

# The Annual Survey of State Laws in India

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# THE NATIONAL CAPITAL TERRITORY OF DELHI

Pranav Verma<sup>1</sup>

## Introduction

This survey analyses the legislative output of the Delhi Assembly for 2020, through both quantitative and qualitative lenses. During the year, the Assembly produced only one substantive legislation, and much of the business of the government of the National Capital Territory of Delhi was transacted through subordinate legislations such as regulations, rules, notifications, circulars, orders, and other executive instruments: 466 notifications/circulars; 1 order; and 20 rules.

Since the primary legislative business of the state was displaced by delegated legislations, this survey also examines such delegated legislations and measures them against the well-settled prescriptions on delegated law-making which emerge from a catena of judicial pronouncements.

The analysis also acknowledges that 2020 marked the onset of the pandemic, the emergency nature of which—coupled with the uncertain power-sharing arrangements between the lieutenant governor (LG) and the Delhi government—made the latter primarily prefer subordinate legislations to manage its COVID-19 response. In this light, it is noted that the Delhi government preferred a primary legislation already available to it to promulgate subordinate legislations, for example, the Epidemic Diseases Act, 1897.

Finally, the survey examines subordinate legislations made under Article 309 of the Constitution which explicitly provides that a legislation made by the state assembly will have primacy over any rules made by the President/Governor, as far as conditions governing the recruitment or service of state employees are concerned. Given the history of disputes over law-making on several issues between the Delhi Government and the LG, it worthwhile to examine the extent to which the Delhi Government exercised what was placed exclusively in its domain by the Constitution.

## Quantitative Analysis: Legislations Notified in 2020

During 2020, a total of six legislations were notified in the National Capital Territory (NCT) of Delhi, with the LG assenting to five bills, and the president of India assenting to one.<sup>2</sup> These were:

1. The Delhi Appropriation (No. 1) Act, 2020 (Delhi Act 1 of 2020);<sup>3</sup>

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1. Assistant Professor (Law), NALSAR University of Law.

2. The Delhi Urban Shelter Improvement Board (Amendment) Act, 2015 (Act 5 of 2020) was assented to by the president, while all the other five legislations were assented to by the LG.

3. The Delhi Appropriation (No. 1) Act, 2020 (Act 1 of 2020).

2. The Delhi Appropriation (No. 2) Act, 2020 (Delhi Act 2 of 2020);<sup>4</sup>
3. The Delhi Sports University Act, 2019 (also labelled the Delhi Act 1 of 2020);<sup>5</sup>
4. The Delhi Skill and Entrepreneurship University Act, 2019 (Delhi Act 4 of 2020);<sup>6</sup>
5. The Delhi Urban Shelter Improvement Board (Amendment) Act, 2015 (Delhi Act 5 of 2020);<sup>7</sup> and
6. The Delhi Goods and Services Tax (Amendment) Act, 2020 (Delhi Act 6 of 2020).<sup>8</sup>

However, three of the above legislations were passed in the sessions of the Assembly preceding the year 2020—both, the Delhi Sports University Act, 2019<sup>9</sup> and the Delhi Skill and Entrepreneurship University Act, 2019<sup>10</sup> were passed by the Assembly in 2019 and received the LG's assent in 2020; while the Delhi Urban Shelter Improvement Board (DUSIB) (Amendment) Act, 2015<sup>11</sup> was passed by the Assembly in 2015 and receive the assent of the LG in 2020.

The Delhi Sports University Act, 2019 sought to set up a sports university in the NCT of Delhi to facilitate sports studies and research in sports education.<sup>12</sup> The Delhi Skill and Entrepreneurship University Act, 2019 aimed to provide “quality education in applied sciences and skill education in various disciplines of education”.<sup>13</sup> The Delhi Goods and Services Tax (GST) (Amendment) Act, 2020 was passed to further amend the Delhi Goods and Services Tax Act, 2017 to align the definition of “union territory” to make it consistent with the Jammu and Kashmir Reorganisation Act, 2019 and the Dadra and Nagar Haveli and Daman and Diu (Merger of Union Territories) Act, 2019; add the words “or services” after the words “of goods” in section 10(2)(a), (b), (c) and (d) of the principal Act; delink the date of issuance of a debit note from the date of issuance of the underlying invoice for availing input tax credit, etc.<sup>14</sup>

The DUSIB (Amendment) Act, 2015 aimed at rehabilitating those slum dwellers whose slums were set up in NCT of Delhi between March 31, 2002 and January 2, 2006. It got the LG's assent five years after the bill was first passed by the Assembly.<sup>15</sup> This marked the culmination of a long-drawn battle between the government and the LG, since the DUSIB (Amendment) Act, 2015 was one of the many legislations over which the LG had initially withheld assent, disputing the Assembly's competence to pass the legislation.<sup>16</sup> To place the controversy surrounding the said legislation, and the final resolution

4. The Delhi Appropriation (No. 2) Act, 2020 (Act 2 of 2020).

5. The Delhi Sports University Act, 2019 (Act 1 of 2020).

6. The Delhi Skill and Entrepreneurship University Act, 2019 (Act 4 of 2020).

7. *Supra* note 2.

8. The Delhi Goods and Services Tax (Amendment) Act, 2020 (Act 6 of 2020).

9. *Supra* note 5.

10. *Supra* note 6.

11. *Supra* note 2.

12. *Supra* note 5, Statement of Objects and Reasons.

13. *Supra* note 6, Statement of Objects and Reasons.

14. *Supra* note 8, also see Taxscan Team, “Delhi GST (Amendment) Act, 2020: Delhi Govt. notifies Fraudulent availment of ITC without Invoice or bill Cognizable and Non-bailable”, *Taxscan*, Sep. 17, 2020, available at: <https://www.taxscan.in/delhi-gst-amendment-act-2020-delhi-govt-notifies-fraudulent-availment-of-itc-without-invoice-or-bill-cognizable-and-non-bailable/74838/> (last visited on Dec. 3, 2021).

15. *Supra* note 2.

16. Mohammed Iqbal, “Three bills passed on day 1”, *The Hindu*, June 24, 2015, available at: <https://www.thehindu.com/news/cities/Delhi/three-bills-passed-on-day-1/article7348409.ece> (last visited on Dec. 3, 2021); TNN, “Bills hanging fire for lack of LG's nod: Oppn”, *The Times of India*, Feb. 6, 2016, available at: <https://timesofindia.indiatimes.com/city/delhi/bills-hanging-fire-for-lack-of-lgs-nod-oppn/articleshow/50872543.cms> (last visited on Dec. 3, 2021); Gaurav Vivek Bhatnagar, “Kejriwal claims centre obstructing his Govt's work, Says ‘I am not a terrorist’”, *The Wire*, Oct. 4, 2017, available at: <https://thewire.in/politics/kejriwal-modi-lg-delhi-assembly> (last visited on Dec. 3, 2021).

of the dispute, in context, it would be useful to briefly recapitulate how the law-making powers of the NCT of Delhi have only recently come to be somewhat clearly delineated.

## The Law-making Powers of NCT of Delhi

Article 239AA of the Constitution provides for the NCT of Delhi to have an elected legislative assembly, and enjoins the LG to act on the “aid and advice” of the council of ministers headed by the chief minister.<sup>17</sup> It also places a limitation upon the legislative assembly with respect to enacting laws on three specific subject-matters in the state list—‘land’, ‘police’, and ‘law and order’. In case of any difference of opinion between the LG and his ministers, it enables the LG to refer such disagreement to the president, by whose decision they are then bound to act. In rare situations, dictated by the urgency of the matter, the LG may proceed to give necessary directions without waiting for the president’s decision.<sup>18</sup>

However, as far as referrals to the president are concerned, the LG cannot act in a “mechanical manner” in making such referrals, but should duly apply their mind so as not to refer every decision of the council of ministers to the president.<sup>19</sup> The supreme court has held that such referrals may be made for “substantial issues of finance and policy which impact upon the status of the national capital or implicate vital interests of the Union”,<sup>20</sup> and not “every trivial difference” of opinion.<sup>21</sup> More importantly, it held that the LG has “not been entrusted with any independent decision-making power”.<sup>22</sup>

A year later, in a subsequent decision, a two-judge bench of the supreme court further clarified that it is the union that shall have authority in respect of the Anti-Corruption Bureau and setting up inquiries under the Commissions of Inquiry Act, 1952; whereas the government of NCT of Delhi will have control over matters under the Electricity Act, Stamp Act, and the appointment of special public prosecutors. The two-judge bench was, however, split over the issue of control over ‘services’.<sup>23</sup>

It is against this backdrop that, after a delay of five years, and with some kind of a demarcation of powers undertaken by the supreme court between the union and the government of NCT of Delhi, that the DUSIB (Amendment) Act 2020 was finally assented to by the president on August 18, 2020 and notified on October 5, 2020.<sup>24</sup>

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17. The Constitution of India, art. 293AA(4).

18. *Ibid.* A Constitution bench of the supreme court, in 2018, interpreted article 239AA and held that the LG is bound by the ‘aid and advice’ of the council of ministers headed by the chief minister, except for ‘law and order’, ‘police’, and ‘land’, see *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501.

19. *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501, at 248.18 (Misra, CJI).

20. *Id.* at 464 (Chandrachud, J.).

21. *Id.* at 475.21 (Chandrachud, J.).

22. *Id.* at 248.17 (Misra, CJI). Also see Pranav Verma, “Delhi Power Tussle: LG Is Flirting Dangerously Close to Contempt of Court”, *The Wire*, Aug. 21, 2018, available at: <https://thewire.in/law/delhi-power-tussle-lg-is-flirting-dangerously-close-to-contempt-of-court> (last visited on Dec. 5, 2021).

23. *Government (NCT of Delhi) v. Union of India*, (2020) 12 SCC 259. The matter was then referred to a larger bench in *Government of NCT of Delhi v. Union of India*, Record of Proceedings, order dated Oct. 5, 2021, available at: [https://main.sci.gov.in/supremecourt/2016/29357/29357\\_2016\\_Order\\_14-Feb-2019.pdf](https://main.sci.gov.in/supremecourt/2016/29357/29357_2016_Order_14-Feb-2019.pdf) (last visited on Dec. 3, 2021). Subsequently, the matter has been adjourned five times (the latest adjournment was on Oct. 5, 2021), with the issue of control over ‘services’ remaining unresolved. See *Government of NCT of Delhi v. Union of India*, Record of Proceedings, order dated Oct. 5, 2021, available at: [https://main.sci.gov.in/supremecourt/2016/29357/29357\\_2016\\_31\\_801\\_30518\\_Order\\_05-Oct-2021.pdf](https://main.sci.gov.in/supremecourt/2016/29357/29357_2016_31_801_30518_Order_05-Oct-2021.pdf) (last visited on Dec. 3, 2021).

24. *Supra* note 2.

## Low Legislative Output, and Rise in Subordinate Legislations

If the legislations which were assented to in 2020 but actually passed by the Assembly in the preceding years are excluded, the legislative output of the Delhi Assembly for 2020 would be restricted only to the Delhi Appropriation (No. 1) Act, 2020;<sup>25</sup> the Delhi Appropriation (No. 2) Act, 2020;<sup>26</sup> and the Delhi GST (Amendment) Act, 2020.<sup>27</sup> Out of these, the two Appropriation Acts are not part of this survey as they are routinely passed in every Assembly's budget session. The substantive output of the Assembly for 2020 was limited to just one legislation—the Delhi GST (Amendment) Act, 2020<sup>28</sup>—adopted by voice-vote in the Assembly's first session (fourth part on September 14, 2020).<sup>29</sup>

The Assembly had only eight sessions in the year. An output of one substantive legislation in eight sessions amounts to a productivity rate of 12.5 percent. This would make 2020 the second-most unproductive year for the legislative assembly of Delhi when compared with the past five years.<sup>30</sup>

However, the government's business continued to run apace through several subordinate legislations and executive instruments of the likes of notifications, circulars, orders, etc. In fact, it would appear that the volume of subordinate legislation notified more than makes up for the lack of legislative activity. Given that the pandemic commenced in 2020, it is also important to note that it is subordinate legislation and not primary enactments which formed the bedrock of the government's COVID-19 responses.

An examination of the available public records reveals that these subordinate legislations included about 466 notifications/circulars (spread across 21 government departments); 1 Essential Commodities Order; and 20 rules. These rules—excluding the rules made by the high court of Delhi regarding virtual hearings and video conferencing of court proceedings—were made under six primary legislations, apart from four rules made under article 309 of the Constitution. Both, the notifications/circulars and the rules, dealt with routine matters of day-to-day administration.<sup>31</sup> In substantive terms, the government's COVID-19 response was largely managed through two primary regulations, analysed in the next section of the survey.

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25. *Supra* note 3.

26. *Supra* note 4.

27. *Supra* note 8.

28. *Ibid.*

29. Legislative Assembly of the NCT of Delhi, "Session Reviews—Seventh Assembly", available at: <http://www.delhiassembly.nic.in/review.htm> (last visited on Dec. 1, 2021).

30. The lowest output was in 2018 at approximately six percent with two substantive legislations being passed out of 33 sittings of the Assembly. In 2019, the output stood at approximately 27 percent, with three substantive legislations being passed out of 11 sittings. In 2017, the output stood at approximately 24 percent, with five substantive legislations being passed out of 21 sittings. In 2016, the output stood at 20 percent, with three substantive legislations being passed out of 15 sittings. Finally, in 2015, the output stood at a record-high of 73 percent, with 19 substantive legislations being passed out of 26 sittings (out of which assent is awaited on eight bills; five were returned by the LG; and two were returned, re-introduced, and then assented to). See Bills in Delhi Legislative Assembly, available at: <http://delhiassembly.nic.in/Legislation/billDetailsLeg.html> (last visited on Dec. 3, 2021); and Session at a Glance, Delhi Assembly - Session Reviews, available at: <http://www.delhiassembly.nic.in/review.htm> (last visited on Nov. 26, 2021).

31. The department-wise notifications/circulars can be accessed from <https://delhi.gov.in/departments.html> (last visited on Jan. 27, 2022); and the rules promulgated can be accessed from the 'Acts and Rules' section available at: <https://delhi.gov.in/> (last visited on Jan. 27, 2022).

## Qualitative Analysis

### Deviations from the Fundamental Principles Governing Delegated Legislations

The government's legal response to the COVID-19 pandemic came in the form of regulations issued in the exercise of the powers conferred under section 2 of the Epidemic Diseases Act, 1897.<sup>32</sup> No new legislation was enacted.

There were two primary regulations under the 1897 Act which formed the bedrock of the government's COVID-19 response, and all further orders were issued under the authority of these primary regulations. The Health and Family Welfare Department issued the Delhi Epidemic Diseases, COVID-19 Regulations, 2020<sup>33</sup> on March 12, 2020, and the Delhi Epidemic Diseases, (Management of COVID-19) Regulations, 2020<sup>34</sup> on June 13, 2020. These regulations were initially issued for a period of one year from the date of publication, but were later extended by another year through a notification dated October 14, 2021 by the LG.<sup>35</sup> The specific prescriptions governing the fundamental rules of delegated law-making are discussed below, and these regulations are analysed vis-à-vis such prescriptions.

#### ***Delegated Legislation Cannot Encroach into 'Essential Legislative Functions' (The Policy and Guidance Test)***

It is a trite proposition of law that delegated legislation cannot transgress into the domain of 'essential legislative policy'. This principle requires the primary legislation to spell out the policy and set out the standards to guide the executive. The principle disallows the use of vague and general terms which confer an unfettered discretion upon the executive. It is not permissible for the legislature to confer upon the executive an uncanalised power to change or modify the legislative policy laid down by it, without reserving for itself any control over the subordinate legislation. Determining legislative policy is, thus, a function exclusively within the domain of the legislature, and cannot be delegated through subordinate legislation.<sup>36</sup>

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32. The Epidemic Diseases Act, 1897 (Act 3 of 1897).

33. Health and Family Welfare Department, Government of the National Capital Territory of Delhi, The Delhi Epidemic Diseases, COVID-19 Regulations, 2020, *available at*: <http://health.delhigovt.nic.in/wps/wcm/connect/c05a8d804d883d25974cf7982ee7a5c7/NED+Act.pdf?MOD=AJPERES&lmod=-754584952&CACHEID=c05a8d804d883d25974cf7982ee7a5c7> (last visited on Jan. 26, 2022).

34. Health and Family Welfare Department, Government of National Capital Territory of Delhi, The Delhi Epidemic Diseases, (Management of COVID-19) Regulations, 2020, *available at*: [https://covidlawlab.org/wp-content/uploads/2020/12/India\\_2020.06.13\\_Legislation\\_The-Delhi-Epidemic-Diseases-Management-of-COVID-19-Regulations-2020\\_EN.pdf](https://covidlawlab.org/wp-content/uploads/2020/12/India_2020.06.13_Legislation_The-Delhi-Epidemic-Diseases-Management-of-COVID-19-Regulations-2020_EN.pdf) (last visited on Jan. 26, 2022).

35. Department of Health and Family Welfare, Government of National Capital Territory of Delhi, notification dated Oct. 14, 2021.

36. *Devi Dass Gopal Krishnan v. State of Punjab*, AIR 1967 SC 1895, at 15; *Gwalior Rayon Silk Mfg. (Wvg.) Co. v. Assistant Commissioner of Sales*, (1974) 4 SCC 98; *Ramesh Birch v. Union of India*, (1989) 1 SCC Supp 430, at 13, 15, 18, and 19; in *Re Delhi Laws Act, 1912, Ajmer-Merwara (Extension of Laws) Act, 1947 and Part "C" States (Laws) Act, 1950*, AIR 1951 SC 332; *Municipal Corporation of Delhi v. Birla Cotton, Spinning, and Weaving Mills*, AIR 1968 SC 1232; *M.K. Papiiah and Sons v. Excise Commissioner*, (1975) 1 SCC 492; *Avinder Singh v. State of Punjab*, (1979) 1 SCC 137; *Registrar of Cooperative Societies v. K. Kunjabmu*, (1980) 1 SCC 340; *Roger Mathew v. South Indian Bank Ltd.*, (2020) 6 SCC 1.

Recently, in *Keshavlal Khemchand and Sons Private Limited v. Union of India*, (2015) 4 SCC 770, a two-judge bench of the supreme court noted that "the proposition that essential legislative functions cannot be delegated does not appear to be such a clearly settled proposition and requires a further examination... We leave it open for debate in a more appropriate case on a future date" (at 51.1). The court pointed out that earlier decisions had not been able to lay down as to what exactly

These principles find support from comparative developments in common law jurisdictions as well. For instance, the House of Lords Select Committee on the Constitution, in its sixteenth report (2018), has also recently concluded that primary legislation should be ‘sufficiently clear’ to be able to guide executive discretion. It stated that if there are policy lacunae within the legislation, it is unacceptable for subordinate legislations to fill them especially since they escape parliamentary scrutiny in most part.<sup>37</sup>

Before we move on to examine the contents of the Delhi (COVID-19) Regulations and the Delhi (Management of COVID-19) Regulations against the above-mentioned principles, the statutory provision under which they have been promulgated needs to be briefly discussed. Section 2 of the 1897 Act provides that in order to prevent the outbreak of an epidemic, the state government may take such measures “as it shall deem necessary” to prevent such an outbreak. Hence, the above two regulations were promulgated under the authority of section 2 of the 1897 Act.

Now, the Delhi (COVID-19) Regulations invoke section 2 of the 1897 Act to provide for pre-censorship of the media vide regulation 6, which prescribes that:

“No person/institution/organisation will use any print or electronic media for information regarding COVID-19 without prior permission of the Department of Health and Family Welfare, Govt of NCT of Delhi. This is to avoid spread of any rumour or unauthenticated information regarding COVID-19. In case any person/institution/organisation is found indulging in such activity, it will be treated as a punishable offence under these regulations.”<sup>38</sup>

Further, regulation 15 of the Delhi (COVID-19) Regulations, ipso facto incorporates all the advisories issued by the union government under a different legislation, viz., the Disaster Management Act, 2005,<sup>39</sup> as directions issued by the government of NCT of Delhi under the 1897 Act.<sup>40</sup> Furthermore, regulation 16 prescribes the containment measures that the state task force is entitled to take if cases of COVID-19 are reported from a specific geographical area. These contain a list of eight specific measures, in addition to a catch-all sub-regulation entitling the government to take “any other measure as directed by the Department of Health and Family Welfare.”<sup>41</sup> It was in furtherance of the Delhi (COVID-19) Regulations that the Health and Family Welfare Department issued an order dated 12 March 2020 – on the same date when the Delhi (COVID-19) Regulations were promulgated – ordering the shutting down of educational institutions, cinema halls, and public swimming pools.<sup>42</sup>

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constitutes “essential legislative function”. While it is no doubt true that there has not been a clear and exhaustive elucidation of what constitutes essential legislative policy, this analysis is concerned with the recognition of the principle that it is for the legislature to make policy and for the executive to implement it, which has not been controverted by the decision in *Keshavlal Khemchand and Sons Private Limited v. Union of India*. The present analysis also more sharply focuses on the use of general and vague terms such as in section 2 of the Epidemic Diseases Act, 1897 which provide no guidance at all and enable the executive to define for itself what the policy should be. That this is not for the executive to do is, again, not something that is disputed in the decision in *Keshavlal*. In any event, the principles supported by the catena of decisions cited above have been affirmed by the more recent decision by a Constitution Bench of the supreme court in *Roger Mathew*, (2020) 6 SCC 1.

37. House of Lords Select Committee on the Constitution, “The Legislative Process: The Delegation of Powers” (2018) p. 23, available at: [https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22506.htm#\\_idTextAnchor028](https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/225/22506.htm#_idTextAnchor028) (last visited on Dec. 2, 2021).

38. *Supra* note 33, reg. 6.

39. The Disaster Management Act, 2005 (Act 53 of 2005).

40. *Supra* note 33, reg. 15.

41. *Id.* s. 16 (ix).

42. Health and Family Welfare Department, Government of National Capital Territory of Delhi, order dated Mar. 12, 2020 under the Delhi Epidemic Diseases, COVID-19, Regulations, 2020 and the Epidemic Diseases Act, 1897.

The contents of the Delhi (COVID-19) Regulations as detailed above—viz., pre-censorship on the media; automatically incorporating central government advisories as regulations issued under a different central legislation; and empowering the executive to take any measures as it may consider appropriate under the circumstances—could be seen as bordering on policy choices being made by the executive.

### ***Delegated Legislation Shall Not Be ‘Manifestly Arbitrary’***

Several judicial pronouncements have declared that delegated legislations would be held to be violative of Article 14 if they are “manifestly arbitrary”. These have held that a delegated legislation is “manifestly arbitrary” if it cannot reasonably be expected to emanate from the authority delegated; is formulated without adequate determining principle; and is forbiddingly excessive or disproportionate.<sup>43</sup>

More recently, in *Shayara Bano*,<sup>44</sup> Justice Nariman (speaking for himself and Justice Lalit), in his concurring opinion stated:

“...it will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation... The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.”<sup>45</sup> (emphasis supplied)

The contents of the Delhi (COVID-19) Regulations, as discussed in the previous sections of this survey, may be seen to breach the above prescriptions. The “as it shall deem fit” directive in section 2 of the 1897 Act—unaccompanied by any further indication of legislative policy—renders the legality of the Delhi (COVID-19) Regulations without any adequate determining principle. Further, its imposition of pre-censorship upon print media also puts it in danger of violating Article 19(1)(a) of the Constitution, as held by a catena of supreme court decisions.<sup>46</sup>

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43. *Khoday Distilleries Ltd. v. State of Karnataka*, (1996) 10 SCC 304; *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641; *Sharma Transport v. State of Andhra Pradesh*, (2002) 2 SCC 188; *Cellular Operators Association of India v. Telecom Regulatory Authority of India*, (2016) 7 SCC 703; *Franklin Templeton Trustee Services Private Limited v. Amruta Garg*, AIR 2021 SC 3494; *Shayara Bano v. Union of India*, (2017) 9 SCC 1; *Pravinsinh Indrasinh Mahida v. State of Gujarat*, High Court of Gujarat, R/Special Leave Application No. 5301 of 2020, decided on Aug. 27, 2021.

These decisions reaffirm the proposition that delegation legislation shall not be manifestly arbitrary. It is also worth mentioning that the full bench decision of the Madhya Pradesh high court in *State v. Haiderali*, AIR 1957 MP 179 (FB), 1957 CriLJ 1266 had laid down the proposition that delegated legislation cannot infringe fundamental rights by the exercise of uncontrolled and arbitrary executive action, but does not seem to have been directly followed by the supreme court, apart from a citation by the Delhi high court in *Durga Chand Kaushik v. Union of India*, AIR 1979 Del 249.

44. *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

45. *Id.* at 101.

46. *Brij Bhushan and Another v. State of Delhi*, AIR 1950 SC 129; *Express Newspapers (Private) Ltd. And Ors. v. Union of India and Ors.*, AIR 1958 SC 578; *Secretary, Ministry of Information and Broadcasting, Govt. of India and Ors. v. Cricket Association of Bengal and Ors.*, AIR 1995 SC 1236; *R.K. Anand v. Registrar, Delhi High Court*, (2009) 8 SCC 106; and *Subramanian Swamy v. Union of India*, AIR 2016 SC 2728. In *K.A. Abbas v. Union of India and Anr.*, AIR 1971 SC 481, a constitution bench of five judges of the supreme court treated motion pictures/films on a different footing from print media, terming pre-censorship not unjustifiable per se for the former.

## ***Delegated Legislation Cannot Prescribe New Penalties Not Contemplated by Primary Legislation***

When it comes to prescribing penalties and fines by way of delegated legislation, it has been held that if the parent statute itself prescribes the penalties in question, or an upper limit of a fine to be imposed, then it constitutes ‘permissible delegation’ for the executive to make rules incorporating those penalties, or impose fines within the upper limit prescribed by the legislation, as the case may be. Imposition of penalties and fines, ultimately, needs to be on the back of statutory authority.<sup>47</sup> The underlying principle has been held to be as follows:

“Prescribing an offence and its punishment is essentially a legislative act. But provided that this can be attributed to the legislative body, the actual working out of it can be delegated to a non-legislative body. The most simple example will be where the legislature itself prescribes the rules, makes its violation an offence, and lays down the penalty... *The legislative body, instead of prescribing the precise penalty may also lay down the limit or standard, leaving it to the non-legislative body to prescribe the penalty within such limits or in accordance with the standard laid down.* In such a case where the non-legislative body avails itself of the power, it cannot be said that it has created the offence or prescribed the penalty. *It is the legislative body which has created the offence and prescribed the penalty, but has delegated the power to the non-legislative body to apply or not to apply such provisions, or apply them in a suitable manner within the limits imposed, as is required under the prevailing circumstances.* To this extent the delegation of power is a permissible delegation... Then again the limits of the penalty have been fixed by the legislature and the standard to be followed has also been laid down.”<sup>48</sup> (emphasis supplied)

Now, coming to the government’s COVID-19 response, regulation 3(h) of the Delhi (Management of COVID-19) Regulations empowers ‘authorised persons’ to impose a fine of Rs. 500 for the first offence, and of Rs. 1,000 for the second offence of disobeying directives on social distancing and hygiene.<sup>49</sup> Further, regulation 5 provides that if any person fails to pay the penalty “on the spot”, action would be taken against them under section 188 of the Indian Penal Code (IPC), 1860, which prescribes penalties for disobedience of orders duly promulgated by public servants.<sup>50</sup> Furthermore, the Delhi (COVID-19) Regulations and the Delhi (Management of COVID-19) Regulations both provided for legal immunity for actions undertaken further to such regulations under “good faith”, and a general provision enabling proceedings under section 188, IPC against anyone in breach of the regulations. These are direct incorporations of sections 3 and 4 of the 1897 Act, respectively.<sup>51</sup>

To be sure, the 1897 Act does provide for prosecution under section 188 of the IPC<sup>52</sup> and legal immunity for actions undertaken in good faith,<sup>53</sup> and to that extent the Delhi (Management of COVID-19) Regulations were entitled to incorporate these two prescriptions. Section 188, IPC further provides the

47. *D.N. Ghosh v. Additional Sessions Judge*, AIR 1959 Cal 208, at 12. Also see *Delux Land Organisers v. State of Gujarat*, AIR 1992 Guj 75; *In re Delhi Laws Act, 1912, Ajmer-Merwara (Extension of Laws) Act, 1947 And Part ‘C’ States (Laws) Act, 1950*, AIR 1951 SC 332; *Kunj Behari Lal Butail v. State Of Himachal Pradesh*, (2000) 3 SCC 40; *Khemka and Company v. State of Maharashtra*, (1975) 2 SCC 22; *Collector of Central Excise, Ahmedabad v. Orient Fabrics Private Ltd.*, (2004) 1 SCC 597.

48. *Ibid.*

49. *Supra* note 34, reg. 3(h).

50. *Id.*, reg. 5.

51. *Supra* note 33, regs. 18, 19; *supra* note 34, regs. 5, 6.

52. *Supra* note 32, s. 3.

53. *Id.*, s. 4.

penalty of a maximum fine of Rs. 1,000, and therefore, again, the Delhi (Management of COVID-19) Regulations could lawfully impose the first fine of Rs. 500 and the second fine of Rs. 1,000.

Accordingly, while the Delhi (COVID-19) Regulations and the Delhi (Management of COVID-19) Regulations come close to placing essential policy choices in the hands of the executive without adequate determining principle, they nevertheless meet the third prescription of no new penalty without legislative backing, as they stay within the limits imposed by sections 3 and 4 of the 1897 Act.

It may be argued that the above deviations could have been prevented by the enactment of a *sui generis* primary legislation incorporating clear guidelines for the executive; or an ordinance could have first been enacted to be later replaced by legislation.<sup>54</sup> However, this would be overlooking the complications and uncertainties which currently exist over the demarcation of law-making powers between the cabinet and the LG – as already discussed in the previous sections of this survey. With the LG having withheld consent on even routine administrative matters on past occasions, it is doubtful that a *sui generis* primary enactment on COVID-19 would have received the LG's assent without controversy.<sup>55</sup> This may perhaps justify the Delhi government's choice of the 1897 Act—a primary legislation already available to it—for promulgating subordinate legislations to manage its COVID-19 response.

Moreover, the route of adopting subordinate legislations should also be appreciated in light of the emergency nature of the pandemic. It has been shown in the quantitative analysis of this survey that 2020 saw the legislative assembly sitting for one of its fewest number of sessions, and hence the impact of COVID-19 on the government's legislative output cannot be overstated.

## Rule-making under Article 309 of the Constitution of India

Article 309 of the Constitution subjects the 'recruitment and conditions of service of persons serving the union or the state' to other provisions of the Constitution.<sup>56</sup> The proviso further enables the president (in case of services and posts in connection with the affairs of the union) and governors (in case of services and posts in connection with the affairs of the states) to make rules regarding such recruitment and conditions of service, "until provision in that behalf is made by or under an Act of

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54. Indeed, states such as Karnataka, Kerala, Rajasthan, and Uttar Pradesh did follow the latter route by promulgating ordinances to either amend or replace entirely the 1897 Act. These ordinances then took the form of individual state legislations on epidemic diseases. See Anoop Ramakrishnan and N. R. Nikhil, "Annual Review of State Laws, 2020", *PRS Legislative Research*, June 2021, at 8, available at: [https://prsindia.org/files/policy/policy\\_analytical\\_reports/Annual\\_Review\\_of\\_State\\_Laws\\_2020.pdf](https://prsindia.org/files/policy/policy_analytical_reports/Annual_Review_of_State_Laws_2020.pdf) (last visited on Dec. 4, 2021). Also see the Karnataka Epidemic Diseases Act, 2020 (Act 26 of 2020); TNN, "Epidemic bill gets passed in Kerala assembly unanimously", *The Times of India*, June 4, 2021, available at: <https://timesofindia.indiatimes.com/city/kochi/epidemic-bill-gets-passed-in-assembly-unanimously/articleshow/83213580.cms> (last visited on Dec. 5, 2021); the Rajasthan Epidemic Diseases Act, 2020 (Act 21 of 2020); and the Uttar Pradesh Public Health and Epidemic Diseases Control Act, 2020 (Act 17 of 2020). All of these were preceded by ordinances, and later approved as enactments by the respective state legislative assemblies.

55. In fact, only recently the LG refused the Delhi government's proposal to lift the weekend curfews and ease COVID-19 restrictions imposed in the wake of the Omicron wave in the state. See Express News Service, "Delhi LG rejects AAP govt's proposal, refuses to lift weekend curfew, ease Covid-19 restrictions", *The Indian Express*, Jan. 22, 2022, available at: <https://indianexpress.com/article/cities/delhi/delhi-weekend-curfew-covid-restrictions-odd-even-system-7734710/> (last visited on Jan. 21, 2022).

Even an ordinance would have had to be first promulgated by the LG and then be replaced by a primary legislation passed by the Assembly—in effect necessitating cooperation between the Assembly and the LG over the contents of such an ordinance and the legislation that would follow.

56. The Constitution of India, art. 309.

the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.<sup>57</sup> This implies that the power of the president and governors to make rules on recruitment and service conditions is operable only in the vacuum where the appropriate legislature (parliament—for persons serving the union and state legislative assemblies—for persons serving the state) has not enacted a law governing such recruitment/service conditions. Accordingly, the effect of the proviso is that state legislatures are entitled to regulate the recruitment/service conditions of state government employees, and the rules made by the governor in that behalf would need to give way to the relevant state legislation.

The proviso to Article 309, thus, enables the state government to exercise legislative control over the above-mentioned field, and specifically grants state legislatures primacy and an overriding power over the rules made by governors.

In fact, amendments were tabled during the discussion on the draft Article 282 in the constituent assembly (which later took the form of Article 309) with the specific objectives of diluting the state legislature's powers in the matter, and giving them to either the state public service commissions (moved by Brajeshwar Prasad) or be retained with the parliament (moved by Shibban Lal Saxena).<sup>58</sup> However, all such amendments were vetoed during the vote on the Article in the Assembly after Dr. Ambedkar indicated his disapproval of the amendments.<sup>59</sup> This reaffirms the view that the legislative intent was to provide state legislatures with primacy vis-à-vis the union with respect to legislating on the recruitment/service conditions of state employees.

Notwithstanding the same, the government, in 2020, ceded ground to the union on at least four instances where rules were promulgated by the LG. These include:

1. Delhi Higher Judicial Service (Amendment) Rules, 2020;
2. Department of Training and Technical Education, Government of National Capital Territory of Delhi, Assistant Professor, Pharmacy Recruitment Rules, 2020;
3. Lecturer, Fashion Designing Recruitment Rules, 2020; and
4. 'Multi -Tasking Staff' Recruitment Rules, 2020.

Accordingly, for at least the above subject-matters, the legislative assembly could have validly exercised its mandate under the proviso to Article 309, but it appears to have let the union drive the regulation instead. This is particularly puzzling for a state such as Delhi which has had a chequered and mostly bitter history of disputes between the cabinet and the LG over control over several legislative categories. One explanation could be that in comparison to the matters over which the government has had differences with the LG in the past – transfer and posting of civil servants in the state, initiating inquiry over government officers, enactment of an anti-corruption legislation, etc. – the above-mentioned four subject-matter categories may have been perceived as relatively low-stakes. However, there is no such official explanation from the government, leaving us with the limited conclusion that at least in these four aspects, the government was comfortable for the union to exercise its own rule-making powers, pending any future enactments by the Assembly.

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57. *Ibid.*

58. Constituent Assembly Debates on Sept. 7, 1949, available at: [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/9/1949-09-07](https://www.constitutionofindia.net/constitution_assembly_debates/volume/9/1949-09-07) (last visited on Dec. 1, 2021).

59. *Ibid.*

## Conclusion

The year 2020 saw the NCT of Delhi government's primary legislative business being displaced by delegated law-making. Some of these delegated legislations seem to raise issues of constitutional principle when seen against specific prescriptions on delegated legislations.

However, in the context of the uncertain power-sharing arrangement between the government and the LG, and also the emergency nature of the pandemic, the state perhaps did not have much choice other than promulgating subordinate legislations under the set of primary legislations already available to it, for which purpose it chose the 1897 Act.

The state has been uniquely placed within the constitutional scheme as the assembly is restricted by Article 239AA from enacting laws in the spheres of 'police', 'land', and 'public order' – items otherwise available in the state list. This led to bitter disputes in the past between the government and the union—represented by the LG—on control over several matters such as transfers and postings, services, installation of CCTVs, and other welfare schemes of the government. Against that backdrop, it is puzzling to note that while Article 309 of the Constitution empowers the Assembly to enact laws with respect to recruitments and service conditions of the state government employees, and also accords to them express primacy over any rules made by the LG, the government has not yet enacted any primary legislation for the said fields, which continue to be governed by union rules.