

GCE

# LAW: DELEGATED LEGISLATION



## DELEGATED LEGISLATION

Parliament is the supreme law-making body in the UK. This supremacy is referred to as 'THE SOVEREIGNTY OF PARLIAMENT'. However, not only can Parliament make laws, but it can also empower other people to do so. Parliament will normally pass a 'PARENT' or 'ENABLING' act which gives the 'bare bones' of the legislation. The detail or 'flesh' is added by other bodies e.g. Local Authorities.

The word '**delegate**' means to pass power to another person. Delegated legislation is therefore formed when **Parliament** has delegated power to other persons or bodies. The authority to make these laws is laid down in **primary legislation** (Acts of Parliament).

### Developing the subject

#### How delegated legislation is made

The specific power to make delegated legislation is contained in an enabling provision or enabling section of the Parent/Enabling Act. The relevant section in the Environment Act 1995, s 97, states that the 'appropriate Ministers' (then Secretary of State for the Environment and Minister of Agriculture) may 'by regulations make provision for, or in connection with, the protection of important hedgerows in England and Wales'. This provision has the effect of identifying the person/body responsible for creating new law (Secretary of State/Minister); determining the type of secondary legislation to be made (regulations); and prescribing the focus required by that law (the protection of important hedgerows in England and Wales). The outcome of the process, then, is the creation of a new piece of delegated legislation: the **Hedgerows Regulations 1997**.

On a simple level, therefore, it can be said that the **Hedgerows Regulations** are the offspring of the main primary legislation, the Environment Act 1995. For this reason, the 1995 Act might be referred to as the '**Parent Act**'. Alternatively, such primary legislation can be called an **Enabling Act**, because it has enabled further law to be made.

Comparing the volume of Acts of Parliament and UK delegated legislation (Statutory Instruments) between 199 and 2004

<i>Year</i>	<i>Acts of Parliament Figures relate to Public General Acts (i.e. those Acts originating as Public Bills)</i>	<i>Delegated legislation in the form of Statutory Instruments</i>
1997	69	3,114
1998	49	3,319
1999	35	3,488
2000	45	3,424
2001	25	4,147
2002	44	3,271
2003	45	3,354
2004	38	3,452

Source: Cracknell, R (2004) *Acts and Statutory Instruments: Volume of Legislation 1950-2004*

(House of Commons Library) – [www.parliament.uk/commons/lib/research/notes/snsg-02911.pdf](http://www.parliament.uk/commons/lib/research/notes/snsg-02911.pdf)

### **Making delegated legislation**

*Example of Act of Parliament passing power to another person/body*

*Example of person/body to whom Example of the type of such power to make delegated legislation which law is passed results from this process*

**Environment Act 1995 (a general Act to protect and enhance the environment)**

**Secretary of State for the Environment; and Minister of Agriculture**

**Hedgerows Regulations 1997 (technical laws to provide protection for important environmental habitat features, that is, important hedgerows)**

Delegated legislation takes place when Parliament has delegated its law – making powers to some subordinate authority. The reason for DELEGATED LEGISLATION is because the business of Parliament covers such a wide range of activities concerning the modern state, and the problems to be dealt which are often so complex and technical, that it is impracticable for Parliament to deal with them all personally by legislation.

**This enables Parliament to devote more time to general policy and the running of the state.**

## FORMS OF DELEGATED LEGISLATION:

### 1. ORDERS IN COUNCIL

This is Government legislation which does not have to go through the full parliamentary procedure. It is used to implement matters of major importance e.g. during World War II the government acted by ORDERS IN COUNCIL in the exercise of power delegated by the EMERGENCY POWERS [DEFENCE] ACT 1938 & 1940, also the PREVENTION OF TERRORISM [TEMPORARY PROVISIONS] ACT 1976.

Members of the Cabinet are always Privy Councillors, Principal Council of the Crown, Orders in Council – law made in the name of the Queen through a group of ministers sitting as the PRIVY COUNCIL usually to meet any national emergencies that might arise in the future – threats to the supply and distribution of food, water, fuel or other essentials of life.

### 2. BY LAWS

These are rules made by an authority subordinate to Parliament [e.g. Local Authorities, British Rail Board & British Airport Authority] for the regulation, administration or management of their district or property. Local Authorities have power given by Parliament to make BY LAWS which have legal force only within a SPECIFIC GEOGRAPHICAL LOCALITY/AREA, and the power is delegated on a specific topic.

BODDINGTON v BRITISH TRANSPORT POLICE [1998]

Enabling Act was the Transport Act 1962 which authorised the creation of the British Railways Board Bylaws 1965 – which prohibited smoking in railway carriages. Boddington was convicted of breaching the provisions of the bylaw.

### 3. MINISTERIAL REGULATIONS

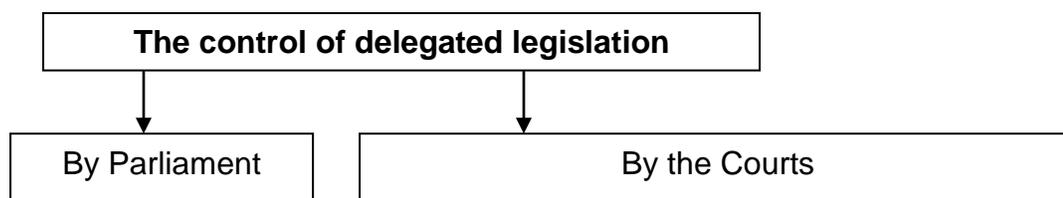
Here power is given or delegated to the minister by the Government e.g. the Minister of Transport makes detailed rules in a given area – road traffic regulations. Also called STATUTORY INSTRUMENTS.

It is common for EU law to be implemented by secondary legislation in the form of regulations – Employment Equality (Sexual Orientation) Regulation 2003, Employment Equality (Religion or Belief) Regulation 2003 protection of workers from harassment and discrimination on grounds of sexual orientation or religious beliefs.

Health & Safety – changing conditions in the workplace implemented through regulations  
Control of Asbestos at Work Regulations.

Road Vehicles Regulations – an offence to use a hand-held mobile telephone whilst driving.

Clearly there are dangers in the delegation of legislative power, since it takes the power to legislate away from elected representatives of the people and undermines the sovereignty of Parliament. Safeguards are needed to prevent the abuse of power by those to whom it has been given. Control is exercised both by Parliament itself and by the courts.



Control of delegated legislation is achieved in the following ways:

**1. Through the enabling Act.** It is very important that this is expressed in clear and unambiguous terms so as to define the precise power given. Parliament has ultimate power because it can always repeal or amend the enabling Act.

**2. Laying before Parliament.** There is no general Act which requires all delegated legislation to be laid before Parliament; whether this is necessary or not will be stated in the enabling Act. Most enabling Acts do require that the delegated legislation be laid. There are two main forms:

**Negative resolution** by which the legislation must be laid before Parliament for a specified time (usually 40 days) during which time a member may attempt to annul it (by asking the House to

The limited time available for discussion of delegated legislation and the fact that the government has a majority in Parliament, ensures that delegated legislation is unlikely to be challenged successfully, and so laying before Parliament is not a particularly effective form of control.

**3. Publication.** Statutory instruments (but not other kinds of delegated legislation) are covered by the **Statutory Instruments Act 1946** which provides in s2 that they must be printed and put on sale as soon as possible after they are made. Failure to do this does not make the instrument invalid, but under s3 (2) a person charged with an offence under a statutory instrument has a defence if he can prove that it has not been “issued” (printed and sold) at the time of the offence. The minister then has the onus of proving that reasonable steps had been taken to bring the instrument to the notice of those likely to be affected by it. Certain instruments are exempt from publication under the provisions of the **Statutory Instrument Regulations 1947**, usually because they are local, bulky, or temporary or because publication is not in the public interest.

**4. Scrutinising committees.** A Joint Select Committee on Statutory Instruments, composed of members from both Houses of Parliament, has the power to examine all general statutory instruments and other instruments that have to be laid before Parliament. This scrutiny is concerned not with content but with whether the instrument should be drawn specifically to the attention of Parliament – for example, because it imposes a tax or purports to have retrospective effect when the Act does not allow this. Only a few of the many instruments passed are actually considered in this way.

**5. Control by the courts.** The courts have no power to declare an Act of Parliament invalid, however much they disapprove of it, unlike delegated legislation which is subject to control by the courts. Delegated legislation can be declared *ultra vires* and therefore void or said to be unreasonable.

a. **Substantive *ultra vires*.** The courts may declare the contents of a piece of delegated legislation *ultra vires* because the person or body making it exceeded the power given by Parliament (*ultra vires* meaning “beyond the powers”). A classic example of *ultra vires* is **Attorney-General v Fulham Corporation [1921]** in which the local authority was given power under the **Baths and Wash-houses Acts 1846-78** to set up wash-houses. When they set up a laundry they were held to be acting beyond their powers and were prevented.

## **R v HOME SECRETARY ex parte FIRE BRIGADE UNION (1995)**

b. **Procedural *ultra vires*.** A piece of delegated legislation may be declared invalid if the correct procedure was not followed in making it; for example, if a public enquiry was not held as required, or the prescribed bodies were not consulted.

## **AGRICULTURAL HORTICULTURAL & FORESTRY INDUSTRY TRAINING BOARD v AYLESBURY MUSHROOMS LTD (1972)**

c. **Unreasonableness.** Bylaws may be challenged for uncertainty or unreasonableness. Something is unreasonable only if it is totally unfair, oppressive or dishonest, and it is rare for such a challenge to succeed.

Courts sometimes take the view that Parliament has only given the power on the understanding that it is exercised reasonably. They have on occasions held a local authority bylaw to be VOID because the court feels it is unreasonable i.e. the law is partial or unjust in the way it operates between different classes of people.

### **e.g. STRICKLAND v HAYES [1896]**

Where a bylaw prohibited the singing or reciting of any obscene song or ballad, and the use of obscene language generally, was held to be UNREASONABLE and VOID because it was drawn too widely in that it was not limited to public places and it did not require the prohibited act to be done to the annoyance of the public.

d. **Human Rights compatibility.** After implementation of the **Human Rights Act 1998** (in October 2000) all delegated legislation must be read and given effect in a way that is compatible with the **European Convention on Human Rights** wherever possible. If it is not possible to do this a declaration of incompatibility may be made by the higher courts. There is a fast track procedure set out in the **Human Rights Act** which allows the government to amend incompatible legislation and make remedial orders. The government is not bound to act on declarations of incompatibility.

## **THE ADVANTAGES OF DELEGATED LEGISLATION**

1. The RANGE AND COMPLEXITY OF MODERN LEGISLATION would prove impossible to handle if Parliament dealt with it alone and did not delegate.
2. EXPERT KNOWLEDGE can be used effectively. Some legislation is highly technical and there is a case for leaving such law-making to the experts in that particular field.
3. REDUCES PRESSURE ON PARLIAMENTARY TIME
4. If a body has delegated authority to make rules it can be MORE FLEXIBLE. It may experiment and later amend rules in the light of changing circumstances.

5. Delegated legislation can be used in EMERGENCIES e.g. PREVENTION OF TERRORISM [Temporary Provisions] ACT 1976 enables control to be imposed between Britain and Northern Ireland as a means of combating terrorism. Enables legislation to be passed when Parliament is in recess.

### **DISADVANTAGES**

1. Increasing use of delegated legislation tends to DECREASE LIBERTY of the subject.
2. Unless it is rigorously controlled the citizen would LOSE PROTECTION OF THE COURT
3. If delegated authority is not closely defined there will be UNCERTAINTY as to its use.
4. The giving of DUE NOTICE and where possible CONSULTATION with interested parties is an integral part of parliamentary procedure and COULD BE OVERLOOKED OR IGNORED IF LEGISLATION WAS DELEGATED.
5. Undermines parliamentary sovereignty.
6. Too much law insufficient control.
7. Parliament's knowledge and understanding of the mass of delegated legislation it authorises is questionable. Lord Walker found some regulations on VAT 'remarkably obscure'.
8. Delegated legislation not always publicised.
9. Concerns over sub-delegation – thus legislation becomes remote from its origins.

### **DELEGATED LEGISLATION**

1. What is a 'PARENT' or 'ENABLING' Act?
2. Name the three forms of delegated legislation.
3. What is a Statutory Instrument? How does it differ from a BY LAW?
4. Explain three possible advantages of delegated legislation.
5. Explain the dangers of delegated legislation.
6. What controls are there over delegated legislation?

7. What does '*ultra vires*' mean? Give an example.
8. What happens if a court discovers a power has been exercised unreasonably?
9. Give an example of
  - i. DIRECT LEGISLATION
  - ii. INDIRECT LEGISLATION