

ATTORNEY-GENERAL v. HORNSTEIN

In the Supreme Court Sitting as a Court of Criminal Appeal

*Agranat J., Silberg J. and Goitein J.*

*Administrative Law—Delegatus non potest delegare—Delegation by municipality of its statutory powers to Mayor—Legislative and administrative functions—Delegation of powers to impose tax—Road Transport Ordinance, sec. 25 (1)—Municipal Corporations Ordinance, sec. 99 (1).*

Section 25(1) of the Road Transport Ordinance and section 99(1) of the Municipal Corporations Ordinance provide as follows:

“25(1) A municipal...council may, with the consent of the district commissioner and the licensing authority, make bye-laws in regard to the following matters-...

(b) the regulation by prohibition or otherwise of vehicles when stationary within the municipal... area.”

“99(1) A municipal council may make by-laws to enable or assist it to carry out any of the matters it is required or empowered to do under...any other Ordinance... and may by such by-laws provide for the payment of any fees...by any person...in connection with such matters.”

In bye-laws made by the Municipal Council of Tel-Aviv-Jaffa under the above sections provision was made for the designation by the Council of “parking places”, and the Mayor was empowered, after consultation with certain officials, to set apart a “parking place”, to regulate parking in a “regulated parking place” by an attendant or by means of mechanical devices, and to prescribe different scales of fees for the different regulated parking areas according to the hours of parking, the periods and types of vehicles. The by-laws also provided that a person who contravenes any of their provisions shall be liable to a fine of IL 100.

The respondent was convicted by a Municipal Court of an offence against the bye-laws in that he had parked his car in a “regulated parking place” regulated by means of mechanical devices, namely, parking meters, without depositing the fee prescribed in the Mayor’s notice which appeared thereon. On appeal to the District Court the conviction was quashed on the grounds that the delegation of powers by the council to the Mayor was *ultra vires* the powers of the Council under the sections cited, and that the Mayor’s regulations regarding the duty to pay a fee at a certain rate were of a legislative character and had not been published as required by law. The Attorney-General appealed.

Held, dismissing the appeal:

Per Agranat J. (Silberg J. concurring),

- (1) the function of the Mayor in designating a parking place as a "regulated parking place" was of a legislative character, while the function of regulating parking thereon by an attendant or by means of mechanical devices was merely administrative in character.
- (2) The principle of *delegatus non potest delegare* is not to be regarded, even to the extent that it applies to the authority of a secondary legislator, as an inflexible rule but merely as a presumption which may sometimes be rebutted, and at least one recognised qualification upon its application is that in the case of a secondary legislator upon whom full legislative authority has been conferred to regulate a number of different matters—power to make primary regulations and not merely rules of an executive nature in relation thereto—it may be inferred that the Law from which this authority derives intended by implication to permit him to place upon an administrative body the task of determining when or how the regulations prescribed by such legislator should come into effect.
- (3) The provisions of the bye-laws therefore empowering the Mayor to prescribe "regulated parking places" in those places which had previously been designated as "parking places" by the Council itself, and having done so to determine whether parking thereon should be regulated by attendants or by means of parking meters, should be upheld.
- (4) The fee imposed for parking was not only of the nature of a "price" but also of the nature of a "tax", and as the authority to levy a tax emanates from the sovereign character of the supreme legislative organ, if for this purpose it has chosen to be assisted by a subordinate law-making body, the latter must necessarily abide, even to a greater degree, by the principle of *delegatus non potest delegare*; and as moreover the Council could itself control the fixing of the price either by outlining a rational basis or mode of action for guiding the Mayor in prescribing the relevant scales of fees or by fixing a maximum rate for the parking fee, the determination of the scale by the Mayor alone was of no effect.

Per Goitein J. (dissenting),

the parking fee was not of the nature of a tax, and the Council had therefore not exceeded its powers in delegating the function of prescribing the fee to the Mayor.

Israel cases referred to:

- (1) *Cr.A. 213/56—Attorney-General v. Yeshayahu and Genya Alexandrovitz* (1957) 11 P.D. 695.

- (2) *H.C. 220/51—Jemal Mahmud Asslan and others v. Military Governor of Galilee, Nazareth* (1951) 5 P.D. 1480.
- (3) *H.C. 104/54—Irgun Nehagei Moniot Sherut Le'Mehoz Tel-Aviv v. Mayor of Tel-Aviv, Haim Levanon, as Local Road Signs Committee within the meaning of Road Transport (Traffic) Regulations, 5713-1953 and others* (1955) 9 P.D. 100.
- (4) *C.A. 300/53—Yosef Woszczyna v. Local Council of Kiryat Haroshet* (1955) 9 P.D. 1639.
- (5) *H.C. 21/51—N. Binenbaum and others v. Tel-Aviv Municipality* (1952) 6 P.D. 375.
- (6) *Cr.A. 75/54—Attorney-General v. B. Schreiber and A. Mitelman* (1954) 8 P.D. 927.
- (7) *C.A. 43/53—The Local Council of Kfar Ata v. "Ata" Textile Company Ltd.* (1955) 9 P.D. 869.

English cases referred to:

- (8) *Allingham and another v. Minister of Agriculture and Fisheries* [1948] 1 All E.R. 780.
- (9) *Ferdinand Longfield Speight and others v. Isaac Gaunt* [1883-84] 9 App. Cas. 1.
- (10) *The Queen v. Burah* [1877-78] 3 App. Cas. 889.
- (11) *Charles Russell v. The Queen* [1881-82] 7 App. Cas. 829.
- (12) *Archibald G. Hodge v. The Queen* [1883-84] 9 App. Cas. 117.
- (13) *King Emperor v. Benoari Lal Sarma* [1945] 1 All E.R. 210; [1945] A.C. 14.
- (14) *Shannon and others v. Lower Mainland Dairy Products Board* [1938] A.C. 708.

Australian cases referred to:

- (15) *Croft v. Rose* (1957) *Argus Law Reports* 148.

American cases referred to:

- (16) *Union Bridge Company v. United States* (1907) 51 Ed. 523.
- (17) *May W. Borum v. H.S. Graham and others* (1935). 4 Cal. App. (2d) 331.
- (18) *Minnie Gould and others v. Western Dairy Products, Inc., and others* (1936) 12 Cal. App. (2d) 188, 191.
- (19) *Angelo Mecchi, Jr., a Minor, etc. and others v. Lyon Van & Storage Co.* (1940) 38 Cal. App. (2d) 674.
- (20) *People v. Sullivan* (1930) 238 N.Y. Supp. 253; 72 A.L.R. 231.
- (21) *Samuel C. Taylor v. Abel J. Roberts* (1922) 84 Fla. 654; 72 A. L.R. 231.

- (22) *State ex rel. Harkov v. McCarthy* (1936) 171 So. 314; 108 A.L.R. 1153-1154.
- (23) *J.W. Hampton Jr., & Co. v. United States* (1928) 48 S. Ct. 348.
- (24) *City of Birmingham and others v. Hood-McPherson Realty Company* (1937) 108 A.L.R. 1140.
- (25) *Marion L. Frost and others Co-partners, Doing Business under the Name and Style of Frost & Frost Trucking Company v. Railroad Commission of The State of California* (1926) 47 A.L.R. 457.

American Act referred to:

Constitution of the United States of America, 1787, Art. 1, 2, 3.

*Zilbiger and Rivka Dinai* for the appellant.

The respondent appeared in person.

AGRANAT J. The problem involved in this appeal is of a constitutional character, concerning the legislative powers of a local authority, the Municipal Council of Tel Aviv-Jaffa. The question arose in connection with the following statutory provisions:

(The learned judge cited sec. 25(1) of the Road Transport Ordinance and sec. 99(1) of the Municipal Corporations Ordinance, 1934, and continued)

Relying on these two statutory provisions, the above Municipal Council (hereinafter referred to as "the Council") enacted the "Bye-laws for Tel Aviv-Jaffa (Stationing and Parking of Vehicles), 1945" (Reshumot, 1954, no. 459, p. 1000—hereinafter referred to as "the Bye-laws").

Sec. 1 of the bye-laws contains the following definitions:

"'A parking place' is a place where the parking of vehicles is permitted under section 2.

"'A Regulated Parking Place' is a parking place set apart as a regulated parking place under section 3(a)."

The following are other sections of the bye-laws which are important in the present context.

"2. With the approval of the Traffic Commissioner, and after consultation with the Chief of Police, the Council may prohibit, limit and regulate the stationing of vehicles or of a particular class of vehicles, and also designate a street or part thereof or some other place as a parking place in which the parking of vehicles or of a particular class of vehicles is permitted, prescribe the days and hours and the periods when

parking is permitted, and the number of vehicles which may at any one time park in such place.

3. (a) The Mayor may, after consultation with the Traffic Commissioner and the Chief of Police, designate a parking place as a regulated place and regulate parking thereon by an attendant or by means of mechanical devices.

(b) Where parking is regulated by an attendant, a person leaving a vehicle in the parking place must comply with the instructions of such attendant in every manner pertaining to parking.

(c) Where parking is regulated by mechanical devices, a person leaving a vehicle in the parking area must leave it within one of the vacant spaces marked therefor, opposite the mechanical device allotted to such space, and set the mechanical device in operation in accordance with the directions stated thereon.

11. (a) No person shall station or park, or permit another to station or park, a vehicle in a regulated parking area unless he has paid a parking fee in accordance with the scale of fees prescribed for that parking place under subsection (c).

(c) The Mayor, with the consent of the Traffic Commissioner, may prescribe different scales of fees for different regulated parking areas, according to the hours of parking, the periods and types of vehicles.

(d) The scale of fees as prescribed under subsection (c) shall be set out in a notice by the Mayor and publicly displayed in the regulated parking area or upon the mechanical devices.

(f) Where parking is regulated by means of mechanical devices, the fee shall be inserted in the mechanical device by a coin or by a special metal token in accordance with the directions for use which shall be set out upon such devices.

14. A person who contravenes any of the provisions of these By-laws shall be liable to a fine of IL 100."

It is not in dispute that on November 19, 1956, the respondent stationed his car in one of the streets of the city of Tel Aviv-Jaffa in a place where parking was permitted under sec. 2 of the the bye-laws, which had been designated by the Mayor as a place where parking

was "regulated" by means of a mechanical device (hereinafter referred to as a "parking meter") under sec. 3; likewise, that the respondent did not deposit in the meter—and therefore did not pay—the fee prescribed in the Mayor's notice which appeared thereon. On these facts, the respondent was found guilty by the Municipal court, in his absence, of an offence under secs. 11(a) and 14 of the bye-laws, and ordered to pay a fine amounting to IL 4. He appealed against the conviction to the District Court and his appeal was allowed upon the following grounds:

(a) The effect of the provisions enacted in secs. 3(a), 11(a) and 11(c) of the Bye-laws is that the Council had delegated to the Mayor the authority conferred upon it at the time by Mandatory legislative organ pursuant to sec. 25 of the Road Transport Ordinance and sec. 99(1) of the Municipal Corporations Ordinance, but such delegation of that authority was not permissible and *ultra vires* the Municipality's powers in view of the principle *delegatus non potest delegare*. For this reason, the regulations made by the Mayor pursuant to secs. 3(c) and 11(c) of the bye-laws were likewise lacking in legal force. To support this ground, the District Court relied upon the rule in *Allingham v. Minister of Agriculture and Fisheries* (8).

(b) The Mayor's regulation regarding the duty to pay a fee at a certain rate made by virtue of sec. 11(c) of the bye-laws is of a legislative character and required publication in Reshumot in accordance with sec. 17 of the Interpretation Ordinance. As for this ground, the District Court based itself on the rule in *The Attorney-General v. Alexandrovitz* (1).

I shall now deal with the first and main reason of the District Court. In this regard, I shall first of all confine myself to the question of the validity of the provisions of sec. 3(a) of the bye-laws. I hold, contrary to the District Court, that the Council was authorized to enact these provisions and accordingly that the designation of the "regulated area" involved, which was made by the Mayor by virtue thereof, is valid. My reasoning on this point is as follows:

A. The decision in the *Allingham case* (8) is not relevant because all that was decided there is that the principle that an agent cannot delegate precludes the delegation to another of a function of an *administrative* character by the one upon whom such function has been imposed. That rule is construed in this sense in Allen, Law and Orders (2nd edition) pp. 204-5, and also in Griffith and Street, Principles of Administrative Law. I will merely content myself with citing the first author:

“...it is clear...that any administrator,...if certain specific *executive* functions are committed to him,...cannot, without authority, entrust them to a deputy of his own choice.”

This rule is not germane to the present case since the authority conferred upon the Municipal Council under sec. 25 of the Road Transport Ordinance to enact by bye-law provisions regulating the parking of vehicles within its boundaries, is clearly of a *legislative* character. Moreover, in view of the wide language employed—“to regulate parking... by prohibition or otherwise”—the section is to be construed as vesting in the Council the power to determine even the “primary law-making” in this sphere and not merely the executory regulations. (As to the distinction between these two categories of secondary legislation, see an article by Professor H. Klinghoffer, *Praeter Legem Regulations*, in 14 Hed HaMishpat, 1957, p. 245, 257). Considering the broad character of the legislative authority conferred upon the Council, no doubt whatever can arise regarding its power to provide by bye-laws intended to regulate the parking of vehicles within its boundaries for the *administrative* functions which it has placed upon the Mayor to carry out for this purpose. Such bye-law provision would accordingly not involve any “delegation” to another of a function of this character by one charged to carry it out. Therefore, if the matter of designating a “regulated place” and the regulation of parking thereon by means of a parking meter constitutes a function of an administrative character, the provisions of sec. 3(a) of the bye-laws do not conflict howsoever with the principle of *delegatus non potest delegare* and are valid. But even if these provisions must be treated as conferring upon the Mayor a function of a legislative character, the question still remains whether the said principle is applicable to a situation in which a body which has been granted power to regulate a given matter by means of secondary legislation, purports to yield some of its legislative authority to another. This is evident from the following observation of Allen’s (*ibid.*) when dealing with this question: “In respect of legislative functions, however, the position is not so clear.” Be that as it may, the rule in *Allingham’s case* (8) does not assist us in the present case.

B. From what has been said in the preceding paragraphs it follows that the first question which we must resolve is whether the function dealt with in sec. 3(a) of the bye-laws—the designation of a “regulated place”, etc.—is administrative or legislative. We all know that it is sometimes difficult nowadays to determine the quality of a function assigned to some or other body or official, in regard to whether it belongs to one or the other of these two categories. One of the factors

giving rise to this difficulty is that in many instances the legislative and administrative characteristics of a given function are intermixed. Thus in England the report of the Committee on Ministers' Powers, (Cmd. 4060) published in 1932, emphasized (at p. 95):

"It is indeed difficult in theory and impossible in practice to draw a precise dividing line between the legislative on the one hand and the purely administrative on the other; *administrative action so often partakes of both legislative and executive characteristics.*"

If we consider the content of sec. 3(a) carefully, we are persuaded that a dual function was placed upon the Mayor, or at least, one which is partly legislative and partly administrative. Firstly, he may determine that a place in which parking has been permitted by the Council, in accordance with sec. 2 of the bye-laws, shall be a "regulated" parking area. What such determination means is that any person who parks his vehicle in that place must comply with the directions of the attendant who is present or the "instructions" upon the parking meter found there which he is to set in operation (Sec. 3(b)). Secondly, after he has decided that a certain "parking place" shall be a "regulated" place, the Mayor must choose between two parking arrangements which are to be applied—regulation by an attendant, or by means of a mechanical device; and, having made the choice, it becomes his duty to put it into effect accordingly. Indeed, it may be supposed—since it is in the nature of things—that the Mayor will in practice carry out both such functions simultaneously and even be guided, as regards each of them, by the same considerations. In theory, however, it is possible to separate the two; for example, it is not impossible that the Council would assume the task of determining the "regulated" places, leaving to the Mayor only the decision as to the choice of one of the two parking arrangements—attendant or meter—which must be made with regard to such places.

Reverting now to the question posed at the beginning of this section, my answer is that the first function is to be regarded as of a legislative character but the second as of an administrative character. To support this conclusion, I rely on the decision in *Attorney-General v. Alexandrovitz* (1) from which it appears that the distinguishing features of a regulation of legislative effect are "first, that it should establish a legal norm" (rule of conduct) and thereby bring about a change in the law of the country, and secondly, "that this should be a general or 'abstract' norm, i.e. a norm directed to the public generally, or at least to an indefinite part thereof." It was accordingly held in that



case that the prescription of a mark of identity for merchandise subject to purchase tax by the Director of Customs and Excise (by virtue of the authority granted to him under sec. 15 of the Purchase Tax Law, 1952) constitutes a provision of legislative effect, inasmuch as it "adds an obligation which, apart from it, would not exist" (ibid, p. 702). In his judgment, Sussman J. followed the decision of the High Court of Justice in *Asslan v. Military Governor of the Galil* (2), which held that it was essential to treat as of legislative character an order issued pursuant to sec. 125 of the Emergency Defence Regulations, 1945, because the effect of the order was to limit freedom of movement enjoyed previously by citizens in the region which had been proclaimed a closed area by the order.

This rule is also applicable to the designation of a particular parking area as a "regulated" place, since the two distinguishing features which characterize a legislative regulation exist in relation thereto: (a) the designation constitutes a provision directed to an indefinite portion of the public, namely, the class of persons who need to park their vehicles in a place as aforesaid; (b) its effect is that those persons have to obey the attendant present at the regulated place, or to set the parking meter in motion, whereas before the designation they were under no obligation to observe either of these rules of conduct. I must add that it is possible that the definition upon which I have based this conclusion cannot be reconciled with the view expressed in *Irgun Nehagei Moniot Sherut v. Mayor of Tel Aviv* (3), with regard to the character of a decision to erect traffic signals, made pursuant to Reg. 111 (a) (2) of the Transport (Traffic Rules) Regulations, 1953. I do not intend to dwell at length upon this matter except to observe that that view was obiter and was not required for determining the question which was considered in that case (see, ibid. (3) p. 102, between the letters C and D).

As for the function of regulating parking in a "regulated" place by the use of one of the two methods provided therefor in the bye-laws, I find that the decision of the Mayor thereon lacks the distinguishing feature of a "change in the law" and that consequently its character is merely administrative. The duty resting upon one who has put his vehicle in a parking place as aforesaid—to obey the attendant or to activate the meter—flows from the provisions of sec. 3, subsecs. (b) and (c) of the bye-laws, as well as from the designation of the place by the Mayor as a "regulated" place. The fact that the choice of one or the other of the two forms of regulating parking requires the exercise of a certain discretion on the part of the Mayor cannot bestow upon this function any legislative character whatever. If it were otherwise, it would mean

that it is impossible to impart to any function whatever an administrative character when to carry it into effect demands the exercise of discretion. Such is not the case.

I have deemed it proper to dwell on the theoretical distinction which is to be drawn between these two functions, not only in order to give a precise answer to the above-mentioned question but also to forewarn that due to the close connection which exists between them the distinction may have an important legal consequence. For example, it can be argued that whilst the act of designating a "regulated" place requires public notice, the same does not apply to the function of regulating parking in such a place by means of an attendant or a parking meter. In the report of the English Committee above-mentioned it was likewise stressed that

"to take any set of regulations and conclude that, because they are primarily administrative, they can be disregarded as having no legislative aspect may often be wrong."

C. The upshot of this is that the question which we have to answer at this stage is whether the District Court was right in holding that the Council did not have the power to delegate to the Mayor the legislative function of designating "regulated" places.

To justify this conclusion, the respondent stressed that sec. 25(1) of the Road Transport Ordinance—the source of the Council's authority to regulate parking—says that it "may make *by-laws*" for this purpose, from which it is inferred that it has the power to carry out such function in this matter alone and that therefore it may not be aided to this end by the Mayor or anyone else. The respondent found support for his argument in *Woszczyna v. Local Council of Kiryat Haroshet* (4), in which it was decided that since Art. 40(2) of the Palestine Order in Council 1922 provided that the appellate jurisdiction of the District Courts may be extended "as may be prescribed by any *ordinance*," the Palestine legislator could not thereby nominate any other person for this purpose with the result that sec. 84(a) of the Local Councils Order (A), 1950, made by the Minister of the Interior by virtue of sec. 5(2) of the Local Councils Ordinance, 1941, (as amended in 1947), according to which the District Courts were authorized to hear appeals from a decision of the appeals committee in connection with tax assessments, was not lawfully enacted. In other words, just as the limitation inherent in the words "as may be prescribed by any ordinance" in the Palestine Order in Council prevented the High Commissioner from nominating another to carry out the task of extending the appellate jurisdiction of

the District Courts, so the limitation implicit in the words "may make by-laws" precluded the Council from designating the Mayor as the person to make legislative arrangements for regulating parking within its boundaries.

It should be noted that there is nothing in common between this argument and the principle of *delegatus non potest delegare* by which the District Court judges were guided, since this argument relies upon the language used by the legislator, which in the respondent's opinion forbids in and by itself the Council to give up to another any of its powers in the matter under consideration, whereas the said principle is invoked—for the purpose of deciding whether to nullify the transfer of power which some Law has conferred upon an authority—when no prohibition is expressly prescribed in that law. Similarly in the *Woszczyna* case (4) from which the respondent drew an analogy to the instant case, the Deputy President (Cheshin D.P.) emphasized that "there is no question here of a delegation of authority from one agent to another, but of adhering to *express* limitations which have been laid down by superior legislation" (at p. 1646).

As for the argument itself, I think it is untenable. In the *Woszczyna* case, the enabling provision was devoted to a specific limited objective, to enable the appellate jurisdiction of the District Courts to be extended, and since the provision had clearly prescribed that the method to be followed for extending such jurisdiction was by enactment of an "ordinance", there was no avoiding the conclusion that this restriction constituted an express prohibition upon the delegation of the power for achieving the result to one not authorized to enact "ordinances". On the other hand, we have seen earlier that the enabling provision in the present case, in sec. 25(1) of the Road Transport Ordinance, is devoted to regulating the entire field of matters pertaining to parking of vehicles within the boundaries of local authorities, and in view of the wide terms conferring the power upon the Municipality to do so within its own area, which indicates that it was also empowered to prescribe "the primary regulations" in this connection, it is impossible to hold *ipso facto*—merely in reliance upon the words prescribing that the Council may effect this purpose by means of bye-laws—that it is forbidden to delegate to the Mayor the task of formulating the "details" required for the putting into effect of the regulations prescribed by it in the bye-laws it has enacted. Such an "automatic" inference is not possible even if the prescription of such details bears a legislative character. This may be seen from the view expressed by Griffith and Street, *op. cit.* (p. 69), that