

# Parliamentary Scrutiny of Executive Rule Making

## Background Note for the Conference on Effective Legislatures

Under the Constitution, the Parliament has the power to make laws, the Executive is responsible for implementing the laws and the Judiciary is the body interpreting the laws. In most cases the legislature enacts a law covering the general principles and policies and leaves detailed rule-making to the government to allow for expediency and flexibility. For example, under the Essential Commodities Act, 1955 the government has been given the power to amend the list of essential commodities. The government is required to frame the rules in accordance with the policy laid down by the legislature. Such rules are called subordinate legislation and may be referred to as— rules, regulations, bye-laws, orders, and notification.

Under the Constitution, the role of the Executive is not limited to implementing legislation, it has also been given the power to make policies and issue executive orders establishing the necessary framework to implement them. For example, the central government has instituted the National Rehabilitation Policy, 2007 and the National Policy on Urban Street Vendors, 2009. Such policies and schemes are not subject to prior approval by Parliament. However, Parliamentary approval is required to sanction any expenditure to implement the scheme or policy. This note is limited to scrutiny of the government’s rule making power under legislation.

### Mechanisms for Scrutiny of Subordinate Legislation in India

Subordinate legislation can only be framed under a central or state Act if the Act gives rule-making power to the government. However, certain functions and powers cannot be delegated to the government. These include framing the legislative policy, exceeding the scope of the delegating Act, retrospective effect of rules, etc. There are broadly three mechanisms to ensure that the rule making process complies with the above, i.e., parliamentary scrutiny, public consultation and judicial scrutiny.

Unlike some countries that have overarching legislations that regulate delegated legislation, in India every Act has a provision on rule making. The Manual of Parliamentary Procedure requires rules to be framed within six months of the relevant law coming into force.<sup>1</sup> Table 1 shows time between passing of certain Acts and the notification of the first rule under those Acts (15<sup>th</sup> Lok Sabha). Generally, rules come into effect as soon as they are published in the Gazette and they remain in force as long as they are not amended or annulled by the Parliament. The rules are laid after their publication in accordance with the procedure specified in the relevant Act. According to the Manual of Parliamentary Procedure, the rules have to be laid in Parliament within 15 days from (a) the date of their publication in the Official Gazette if Parliament is in session; or (b) the date of the commencement of Parliament, if it is not in session. Between June 2009 and September 2012, 4731 rules and regulations were tabled in the Parliament, of which 552, i.e., 11.7 per cent, were tabled with delay.

**Table 1: Time between passing the Act and the notification of the first rule**

Name of Act	Time (mth)
Civil Liability for Nuclear Damage Act, 2010	15
Land Ports Authority of India Act, 2010	11
Right of Children to Free & Compulsory Education Act, 2009	8
Foreign Contribution (Regulation) Act, 2010	8
National Green Tribunal Act, 2010	6
Nalanda University Act, 2010	3
Clinical Establishments (Registration and Regulations) Act, 2010	27+*
Regulation of Factor (Assignment of Receivables) Act, 2011	10+*

Sources: Bulletin II, RS, LS Committee on Subordinate Legislation; PRS.

\*Rules have not been notified yet.

### Parliamentary scrutiny

Parliament has the power to oversee rules at various levels: (a) during the debate on the Act; (b) statutory motion to discuss rules; (c) Question Hour; and (d) Committee on Subordinate Legislation.

#### A. Debate on the Act

At the time of passing the Act, Members of Parliament (MPs) may debate the provisions relating to delegated legislation. The relevant departmentally related standing committee while examining the Bill may also make recommendations regarding the scope of delegated legislation. For instance, while looking at the Companies Bill, 2009, the Standing Committee on Finance observed that there was excessive delegation in the Bill as certain substantive provisions had been delegated to the rules. The Committee recommended some of the important provisions should be incorporated in the main Bill.<sup>2</sup>

## B. Statutory Motion

After the rules have been tabled, MPs may move a statutory motion seeking an annulment or modification of the rules. The parent Act usually provides that the rules shall be tabled in the House for a period of 30 sitting days, and MPs may move a motion to amend or annul the rule till the last date of the subsequent session. If during that time, the rule is modified or annulled, then the rule shall accordingly be modified or cease to have effect. Most laws provide that the amendment to the rules shall apply prospectively and any prior action under the rules will not be affected.

In the 2012 budget session, two statutory motions were moved in the Rajya Sabha.<sup>3</sup> One was to annul the Information Technology (Intermediaries Guidelines) Rules, 2011. The second motion was to modify the Airports Authority of India (Major Airports) Development Fees Rules, 2011. Both the rules were discussed in the Rajya Sabha and the ministers made certain assurances. Both the motions were not passed.

## C. Question Hour

The scope and provisions of the rules may also be discussed in the Question Hour. However, this method has not been exercised frequently. For example, between December 2011 and August 2012, two questions were asked in the Rajya Sabha on the provision relating to the Civil Liability for Nuclear Damage Rules, 2011.<sup>4</sup>

## D. Committee on Subordinate Legislation

Each house of Parliament has a Standing Committee on Subordinate Legislation. The main purpose of the Committee is to oversee whether the power delegated by Parliament to the government is being properly exercised. The Rules of Procedure of both Houses define the scope of the Committee's powers. These include examining whether:<sup>5</sup> (a) the rules are in accordance with the Constitution and the Act under which they have been drafted; (b) there has been an unusual delay in the publication of the rules; (c) there is a retrospective application of the rules; (d) they bar the jurisdiction of courts; and (e) they involve expenditure from the Consolidated Fund of India. After the Committee has submitted its report, the government is required to give its response. Based on this response, the Committee prepares an Action Taken Report on the status of the implementation of its recommendations.

Some of the recent rules examined by the Committee are the Transplantation of Human Organs (Amendment) Rules, 2008, and the Civil Liability for Nuclear Damage Rules, 2011. The Committee does not examine all subordinate legislation laid in Parliament. For example, these may include orders that the government notifies as part of routine government business such as land acquisition, revision of tariff under the Customs Act, etc.

### Recommendations of the Committee

In 2011, the Lok Sabha Committee submitted a Report criticising the government for not implementing its previous recommendations.<sup>6</sup> Its observations included:

- The Ministry of Parliamentary Affairs has failed to perform its role as the nodal agency. It has not established a mechanism to ensure compliance of the departments with the recommendations of the Committee. There is a need for the appointment of Law Officers in all ministries and departments.
- Despite its previous observations, there are still inordinate delays in framing and publishing rules.

Of the 4731 subordinate legislations that have been tabled in Parliament during the 15<sup>th</sup> Lok Sabha, 40 rules and regulations, i.e., less than one per cent, have been examined by the Lok Sabha Committee on Subordinate Legislation. Sources: Bulletin II, RS, LS Committee on Subordinate Legislation; PRS.

### Case study: Pravasi Bharatiya Bima Yojna 2003 and 2006

The government had notified an insurance scheme in 2003 for non-resident Indians under the Emigration Act, 1983. The Law Ministry had recommended that the government amend the provision related to delegated legislation in the Act to allow for such a scheme to be issued under the Act. However, due to "emergent" circumstances the government issued these schemes as an executive order.

The Committee was of the opinion that since the scheme was binding in nature; it should have been issued as a statutory scheme rather than an executive order.

While the Committee was examining the 2003 scheme, the government issued an amended version of the scheme in 2006 as an executive order. The Committee reiterated that the scheme should have been issued as a statutory scheme.

The government agreed to make the necessary amendments to the Act to allow for the issue of such a statutory scheme. However, till date no such amendment has been made.

After consulting with various Ministries such as the Law Ministry and Ministry of Indian Overseas Affairs, the Committee recommended:

- The present vetting process of subordinate legislation by the Legislative Department of the Law Ministry should be examined.
- A comprehensive set of guidelines for framing subordinate legislation should be created for the benefit of government departments undertaking such an exercise.

Source: 20th Report of the Lok Sabha Committee on Subordinate Legislation, October 20, 2008.

In its previous Reports,<sup>7</sup> the Committee has made the following recommendations: (a) Rules should not exceed the scope of the Act; (b) rules should be framed within a maximum period of six months from the date of the Act coming into force; (c) rules should not have a retrospective effect, unless the Act expressly provides for it; (d) rules should be laid in Parliament within 15 days of their publication in the Gazette. If there is a delay, then reasons for the delay should be appended; and (e) the power of judicial review should not be curtailed by rules.

## Judicial Interpretation

Since delegated legislation forms a part of law, courts have the jurisdiction to examine them. The courts have held that framing of legislative policy is an essential function and cannot be delegated to an administrative body.<sup>8</sup> However, they have generally leaned towards upholding the validity of rules. For example, the validity of the Essential Commodity Act, 1955 and Minimum Wages Act, 1948 has been upheld, even though under those Acts, wide powers have been delegated to the government.<sup>9</sup>

The courts have held that the legislature has the authority to delegate the power to: (i) modify an Act as long as the legislative policy remains intact. For instance, under the Companies Act, 1956, the central government has been given the power to amend the schedules of the Act; (ii) appoint a commencement date of the provisions of the Act; and (iii) exempt and include certain categories of people, goods, etc.<sup>10</sup> Additionally, fiscal power can be delegated provided the Act provides the guidelines for the exercise of such power. For example, under the Mines and Minerals (Development and Regulation) Act, 1957, the state government may enhance the royalty for minor minerals.

## Public Consultation

Some countries have overarching legislations requiring rules to be published in draft form. However, in India, there is no such requirement. Some Acts mandatorily require prior publication and consultation on draft rules while in others the government may exercise its discretion and invite comments on the draft rules. As per the General Clauses Act, 1897, when the Act requires publication of draft rules, the following criteria have to be satisfied:<sup>11</sup> (a) draft rules have to be published in the Official Gazette; and (b) objections and suggestions on the draft rules have to be invited by a specific date and the government should consider them. However, such a provision for prior publication and public consultation of the draft rules is not found in most Acts.

Even if the Act does not require the draft rules to be published, the government may invite comments from the stakeholders on a draft version of the rules. For example in July 2012, the central government had published the draft Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Amendment Rules, 2012 seeking comments from stakeholders within 30 days. After the public comments were received, the final rules were notified in September 2012.

## International Comparison

Countries such as the United Kingdom and United States have enacted laws to provide for the manner of regulating delegated legislation. For example, the United Kingdom has enacted the Statutory Instruments Act, 1946 and the United States has enacted the Congressional Review Act, 1996 and the Administrative Procedure Act, 1946. A comparison of the manner for scrutiny of delegated legislation of various countries is given in the Table 2.

### FSLRC Recommendations on Delegated Legislation

The government had appointed the Financial Sector Legislative Reforms Commission (FSLRC) in 2011-12 for the purpose of rewriting and harmonizing the financial sector legislations, rules and regulations. The FSLRC submitted its approach paper in October 2012. Some of the recommendations by the FSLRC on framing financial sector regulations are:

*Specification of rule making process and a cost benefit analysis:* The Act should clearly specify a detailed rule making process. Such a provision will help to introduce the necessary checks and balances. Further, a statement of the objects and reasons as well as a cost benefit analysis of the subordinate legislation should be appended to the draft subordinate legislation. Specifically for regulatory laws, a clear exposition of the market failure, the proposed intervention, whether this is in the powers of the regulator and how this intervention would address the market failure should be highlighted.

*Consultation:* The rules should be published in a draft form and consultation should be held with the public. The delegated authority should substantively respond to all public comments. Modified subordinate legislation should be published with a prospective date from when it becomes effective.

Source: Financial Sector Legislative Reforms Commission Approach Paper, Ministry of Finance, October 2012.

**Table 2: International comparison of mechanisms for scrutiny of subordinate legislation**

United Kingdom	United States	Canada	South Africa
<b>Pre-Rule making scrutiny</b>			
If an Act provides for the draft rules to be laid before Parliament, it shall be laid for 40 days.	The draft rules have to be published in the Federal Register. A cost-benefit analysis of the rules has to be done by the regulatory agency.	The draft rules have to be published in the gazette for public comments.	The Constitutional Court has held that prior public consultation is required before making rules.
<b>Publication of Rules</b>			
The rules shall be published as soon they are made.	The rules have to be published in the Federal Register as soon as approved by Congress.	The rules shall be published in the gazette within 23 days of being registered in the Privy Council.	The rules have to be published in the gazette.
<b>Laying before Legislature</b>			
If the Act requires the rules to be laid before Parliament, it has to be done before the rules come into operation.	Prior to the rules coming into effect, they have to be laid before Congress.	Rules will be tabled if required by the Act.	All rules have to be tabled in Parliament.
<b>Committee System</b>			
Four committees which examine the extent of delegation, policy merits, legal compliance of the rules with Act and regulatory oversight respectively.	All rules are referred to the standing committee with jurisdiction on the particular subject.	All rules are referred to the scrutiny committee to examine the legality and the procedural aspect of the rules.	There is no provision for the rules to be referred to a committee.
<b>Amendment/modification of Rules</b>			
Parliament can annul the rules, but not amend them.	The Congressional Review Act gives Congress 60 days to review and annul rules having major financial impact on the economy, increase in costs and adverse effect on markets.	Parliament may revoke the rules if the scrutiny committee suggests the same.	The Constitution provides that the legislation may provide for amendment or modification of rules.
<b>Procedure for approval by Parliament</b>			
The rules may be subject to (i) an affirmative approval; or (ii) a negative procedure (becomes law without debate).	Congress has the power to approve or reject the rule.	Parliament has the power to approve or reject the rule.	The procedure for approval or annulment of the rule is stipulated in the Act.

**Sources:** Statutory Instruments Act, 1946 (U.K.), Congressional Review Act, 1996 (U.S.A), Administrative Procedure Act, 1946(U.S.A), Statutory Instruments Act, 1970 (Canada), South African Constitution, 1996, Interpretation Act, 1957; PRS.

### Notes

- Chapter 11, Manual of Parliamentary Procedure, Ministry of Parliamentary Affairs, 4th Report of the Committee on Subordinate Legislation (LS), December 18, 1985.
- Companies Bill, 2009 21<sup>st</sup> Report of the Standing Committee on Finance, August 31, 2010.
- Bulletin 1, Rajya Sabha, May 17, 2012; Bulletin 1, Rajya Sabha, May 21, 2012.
- Rajya Sabha, Unstarred Question No. 2485, December 15, 2011; Rajya Sabha, Unstarred Question No. 836, August 17, 2012.
- Rule 320, Rules of Procedure of Lok Sabha.
- 21st Report on 'Non-implementation of the Oft- Repeated Recommendations of the Committee' (Lok Sabha), Dec 16, 2011.
- Fourth Report of the Lok Sabha Committee on Subordinate Legislation, December 18, 1985; 24<sup>th</sup> Report of the Lok Sabha Committee on Subordinate Legislation, March 25, 1996.
- Harishankar Bagla vs. State of M.P, AIR 1954 SC 465.
- Registrar of Co-operative Societies, Trivandrum vs. K. Kunjabmu, AIR 1980 SC 350; Bhatnagars & Co., vs. UoI, AIR 1957 SC 478.
- Raj Narian Singh vs. Patna Administration Committee, AIR 1954 SC 569; Gammon India Ltd. vs. UoI, AIR 1974 SC 960; Edward Mills Co. vs. Ajmer, AIR 1955 SC 25.
- Section 23, General Clauses Act, 1897.

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