

Delegated Legislation

Anupama Yadav
Law

INTRODUCTION

When the function of legislation is entrusted to organs other than the legislature itself, the legislation made by such organs is called delegated legislation. Or we can also say that when the legislature delegates its power to the administrative and the administrative body makes any law related to the powers delegated to it then the law made in such case is said to be delegated legislation. There is a limit to the power of delegation which is a kind of restriction over the powers to delegate. Based on this, the delegated powers can be said to have following limits on it:

- 1) Permissible limits
- 2) Impermissible limits.

There is a doctrine which deals with the limits of delegated legislation and is known as 'The Doctrine of Permissible Limits'. This doctrine deals with the power of legislature which can be delegated to the administrative authorities as well as the powers which can't be delegated.

DOCTRINE OF EXCESSIVE DELEGATION

The legislature can delegate its legislative powers subject to its laying down the policy. the legislature must declare the policy of the law , lay down legal principles and provide standards for the guidance of the delegate to promulgate delegated legislation, otherwise the law will be bad on account of "excessive delegation".

So, this doctrine means that the legislature can't delegate unrestrained uncanalised and unqualified legislative powers on an administrative body. Delegation is valid only if it is confined to legislative policy and guidelines.

In *Sitaram Vishabhar Dayal*¹, court held that whether the power delegated by legislature to the executive has exceeded the permissible limits in a given case depends upon the facts and circumstances. The question doesn't admit of any general rule.

FUNCTIONS WHICH CAN BE DELEGATED (PERMISSIBLE LIMITS)

Commencement

Several statues contain an appointment day clause, empowers the government to appoint a day for the act to come into force. Here, the operation of act depends upon the decision of government e.g., sec 3 of Bombay rents ,hotel and lodging house rates control act 1947 provides that the act shall come into force on such date as state govt. by notification in official gazette in that behalf. Such a provision is valid

¹ *Sitaram Vishambhar Dayal v. State of U.P.* AIR 1972 SC 1168,para7, p. 1170 ©1972)2 SCR 141.

Power of Exclusion and Inclusion

A power can be conferred on the Government to bring individuals, bodies or commodities within, or to exempt them from, the purview of a statute.

A usual legislative formula is to say that the Act applies to the items mentioned in the schedule annexed but Government has power to alter the schedule by adding thereto or removing there from some items. Thus, the range of operation of the Act can be expanded or reduced by making alterations in the schedule through delegated legislation. Such a provision has been upheld as valid.

For example-The Minimum Wages Act, 1948 has been enacted, "to provide for fixing minimum wages in certain employments". The Act applies to employments mentioned in the schedule but Government is given power to add any other employment thereto and, thus, to extend the Act to that employment.

In *Edward Mills Co. v. State of Ajmer*², the Supreme Court upheld the provision arguing that the policy was apparent on the face of the Act which was to fix minimum wages in order to avoid exploitation of labour in those industries where wages were very low because of unorganized labor or other cause.

Power to Amend Schedule

In a number of cases, the power to amend the schedule has been upheld because the policy to give guidance to the Government was discernible from the Act. It is constitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as selection of persons on whom tax is to be laid, the rates at which it is to be charged, in respect of different classes of goods, and the like. It was held in *Banarasidas Bhanot*³ that power conferred on the State Government by s. 6(2) of the C.P. and Berar Sales Tax Act, 1947 to amend the schedule relating to exemption is in consonance with the accepted legislative practice relating to the topic and is not unconstitutional.

The Punjab General Sales Tax Act, 1948 levied a purchase tax on goods except the items mentioned in the schedule annexed. The State Government could add to or delete any item from the schedule after giving three months' notice. This meant that if the Government added an item to the schedule, it became tax exempt; if any item was excluded from the schedule, it became subject to taxation. The Supreme Court upheld excluded from the schedule, it became subject to taxation. The Supreme Court upheld the provision against challenge on the basis of excessive delegation on two grounds:

(1) It is common to give to the Executive the power to amend schedules and such power has been upheld in a number of cases;

² AIR 1955 SC 25 : (1955) 1 SCR 735.

³ Banarsidas Bhanot v. State of Madhya Pradesh, AIR 1958 SC 909.

(2) Changes in the schedule could be made after giving three months notice. This was a check on an arbitrary exercise of power. The Government would give prior publicity of its intention to amend the schedule and also give an opportunity to interested parties to make representation against the proposed changes. In the case of a democratic government, this procedure itself acts as a check on arbitrary exercise of power. In this case, delegation of Legislative power was upheld because it was subject to the procedural safeguard of three months notice.

POWER TO EXEMPT

The legislature can exempt any person, institution or commodity from its purview. The reason to have an exemption clause is to:

- Reduce work of legislature.
- To remove the hardship to the persons this may materially affect the policy of the act.

A typical provision runs as follows:

"Notwithstanding anything contained in this Act, the Government may, subject to such conditions as they deem fit, by notification, exempt any land or building or class of land or buildings from all or any of the provisions of this Act or rules of regulations made there under."

[Section 113 of the Tamil Nadu Town and Country Planning Act, 1971]

Such a provision may be held to be invalid if the Act contains no policy, guidelines or principles for the guidance of the government's discretion to exempt under this clause.

- In *Parasuraman*⁴, the exemption clause was characterized as "uncanalised, unlimited and arbitrary" as the Act did not lay down any principle or policy for the guidance of the government's discretion to exempt.
- In *Jalan Trading Co. v. Mill Mazdoor Union*⁵, the Supreme Court upheld s. 36 of the Payment of Bonus Act, 1965 authorizing the Government to exempt any establishment from the operation of the Act having regard to the financial position and other relevant circumstances, as Parliament had given adequate guidance and laid down the principles in the light of which the power of exemption is to be exercised.

⁴ A.N. Parsuraman v. State of Tamil Nadu, AIR 1990 SC 40.

⁵ AIR 1967 SC 691.

- In *I.T.C. Bhadrachalam Paperboards v. Mandal Revenue Officer*⁶, it was held that power given to executive to bring an Act into force, power to exempt persons or properties from operation of the enactment are instances of conditional legislation.

POWER TO MODIFY

Sometimes, a statute confers on the executive the power to modify or amend the parent statute. This power makes the executive supreme even over the Legislature, but the conferment of this power provides flexibility in the changing circumstances. For example,

- When some complicated scheme is introduced, so to meet any unforeseen difficulty.
- To prevent the delay in the making of necessary changes in the statute by the legislature.

In *Baburam Jagdish Kumar & Co.*⁷ it was held that power by the legislature to a local authority or to executive Government to vary or modify an existing law would not be unconstitutional so long as such delegation does not involve abdication of essential legislative power by the legislature i.e. necessary guidelines are provided.

In *Rajnarain v. Chairman, Patna Administration Committee*⁸, the relevant statutory provision provided that the State Government could extend to a particular area any section of the statute (The Bihar and Orissa Municipal Act, 1922) subject to "such restrictions and modifications as the Government may think fit". The Supreme Court upheld the delegation of power but subject to what it had said in the Delhi case that the Government could not make a change in the essential policy of the Act. The Court held that "when a section of an Act is selected for application, whether it is modified or not, it must be done so as not to affect any change of policy, or any essential change in the Act regarded a whole."

In *Lachmi Narain*⁹, the Government was given power to modify the schedule by giving a three months notice. In addition, the Government was also given power to make such modifications as it "thinks fit". The Government sought to amend the Act by dropping the requirement of giving three months notice for amending the schedule. The Supreme Court declared this modification as ultra-vires on the ground that it changed the "essential feature" and "legislative policy" inherent in the Act. The Court ruled that the requirement of three months notice to amend the schedule was a mandatory requirement, a matter of policy, because adequate

⁶ (1966) 6 SCC 634, PARA 26, P.655.

⁷ . *Baburam Jagdish Kumar & co. v. State of Punjab*, (1979) 3 SCC 616 ; AIR 1979 SC 1475, PARA 30, P. 1484

⁸ AIR 1954 SC 569, para32, 37 and 39.

⁹ AIR 1976 SC 714: (1976) 2 SCC 953 ; XII ASIL 475 (1976).

notice to those affected was necessary so that they could make due representations against the proposed change.¹⁰

Hence, it can be said that a delegation will be ultra vires if it contravenes the policy as policy can't be changed by the delegate even during modification of statute.

Removal of Difficulties

Statutes usually contain a removal of difficulty clause, nick-named in Britain as the Henry VIII clause because "that king is regarded popularly as the impersonation of executive autocracy".

The provision is used usually when the Legislature passes a statute implementing a new socio-economic scheme. Not being sure of what difficulties may crop up in the future implementation of the provisions of the law, the Legislature introduces therein a "removal of difficulty" clause envisaging that Government may make provisions to remove any difficulty that may arise in putting the law into operation.

There are two types of "removal of difficulty" clauses:

- (a) A narrow power under which "power to remove difficulties" has to be exercised consistent with the provisions of the parent Act. In such a case, the Government cannot modify any provision of the statute itself.

Here, the resultant order made by the Executive to remove the difficulty should not change the basic policy of the parent Act. The removal of difficulty order cannot change any provision of the parent Act; the order is to give effect to the Act.

- (b) The other, a broader version, may authorize modification of the parent Act, or any other Act, in the name of removal of difficulties. Usually, such a power is limited in point of time, say two or three years. In principle, such a power is objectionable as it vests a vast arsenal of power in the Executive.

Requirements for application of Henry VIII clause: three requirements must be fulfilled for a removal of difficulty order to be made by the Executive, viz.:

- (1) that a difficulty has arisen in giving effect to the provisions of the scheme;
- (2) that the order to be made is such as appears to the Government to be necessary or expedient for the purpose of removing the difficulty; and
- (3) That the order is not inconsistent with any provision of the scheme.

¹⁰ See 'principles of administrative law' by Jain and Jain. Page no. 70.

Important points related to Henry VIII clause:

- Here the modification of the parent Act is not permitted and the removal of difficulty order is not final and its validity can be tested in a court of law.
- If there is no difficulty, the power to remove the difficulty cannot be exercised. The court can therefore go into the question whether any difficulty has in fact arisen.
- The essential provisions of the Act cannot be amended; only minor changes can be made in the parent Act.
- In *Jalan trading company v. Mill Majdoor union*¹¹, Supreme Court was called upon to decide the legality of section 37 of payment of bonus act, 1965. The court in this case by majority of 3:2 held that sec 37 of the said act is ultra vires on the ground of excessive delegation. The court went on further and said that central government delegated such powers to the executive which was not permissible.
- Later in *Gammon India ltd v. union of India*¹², the minority view of *Jalan trading* case was adopted by the court which says that functions exercised by the central govt. were not legislative functions, so their delegation was permissible.
- After that in *Patna University v. Amita Tiwari*¹³, the court held that “removal of difficulty” clause had only limited application and cannot be applied in every situation having some difficulty.

FUNCTIONS WHICH CAN NOT BE DELEGATED (IMPERMISSIBLE DELEGATION)

The following functions can't be delegated by the legislature to the executive:

- **Essential legislative functions**
There is no bar in the constitution of India against the delegation of legislative power to the executive, but the essential legislative FUNCTIONS can't be delegated to the executive at all. Thus laying down a legislative policy is the function of legislature only and by entrusting this power to other body, the legislature can't escape from its duty and create a parallel legislature.
- **Repeal of law**
Power to repeal a law is an essential legislative function. So, if legislature delegates this power to executive, it will be excessive delegation and will become ultra vires.
- **Modification**
Modifying the act in relation to its important aspects is essential legislative function. So, delegation of such power to modify the act without any limitation is not permissible.
- **Exemption**

¹¹ . AIR 1967 SC 691 : (1967) 1 SCR 15

¹² (1974) 1 SCC 598: AIR 1974 SC 960.

¹³ (1977) 7 SCC 198: AIR 1997 SC 3456.

Without laying down norms and policy for guidance delegation of power of exemption to executive is not impermissible.

- **removal of difficulty**

Under the guise of removing difficulty, legislature cannot enact a Henry VIII clause and delegate a function or power which is essential in nature or which cannot be delegated normally.

- **Retrospective operation**

The power of law making in India vests in the legislature. Parliament can pass a law retrospectively or prospectively subject to the provisions of the constitution. But this principle cannot be applied in the case of delegated legislation. Giving an act a retrospective operation is an essential legislative function which cannot be delegated by the legislature to the executive.

- **Future acts**

Legislature cannot delegate the power by which the executive can adopt the laws which may be passed in future because this is an essential legislative function.

- **Imposition of tax**

Regarding tax statute, following points may be considered:

- Power to impose a tax is an essential legislative function under article 265 of the constitution and cannot be delegated by to the executive.
- Legislature can enact two laws providing for two taxes of same kind on same commodity but for different purposes.
- If a particular item is declared taxable under one enactment and non taxable under other then there cannot be said that there is conflict between the two enactments and one can't repeal the other.
- Taxing statute should be construed strictly. Interpretation which favors the assessee is accepted in case of ambiguity.
- Affairs of taxing tribunal, elected by representative are wholly immaterial in determining excessive delegation.¹⁴

- **Ouster of jurisdiction of court**

Jurisdiction of court is a purely legislative function and hence it can't be delegated to the executive.

- **Offences and penalties**

Making a particular act an offence and prescribing punishment for it is an essential legislative function and hence is not delegated. But if policy and guidelines are provided by the legislature in determining an offence and prescribing punishment for it then this power can validly be delegated by legislature to the executive.¹⁵

SAFEGUARDS REGARDING DELEGATION OF POWERS TO THE EXECUTIVE:

¹⁴ See 'taxing statutes' page no. 96, lectures on administrative law by C.K.Takwani, fourth edition.

¹⁵ See page nos.92, 93 of 'lectures on administrative law' by C.K.Takwani, fourth edition.

- Legislature should lay down guidelines for delegation or exercising the power of delegation.
- To make delegate to act within the framework of the statute, legislature has to set a criteria or standard regarding delegation of powers.
- Delegation should be reasonable.
- Delegation should be limited not unlimited.
- Delegate should not modify the basic legislation.
- Delegation of powers shouldn't be uncanalised and uncontrollable.
- Legislature must set the limits of the power delegated by declaring the policy of the law.
- Essential functions cannot be delegated.

CONCLUSION:

Delegation of powers is helpful but excessive delegation is harmful. Delegation have various advantages like reduction of work load of the legislature etc. but what has to be done by the legislature has to be done by itself only. That is why there is a well defined arena of the delegated legislature beyond which there will not be allowed any delegation of powers and that is known as impermissible limits of delegated legislation. Delegation of powers helps in division of excessive work load too but safeguards and proper control mechanisms should be present and implemented to have a proper canalized and controlled delegation of powers.

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