Review*, 11.1, p. 449-465, at 450-1.

aggrieved by a final agency action, unless a statute precludes judicial review or if a decision is left to agency discretion by law.⁹⁸ Additionally, the APA provisions that a court may compel any agency action that is unreasonably delayed or unlawfully withheld.⁹⁹

C. India

The legislature of India is empowered by the Constitution of India to create laws, and in order to adequately perform all of its responsibilities, the legislature may delegate legislation powers to a second entity. There are some powers that the legislature may not delegate, including framing legislative policy, exceeding the scope of the delegated Act, and retrospective effect of rules.¹⁰⁰ Unlike in other countries, all Acts in India contain provisions on rule-making.¹⁰¹ An Act provides the legal framework and the main policy principles, and the Parliament, through the Act itself, delegates its legislative powers to the government to frame rules and regulations.¹⁰² Thus, although the Parliament cannot delegate its essential legislative powers to the executive, it may provide the basic guidelines that the executive must follow in order to frame the rules and regulations of the Act.¹⁰³ The executive is prohibited from framing rules that go beyond the mandate of the Act itself.¹⁰⁴

Additionally, there are two essential forms of parliamentary oversight of the rules framed by the executive in India. Per the Manual of Parliamentary Procedure, should an Act state that the rules to be framed to further the Act are to be placed before the Parliament, the executive must do so within six months from the date from which the Act is enforced.¹⁰⁵ The executive only has to comply with this provision if the Act specifies this procedure. In 1971, this practice of including a clause in a Bill specifying laying the subordinate legislation before the Parliament for a period of 30 days was enacted.¹⁰⁶ In general, the rules are subject to negative resolutions, which means that the rules will become law after the 30-day period unless they are modified or annulled by the Parliament. In this case, a member of Parliament has to give a notice to move a statutory motion of this nature, and the speaker must decide on the date for this purpose in consultation with the

⁹⁸ <https://fas.org/sgp/crs/misc/IF10003.pdf>

⁹⁹ <https://fas.org/sgp/crs/misc/IF10003.pdf>

¹⁰⁰ Kakkar, J., & Bedi, P. (2012). Parliamentary Scrutiny of Executive Rule Making. PRS Legislative Research Center for Policy Research, New Delhi, at p. 1.

¹⁰¹ Kakkar, J., & Bedi, P. (2012). Parliamentary Scrutiny of Executive Rule Making. PRS Legislative Research Center for Policy Research, New Delhi, at p. 1.

¹⁰² <https://thewire.in/government/delegated-legislation-parliament-executive>

¹⁰³ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹⁰⁴ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹⁰⁵ <https://thewire.in/government/delegated-legislation-parliament-executive> ; Kakkar, J., & Bedi, P. (2012). Parliamentary Scrutiny of Executive Rule Making. PRS Legislative Research Center for Policy Research, New Delhi, at p. 1.

¹⁰⁶ <https://thewire.in/government/delegated-legislation-parliament-executive>

leader of the house, the Prime Minister.¹⁰⁷ Other rules are laid subject to affirmative resolutions, meaning that the Parliament has to expressly vote in favor of the rule after it has been laid before the Parliament for it to become law.¹⁰⁸ Additionally, the government does not have a lot of incentive to allow debate on a rule it wants to notify as soon as possible, and the speaker has no obligation to consult the member of Parliament to determine the date of such discussion, which may be conducted as per his/her discretion.¹⁰⁹ It is possible that once an MP submits a notice, the speaker and government delays taking a decision until the motion lapses.¹¹⁰

The second method of scrutiny of delegated legislation in India is through the Standing Committee on Subordinate Legislation in both houses of Parliament.¹¹¹ When the Committee was formed in 1953, its work could be reviewed under three main heads:

“(i) Evolution of a uniform pattern of the terms of delegation contained in the enabling statutes, particularly in regard to the laying of the rules before Parliament and the right of the latter to modify them.

“(ii) Improvement in the publicity to the rules made and of the language employed so as to make it easily intelligible to the people.

“(iii) Scrutiny of the rules hitherto made so as to develop a sort of jurisprudence of delegated legislation-and a guide to what is good and sufficient and what could be considered objectionable.”¹¹²

This Committee must study the rules, seek expertise and public opinion, and submit reports to the house.¹¹³ More specifically: “There shall be a Committee on Subordinate Legislation to scrutinize and report to the Council whether the powers to make rules, regulations, bye-laws, schemes or other statutory instruments conferred by the Constitution or delegated by Parliament have been properly exercised within such conferment or delegation, as the case may be.”¹¹⁴ Its powers include the following:

¹⁰⁷ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹⁰⁸ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹⁰⁹ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹¹⁰ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹¹¹ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹¹² Sharma, M. P. (1956). *Parliamentary Control Over Delegated Legislation in India*. *Indian Journal of Public Administration*, 2(3), 208–217, at p. 210.

¹¹³ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹¹⁴ https://rajyasabha.nic.in/rsnew/committees/committ_sub_rules.asp

(1) The Committee shall have power to require the attendance of persons or the production of papers or records, if such a course is considered necessary for the discharge of its duties:

Provided that Government may decline to produce a document on the ground that its disclosure would be prejudicial to the safety or interest of the State.

(2) Subject to the provisions of this rule, a witness may be summoned by an order signed by the Secretary General and shall produce such documents as are required for the use of the Committee.

(3) It shall be in the discretion of the Committee to treat any evidence tendered before it as secret or confidential.¹¹⁵

Additionally, its functions are outlined as follows:

After each rule, regulation, bye-law, scheme or other statutory instrument (hereinafter referred to as the 'order') framed in pursuance of the Constitution or the legislative functions delegated by Parliament to a subordinate authority and which is required to be laid before Parliament, is so laid before the Council, the Committee shall, in particular consider-

(i) whether the order is in accord with the provisions of the Constitution or the Act pursuant to which it is made;

(ii) whether the order contains matter which in the opinion of the Committee should more properly be dealt with in an Act of Parliament;

(iii) whether the order contains imposition of taxation;

(iv) whether the order directly or indirectly bars the jurisdiction of the court;

(v) whether the order gives retrospective effect to any of the provisions in respect of which the Constitution or the Act does not expressly give any such power;

(vi) whether the order involves expenditure from the Consolidated Fund of India or the public revenues;

(vii) whether the order appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;

(viii) whether there appears to have been unjustifiable delay in its publication or laying the order before Parliament;

(ix) whether for any reason the form or purport of the order calls for any elucidation.¹¹⁶

¹¹⁵ https://rajyasabha.nic.in/rsnew/committees/committ_sub_rules.asp

¹¹⁶ https://rajyasabha.nic.in/rsnew/committees/committ_sub_rules.asp

Once the Committee submits its report with findings to the Parliament, the government is required to give a response, and based on it, the Committee prepares an Action Taken Report on the status of the implementation of its recommendations.¹¹⁷

There are numerous stages in which delegation require careful examination: the first is when the Bill proposes delegation to administrative and executive authorities – the draftsman's role is critical, and his/her draft becomes the basis of the Act.¹¹⁸ During this stage, the draftsman receives directions from his/her seniors, parliamentarians, and legislators on what and how much to delegate, and the draftsman also assimilates these directions to formulate them carefully and unambiguously in the Bill.¹¹⁹ The debate on the Act may include the relevant departmental standing committee advising on the scope of the delegated legislation and whether, for example, important provisions have been left out.¹²⁰ The second stage is when the Act passes, and the rules are framed to work out the delegation, where it's necessary to clarify who is responsible for framing the rules and the procedure that should be followed to devise a reasonable set of rules consistent with the Act and with due regard to affected parties.¹²¹ Once the rules themselves have been tabled before the Parliament, MPs may move a statutory motion to seek annulment or modification of the rules within, usually, a 30-day period, as specified by the parent Act.¹²²

Additionally, there is the publicity of the rules, so that the public may give suggestions and objections before making the rules and after making them to leave enough room for corrections.¹²³ However, public consultation is not a requirement in India, although some Acts require prior publication and consultation on draft rules, while in other cases, the government itself may exercise its discretion and invite comments from the public.¹²⁴

¹¹⁷ Kakkar, J., & Bedi, P. (2012). Parliamentary Scrutiny of Executive Rule Making. PRS Legislative Research Center for Policy Research, New Delhi, at p. 2.

¹¹⁸ [http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20\(465-492\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20(465-492).pdf)
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¹¹⁹ [http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20\(465-492\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20(465-492).pdf)
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¹²⁰ Kakkar, J., & Bedi, P. (2012). Parliamentary Scrutiny of Executive Rule Making. PRS Legislative Research Center for Policy Research, New Delhi, at p. 1.

¹²¹ [http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20\(465-492\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20(465-492).pdf)
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¹²² Kakkar, J., & Bedi, P. (2012). Parliamentary Scrutiny of Executive Rule Making. PRS Legislative Research Center for Policy Research, New Delhi, at p. 2.

¹²³ [http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20\(465-492\).pdf](http://14.139.60.114:8080/jspui/bitstream/123456789/15264/1/051_Delegated%20Legislation%20(465-492).pdf)
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¹²⁴ Kakkar, J., & Bedi, P. (2012). Parliamentary Scrutiny of Executive Rule Making. PRS Legislative Research Center for Policy Research, New Delhi, at p. 3.

In practice, however, between 2008-2012, only 101 out of 6,985 delegated legislation pieces were scrutinized in this way.¹²⁵ Thus, the Parliament must consider introducing additional working committees, supplemented by legal and policy expertise, to undertake comprehensive studies of delegated legislation placed before the Parliament.¹²⁶ Another challenge is that although the government must ask for an extension from the committee for a failure to meet the deadline of framing the rules, extension requests fail to contain the reasons for the delay and fail to follow-up as well.¹²⁷

While delegated legislation may be considered a necessity due to the Parliament's shortcomings (i.e. expertise or time), it is also a risk because the Parliament may delegate more liberally than necessary or when framing such delegation, departmental experts may do so with an eye on administrative convenience rather than the convenience of the people.¹²⁸ Therefore, controlling delegate legislation is a very important matter, and the safeguards to do so in India usually take the form of defining the limits of the delegation, laying down the procedures of rule-making, adequate publicity of the proposed rules, requirements that the rules be laid before the legislature, and the provision of control and review by the courts.¹²⁹

6. Towards *Delegated Legislation Act of Nepal*

These brief analysis of the Nepalese situation and the inputs from country studies clearly show that Nepal has a long way to go to institutionalize its efforts to exercise parliamentary control, oversight and supervision of delegated legislation in Nepal. Even though Nepal started as back as 1960, there is little progress in the historical period. It is an opportunity that the first parliament after the promulgation of the Constitution of Nepal 2015 is taking interest to institutionalize the parliamentary control of the delegated legislation through this National Assembly Committee.

All these three case studies show that Nepal also needs a Delegated Legislation Act serving the purpose of an enabling legislation. The Statutory Instruments Act of 1946 of the UK which addresses the matter of delegated legislation in the UK can be an important model. This Act may allow creating delegated legislation through an affirmative or parliamentary procedure, or without any procedure, as determined by the Act. A negative procedure, on the other hand, may determine that the delegated legislation becomes law on the day that a Minister signs it and

¹²⁵ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹²⁶ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹²⁷ <https://thewire.in/government/delegated-legislation-parliament-executive>

¹²⁸ Sharma, M. P. (1956). *Parliamentary Control Over Delegated Legislation in India*. *Indian Journal of Public Administration*, 2(3), 208–217, at p. 209.

¹²⁹ Sharma, M. P. (1956). *Parliamentary Control Over Delegated Legislation in India*. *Indian Journal of Public Administration*, 2(3), 208–217, at p. 209.

remains law unless a motion to reject it is agreed upon by either House within given sitting days. Parliament should be able to approve or disapprove a delegated legislation, but should not be able to amend it. The Act may provide for a Joint Committee on Delegated Legislation that could ensure that delegated legislation is clear and follow the powers that the parent Acts have prescribed.

7. Conclusion

Evaluating these three cases, we may derive some important lessons for Nepal, as it looks towards strengthening parliamentary oversight processes of delegated legislation.

Most importantly, to ensure parliamentary control, it is necessary to the role of the committees be strengthened, as in the case for India, and a separate law, like a Statutory Instruments Act, be passed. Such a committee may be supplemented by a specialized official body to ensure the effectiveness of delegated legislation. As the analysis has demonstrated, the control of the legislature over the delegated legislation process in the US and India is not as strong as in the case of the UK. In the UK, the laying off procedure is followed effectively, as all administrative rule-making is under the control of the Parliament through the Select Committee on Statutory Instruments. In India, control is not as effective, and neither is the implementation of the instruments in place for parliamentary oversight of this process, including of the scrutiny committees that are instituted. India does not have any statutory provisions regarding "laying" a piece of delegated legislation before the legislature.