



A push for procedural certainty

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Gowree Gokhale and Jaideep Reddy analyse the problems of delegated legislation and suggest ways to resolve them.

While the constitution and central and state statutes are the basis of India's legal regime, delegated (or subordinate) legislation plays an important role in the regulatory landscape. Lawyers spend enormous amounts of time splitting hairs on myriad rules, regulations, orders, circulars, clarifications, advisories and office memos issued by various regulators.

Delegated legislation often creates thorny issues for the legal community. This is usually because of procedural shortcomings, ambiguous drafting and frequent amendments.

BASES OF AUTHORITY

One of the most important aspects of delegated legislation is that it should be framed within the four corners of the principal legislation, i.e. the particular statute. For this purpose, the principal legislation needs to provide policy guidance for the issuance of the delegated legislation. The policy may be specified through the preamble or other provisions of the statute, but must be mentioned within the statute. Where there is no such policy or the policy is vague, delegation is excessive. The Supreme Court has recognized this numerous times.

There have been several cases where principal legislation has not clearly defined the boundaries of delegated legislation. One contemporary example is section 67C of the Information Technology Act, 2000 (IT Act), which states that an "intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe". Evidently, there is a lack of policy guidance in this section for the executive to frame rules.

In some cases, the reverse is true: delegated legislation or executive action goes beyond the law's mandate. A few recent examples highlight this.

In September 2016, the Department of Industrial Policy and Promotion (DIPP) issued an office memo making a substantive legal interpretation of section 31D of the Copyright Act, 1957. The section regulates the communication to the public of pre-published works by broadcasting organizations. The office memo stated that internet broadcasting organizations are covered by the section. As Shamnad Basheer, the founder of SpicyIP, pointed out in a letter to the DIPP, this office memo is likely beyond its jurisdiction. The only delegation that section 31D makes is to the Copyright Board, and for a limited purpose. The office memo does not state the statutory authority under which it is made, and there is no trace of such authority apparent in section 31D or the rest of the Copyright Act.

In another instance, the entire food industry was in a state of confusion when the product approval guidelines issued by the Food Safety and Standards Authority of India (FSSAI) were challenged in Bombay High Court in 2013. The guidelines were issued through a 2013 FSSAI advisory that consolidated a series of prior advisories. In 2014, Bombay High Court struck down the 2013 advisory.

Justice RV More (hearing a reference after a division bench was split) held that the advisory did not have the force of law because the FSSAI did not have power under the Food Safety and Standards Act, 2006 (FSSA), to issue it. Further, he held that the FSSAI should have passed regulations as provided under the FSSA to govern the particular subject matter and could not have issued the advisory without following the procedure prescribed by the FSSA. In September 2015, the Supreme Court upheld this ruling.

The regulation of taxi aggregators is made through delegated legislation by state governments under the Motor Vehicles Act, 1988. Initially, state governments tried to regulate the new players as taxi operators, which traditionally owned or leased their fleets, under city/radio taxi schemes. However, most of these schemes did not state the basis of their authority, especially with regard to how they were able to regulate taxi aggregators, which see themselves as technology platforms. The schemes were also ambiguously drafted and often not gazetted. After various high courts observed that the aggregators could not be prevented from operating without following due legal processes, the state governments began amending the taxi schemes or issuing new specialized regulations for taxi aggregators, which they now regulate as agents under section 93 of the Motor Vehicles Act.

The foreign direct investment (FDI) policy, too, a seminal document for corporate India, does not state the authority under which it is made.

The recent demonetization notification by the central government was challenged in various high courts and the Supreme Court. On 16 December 2016, the Supreme Court declined to interfere with the move, but noted the significant constitutional and procedural issues arising as a result of it. The matter has been referred to a constitution bench of the court.

These examples act as reminders even to experienced practitioners to constantly analyse the constitutional and statutory basis of delegated legislation.

PROCEDURAL DISCIPLINE

In 2014, the central government, through the legislative department of the Ministry of Law and Justice, formulated a binding policy which reiterated that subordinate legislation must be made available for public comments where the principal statute requires it. In addition, the policy stated that all legislation from February 2014 onwards should require that drafts of its subordinate legislation be published for public comments.

Other rules are also prescribed. When published for public comments, the legislation or subordinate legislation should be accompanied by an explanatory note detailing key legal provisions in simple language. The summary of comments received from the public and other stakeholders should be put on the website of the concerned department/ministry.

Public and stakeholder consultation can lead to fewer amendments in legislation and subordinate legislation, bringing about more regulatory certainty. Still, not every statute passed since 2014 has included a provision that all delegated legislation must be published for public comments, and earlier statutes relevant to the business community contain no such requirements. These include the Companies Act, 2013, the Income Tax Act, 1961, the Foreign Exchange Management Act, 1999 (FEMA), and the Securities and Exchange Board of India (SEBI) Act, 1992. It is thus left to the discretion of the regulator, and while some regulators (SEBI and the Telecom Regulatory Authority of India being prominent examples) regularly call for public comments, others do not.

Ironically, the 2014 policy itself is not perfectly drafted and may not have followed all procedural requirements. But it is an expression of best practices that, even in their absence, are elements of the rule of law.

Another procedural shortcoming is that delegated legislation is often published on a ministry's website but not notified in the official gazette (as all binding law is required to be). Indeed, Bombay High Court, in the matter of Godrej Industries in 2014, found that rules framed under the Companies Act and put on the website of the Ministry of Corporate Affairs but not published in the official gazette were not binding. There have also been instances of notifications being published in the gazette without being duly signed by the appropriate authority.

The FDI policy and accompanying press notes are only published on the DIPP website and not notified in the official gazette. They are mentioned to take effect as of a particular date. But they are notified in the gazette only when the Reserve Bank of India (RBI) subsequently amends the regulations that they form part of. So the question is: Do the FDI policy and press notes come into force as soon as the DIPP publishes them, or only after the RBI incorporates them into the regulations and notifies them?

Under FEMA, the RBI has the primary rule-making authority for FDI policy matters and is to exercise this in consultation with the central government. Therefore, a strict legal interpretation would view the FDI policy and the changes made in the press notes as being in force only after they are published in the official gazette as amendments to the relevant RBI regulations. It should be noted that a Finance Act, 2015, amendment to FEMA will (when notified) give the central government primary rule-making authority with respect to non-debt transactions. This would require that the FDI policy itself, and any amendments to it, be published in the form of gazetted rules (for non-debt transactions), and follow accepted drafting conventions.

Legal professionals would be well-advised to refer to the law as notified in the official gazette when making assessments on what is binding. In this connection, the recent move of the central government to entirely digitize the official gazette can prove helpful.

CLEARER DRAFTING

One of the key problems with delegated legislation is ambiguous drafting, in some cases even arising from where a comma or semi-colon has been placed!

Referring again to the FDI policy, it is written more as a policy paper than as a binding law, though it effectively operates as the latter. Contrary to accepted legislative drafting conventions, several crucial terms are left undefined, grammatical rules are neglected, nebulous phrases are used, public comments are only sometimes sought, and amendments are issued in the form of press notes. The lack of clarity in areas such as permitted models for e-commerce businesses and single-brand retail trading is a result of this. On single-brand retail trading, for instance, undefined phrases such as “state-of-the-art” and “cutting-edge technology” are given legal effect.

In connection with this, the 2014 policy required that every piece of legislation and delegated legislation be referred to the Law Ministry for vetting. One of the main purposes of this requirement is clear: Not every department has or can be expected to have the wherewithal to draft rules according to accepted legislative conventions. Hence, a draft should be submitted to the Law Ministry, which has a dedicated drafting department, to iron out creases.

If this policy is followed, the FDI policy and other delegated legislation will look more like legal codes and operate with much less ambiguity.

BETTER ACCESS TO LAWS

As mentioned above, a welcome move by the central government has been the complete digitization of the official gazette, beginning 2015. This is further to a provision in the IT Act that recognizes gazettes in digital form as being binding. The website egazette.nic.in is a repository of the central government’s gazette notifications including statutes, delegated legislation and amendments. Some state governments have also begun to partially digitize their gazettes.

However, it is still difficult to find the latest, authoritative, consolidated version of a given law, especially as regards delegated legislation and state law. This is because the pace of amendments for delegated legislation is high, with notifications under some laws numbering several a year (or month). This means that published books and even paid databases are often not up to date.

While indiacode.nic.in (published and managed by the Law Ministry’s legislative department) is a good initiative, it contains only statutes of parliament, not delegated legislation, and the latest versions of some statutes are not available. And while the e-gazette website is helpful, it falls short in terms of the usability of the interface and some notifications not being searchable since they are uploaded as scanned copies.

Most significantly, the e-gazette’s use is limited in cases where a principal law (whether an act or delegated legislation) has been amended several times. There is no repository, whether government or private, that comprehensively consolidates amendments with the principal laws (though new initiatives like Nyaaya appear promising). As a result of this, lawyers and the public are compelled to manually find every single amendment to some delegated legislation and piece together the law word by word. Significantly, some judgments have even been made based on pre-amended versions of laws, because the consolidated, amended versions of those laws may not have been easily available to the parties and their counsel.

Two feasible solutions to this are, first, to have an e-gazette requirement that departments submit consolidated versions of delegated legislation whenever any amending notifications are submitted for publication. This could be done by annexing the consolidated version to the notification (since the gazette is paperless, this is not an issue), or, if the law is too voluminous, by enclosing a hyperlink to the amended version of the law. This would decentralize the burden of consolidation, at least for future amendments.

Second, as a more medium-term aspiration, indiacode.nic.in should be developed to be a comprehensive database of laws, including delegated legislation, and publish the latest, amended versions of laws. This has been successfully implemented by other jurisdictions with similar legal systems, such as the UK (legislation.gov.uk), Australia (legislation.gov.au), New Zealand (www.legislation.govt.nz), Singapore (statutes.agc.gov.sg), and California (leginfo.ca.gov). The World Justice Project Rule of Law Index 2016, the leading source for original data on the rule of law, ranked India behind all these countries with respect to the “Open Government” factor. This factor measures the extent to which a government “shares information, empowers people with tools to hold the government accountable, and fosters citizen participation in public policy deliberations”.

To be truly effective, this cannot be done by the central government alone, since a significant body of law is under the jurisdiction of state governments. A statute ensuring convenient access to laws would be ideal, since it would in one fell swoop bind all executive authorities and carry greater weight. However, from a corporate perspective, initiatives by the central government to begin with would go a long way, because bread-and-butter corporate, tax, technology, and intellectual property laws fall under its jurisdiction.

TOWARDS SOLUTIONS

While the legal community is accustomed to finding ways to tackle many of these issues, in the rough-and-tumble of day-to-day practice, foundational rules of procedure and constitutionalism should be kept in mind.

Representations can be made to government, at least beginning with the central government, on the concerns that the issues above present. In this connection, the combined weight of corporate India can be brought to bear with good effect. In most cases, requirements already exist, such as gazette notifications, vetting by the Law Ministry, pre-legislative consultation (where applicable), clear statements of policy when delegating authority and the doctrine of *ultra vires*.

Cases of deviance can be highlighted with pragmatic suggestions for improvement. Recent cases such as Shreya Singhal, Vital Nutraceuticals (the FSSAI case) and the Godrej Industries matter (which was non-adversarial) show that courts pay heed to such requirements when they are brought to their attention. In other areas, such as access to laws, advocating new requirements would appear the only way to create sustainable solutions.

While policy announcements can be encouraging, clear rules and procedural certainty can act as long-term drivers of a stable and prosperous business climate.

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