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# Excessive Delegation

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MEGHA MAHESH<sup>1</sup>

## ABSTRACT

*This research paper encloses and answers the questions raised by the crowd causing a socio-legal impact in the nation. The author attempts to acknowledge the same and research on the constitutionality of such delegation done by our authorities. To understand excessive delegated legislation, the factors which are required to be considered are The exposition of the law at hand; Grounds of application of the statute along with its Preamble; Scheme of the law; and The facts and circumstances serving as a background for the law to be enacted.*

*These grounds were decided in the case of **St. Johns Teachers Training Institute v. National Council for Teacher Education** that helps to decide whether a particular legislation amounts to excessiveness or not. While the previous case laws and the facts clearly indicate that excessive delegation stands unconstitutional by nature itself, the fact that too much power on one hand invites danger cannot be ignored also. When a statute is under the challenge to prove the constitutionality of the same, it should not be arbitrary by nature and function and therefore should also not be violative with any provision of the constitution. The necessary requirement that needs to be abided by is the principle of reasonableness that is Article 14 and Article 19 of the Indian constitution. It is therefore settled that any rule-making function which acts as a prejudice for any person without the authority or rule of law is to be declared invalid by its nature itself.*

*The Supreme Court of India with its decision in several cases have set out norms of jurisprudence which now acts as a guideline for any delegation to fall under the category of either being constitutional or unconstitutional by nature.*

## I. INTRODUCTION

**Delegated Legislation** is a term which covers the vast amount of **Legislation** made by Government Agencies and the Governor-General under authority of Acts of Parliaments, which **delegate** this power to agencies. Delegated legislation is law that is not passed by an Act of Parliament but by a government minister, a delegated person or an entity in the United Kingdom. Delegated legislation (secondary legislation or subsidiary legislation) is a process by which the executive authority is given powers by primary legislation to make laws in order

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to implement and administer the requirements of that primary legislation. **Regulations, Rules and by-laws** are examples of delegated legislation, which is so named because Parliament has **delegated** powers to a local council, government department or other body to make further laws under a particular Act. Delegated legislation is **necessary** and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for other matters such as those of technical detail. Delegated legislation is controlled by the Parliament and the Judiciary. Parliament has the overall **control** over the **delegated legislation** as it takes account with the statutory committees which make law through bills.

The court in the case of **Queen Vs Burrah**<sup>2</sup> stated that *“It is a general principle of law in India that any substantial delegation of legislative authority by the legislature of the country is void”*. The case thus however lays down that substantive delegation i.e., delegation if the important functions are void in India and that delegation, if at all possible, would have to be conditional.

#### **(A) Definition**

According to Sir John Salmond, *“Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority.”*<sup>3</sup>

Justice P.B Mukherjee also observed about delegated legislation that *“it was an expression which covered a multitude of confusion. He viewed it as an excuse for the Legislature, a shield for Executors and a provocation to the Constitutional Jurist.”*<sup>4</sup>

## **II. DOCTRINE OF EXCESSIVE LEGISLATION**

According to the doctrine of excessive delegation, if the legislature excessively delegates its legislative function to any other authority, such delegation will be held unconstitutional. 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”. This is one of the characteristics of Delegated legislation when essential legislations are delegated, it is considered to be excessive delegation.

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<sup>2</sup> The Empress Vs Burah and Book Singh (1878) ILR 3 Cal 64

<sup>3</sup> Rajya Sabha Practice and Procedure series, Committee on Subordinate legislation, 17-05-2005 [https://rajyasabha.nic.in/rsnew/practice\\_procedure/committ\\_sub\\_legis.pdf](https://rajyasabha.nic.in/rsnew/practice_procedure/committ_sub_legis.pdf)

<sup>4</sup> Diva Rai, Delegated Legislation in India, Ipleaders, <https://blog.ipleaders.in/delegated-legislation-in-india/#:~:text=Justice%20P.B%20Mukherjee%20also%20observed,provocation%20to%20the%20Constitutional%20Jurist.>

**(A) Objectives**

This doctrine fulfills two objectives: -

- It ensures democratic accountability in the laws through which the people are governed and,
- Minimum delegation provides the courts with some discernible standard to judge if the rule/regulation is ultra vires the parent statute.

**III. NATURE AND SCOPE OF EXCESSIVE DELEGATION**

It has been accepted that Parliament does not possess the legislative power as an inherent and original power. That power has been delegated to it by constitution. Parliament thus possesses not a right that it can delegate by its sweet will, but a competence that the Constitution obliges it to exercise itself. It cannot legally delegate its legislative functions to the executive. Such delegation would be unconstitutional. It is well settled that essential and primary legislative functions must be performed by the legislature itself and they cannot be delegated to the executive. Essential legislative functions consist of determination of legislative policy and its formulation as a rule of conduct. In other words, a legislature has to discharge the primary duty entrusted to it. Once the essential legislative powers are exercised by the legislature, all ancillary and incidental functions can be delegated to the executive. In Great Britain, excessive delegations of parliamentary powers are political concerns, in the United States (and in India), they are primarily judicial.

**(A) Operation Of the Doctrine Of Excessive Delegation**

○ **Powers and Duties of Courts-** The Founding Fathers of the Constitution have entrusted the power of legislation to the representatives of the people so that the power may be exercised not only in the name of the people but also by the people speaking through their representatives. The rule against excessive delegation thus flows from and is a necessary postulate of the sovereignty of the people. At the same time, however, it also cannot be overlooked that in view of multifarious activities of a modern welfare state, the legislature can hardly find time and expertise to enter into matters of detail. Delegation of law making power is the dynamo of modern government.

○ **Court's View on Excessive Delegation-** Challenge to the validity of enactments on the ground of delegated legislation often presents problems which are not easy to solve. The recent history of judicial decisions shows that there is a considerable divergence of opinion in the approach to the question dealing with such a challenge. Where the Legislature provides and

lays down principles underlying the provisions of a particular statute and also affords guidance for the implementation of the said principles, it is open for the legislature to leave actual implementation to its chosen delegate.

#### **IV. PRINCIPLES TO DETERMINE EXCESSIVE DELEGATION**

The question whether there is excessive delegation or not, has to be examined in the light of three broad principles:

1. Essential legislative functions to enact laws and to determine legislative policy cannot be delegated.
2. In the context of modern conditions and complexity of situations, it is not possible for the legislature to envisage in detail every possibility and make provisions for them. The legislature, therefore, has to delegate certain functions provided it lays down legislative.
3. If the power is conferred on the executive in a manner which is lawful and permissible, the delegation cannot be held to be excessive merely on the ground that the legislature could have made more detailed provisions.<sup>5</sup>

#### **V. TESTS TO BE APPLIED BY THE COURTS**

In dealing with the challenge to the vires of any statute on the ground of excessive delegation it is necessary to enquire whether the impugned delegation involved surrender of essential legislative function and whether the legislature has left enunciation of policy and principle to the delegate. If the reply is in the affirmative, there is excessive delegation but if it is in negative, the challenge must necessarily fail.

A statute challenged on the ground of excessive delegation must be subjected to two tests:

1. Whether it delegates essential legislative function; and
2. Whether the legislature has enunciated its policy and principle for the guidance of the executive.

#### **VI. PERMISSIBLE DELEGATION (LIMITS)**

The Supreme Legislation gives the permission to the executive to make the law and such a law is called Delegated or Administrative legislation or Permissible legislation. The question that arises in this pretext is: **where exactly do we draw the line for 'permissible limits' of**

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<sup>5</sup> Central University of South Bihar(CUSB), DELEGATED LEGISLATION-CLASSIFICATIONS-FORMS-REASONS FOR THE GROWTH, 9-03-2006 [https://www.cusb.ac.in/images/cusb-files/2020/el/law/Delegated%20Legislation\\_6th%20Sem.pdf](https://www.cusb.ac.in/images/cusb-files/2020/el/law/Delegated%20Legislation_6th%20Sem.pdf)

**delegation?**

In *Re: Delhi Laws Act* [AIR 1951 SC 332]<sup>6</sup> Kania C.J. stated that “*though the legislature can confer powers to make rules and regulations for carrying the enactment into “operation and effect”, it should lay down the “policy and principles providing the rule of conduct”*”. The wide latitude in rule-making power to any non-legislative authority can be left only in “cases of emergency like war”. In **Ajoy Kumar Banerjee v. Union of India** [1984] 3 SCC 127], the court held that “declaring the legislative policy and laying down the standard with sufficient clarity” constitutes ‘essential legislative function’, which cannot be delegated. In **Agricultural Market Committee v. Shalimar Chemical Works Ltd.** [(1997) 5 SCC 516]<sup>7</sup>, the permissibility of delegation was further restricted only to ‘mode of implementation’. This brief survey of *loci classici* on permissibility of delegation makes it clear that the function of subordinate legislation is merely an ancillary one to make the policy functional rather than making policy choices. Though the Court has upheld and struck down delegated legislation in a number of cases in the intervening years, these cases have stood the test of time as they contain the most comprehensive deliberations on the concerned issue. This reasoning was advanced in **Gwalior Rayon Mills Mfg. Co.**,<sup>8</sup> where it was reiterated that the essential legislative function was the determination of the legislative policy and its formulation as a rule of conduct. It was stated that the legislature could not be allowed to abdicate its legislative power as that would fall beyond the permissible limits of delegation. According to the Statement of Objects and Reasons, the sophistication behind distinguishing the Election Commission from Information Commission in this case is that the former was established by the Constitution and performed functions relating to elections, whereas the latter is a statutory body formed under the 2005 Act with a completely different mandate. It is hence necessary for the legislature to declare a standard, which the executive must then keep in mind while formulating rules.

**VII. FUNCTIONS WHICH CANNOT BE DELEGATED**

It is quite evident that the Constitution of India permits delegated legislation, though it does, it is now well settled that essential legislative functions cannot be delegated. Hence, the essential legislative functions must be carried out by the legislature itself. Legislature must not entrust these functions to the executive and must not create a parallel legislature.

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<sup>6</sup> Re The Delhi Laws Act, 1912 vs The Part C States (Laws) Act, 1950, 1951 AIR 332, 1951 SCR 747.

<sup>7</sup> Agricultural Market Committee v. Shalimar Chemical Works Ltd, (1997) 5 SCC 516.

<sup>8</sup> Gwalior Rayon Silk Mfg. (Wvg.) Co. vs The Asstt. Commissioner Of Sales ... on 21 December, 1973, 1974 AIR 1660, 1974 SCR (2) 879

**Gwalior Rayon Silk Mfg. (Wvg.) Co. v. The Asstt. Commissioner of Sales, AIR 1974 SC 1660**, it has been observed that essential legislative function consists of the determination of the legislative policy, and its formulation as a binding rule of conduct and neither be delegated by the legislature, nor is there any unlimited right of delegation inherent in the legislative power itself. The legislature must retain in its own hands the essential legislative functions and what can be delegated is the task of subordinate legislation necessary for implementing the purposes and objects of the Act. What guidance should be given and to what extent and whether guidance has been given in a particular case at all depends on a consideration of the provisions of the particular Act with which the Court has to deal including its preamble. In **Maganbhai v. State of Bombay**,<sup>9</sup> it has been observed that the power of delegation is a constituent element of the legislative power as a whole, and in modern times when the legislatures enact laws to meet the challenge of the complex socio-economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary powers to delegate of their choice for carrying out the policy laid down by their Acts. The legislature cannot delegate its essential legislative function in any case. It may lay down the legislative policy and principle, and must afford guidance for carrying out the said policy before it delegates its subsidiary powers on that behalf.

#### **(A) Essential Legislative Functions**

An attempt is made to define it as the power of laying down the policy of the law and enacting that policy into a binding rule of conduct. The following are considered to be the essential legislative functions.

##### **1. Power to lay the policy and object of the Act:-**

Even though the legislature empowers the executive to make law, it cannot authorize the executive to define the policy and object of the Act. Hence, power of laying the policy and object of the Act is an essential function and it cannot be delegated.

**Kerala State Electricity Board v. Indian Aluminium Co.**<sup>10</sup>, it has been held that the constitutionality of an Act could not be challenged when the legislature had laid down sufficient policy to guide the discretion of the administrative authority.

##### **2. Power to repeal of law: -**

Even though the legislature empowers the executive to make law, it cannot authorize the executive to repeal a law. The power to repeal a law is essentially a legislative function, and therefore, delegation of power to the executive to repeal a law is excessive delegation and is

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<sup>9</sup> Maganbhai v. State of Bombay, AIR 1961 SC 4

<sup>10</sup> Kerala State Electricity Board v. Indian Aluminium Co., AIR 1976 SC 1031

ultra vires. **Mokhan Singh v. State of Punjab**,<sup>11</sup> it has been held that the power to repeal a law is an essential function and it cannot be done only through legislation. The delegation which authorizes an executive agency to exercise the power to repeal a law is excessive delegation and is ultra vires.

### **3. Power to modify an Act:-**

Though the legislature empowers the executive to make law, it cannot authorize the executive to modify an Act. However, it permits to modify the provisions which are not essential in nature.

**Raj Narain Singh v. Chairman, Patna Administration, AIR 1954 SC 569**,<sup>12</sup> it has been declared that the modification of a provision beyond the scope of the delegated power as ultra vires.

### **4. Power to exempt: -**

Even though the legislature empowers the executive to make law, it cannot authorize the executive to exercise the power of exemption without laying down the norms and policy. Hence, power to exempt is an essential function and it cannot be delegated to the executive. The delegation which authorizes an executive agency to exercise the power of exemption is excessive delegation.

### **5. Power to remove doubts or difficulties: -**

Though the legislature empowers the executive to make law, it cannot authorize the executive to remove doubts or difficulties. Under the pretext of removal of difficulties, the legislature cannot enact a Henry VIII Clause and thereby delegate essential legislative functions to the executive. **Jalan Trading Co. v. Mill Mazdoor Sabha**,<sup>13</sup> it has been observed that **Section 37 of the Payment of Bonus Act, 1965** authorized the Central Government itself to remove the doubt or difficulties in giving effect to the provisions of the Act. The Court held Section 37 as ultra vires on the ground of excessive delegation.

### **6. Power to give retrospective effect to an Act: -**

Even though the legislature empowers the executive to make law, it cannot authorize the executive to give retrospective effect to a law. Retrospective effect means giving backward effect to a law. The legislature can make law prospectively and retrospectively. Thus, giving

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<sup>11</sup> Makhani Singh v. State of Punjab, AIR 1964 SC 381

<sup>12</sup> Raj Narain Singh v. Chairman, Patna Administration, AIR 1954 SC 569

<sup>13</sup> Jalan Trading Co. v. Mill Mazdoor Sabha, AIR 1967 SC 691

retrospective effect to an Act is an essential function and it cannot be delegated.

### **7. Power to adopt the future laws: -**

Though the legislature empowers the executive to make law, it cannot authorize the executive to adopt the laws which may be passed in future. However, the legislature may authorize the executive to adopt and apply the laws existing in the other States. **Shama Rao v. Union Territory of Pondicherry**,<sup>14</sup> it has been observed that the Pondicherry General Sales Tax Act, 1965 permitted to adopt the Madras General Sales Tax Act, 1959 and all the amendments to the Madras Act thus, became automatically applicable to Pondicherry. Such power to adopt Madras laws was held to be excessive delegation and therefore, invalid.

### **8. Power to impose tax:-**

Even though the legislature empowers the executive to make law, it cannot authorize the executive to make laws which impose taxes. According to Article 265 of the Constitution of India<sup>15</sup> Only the legislature can make laws relating to taxes. Hence, power to impose tax is an essential function and it cannot be delegated to the executive.

### **9. Power to make criminal law**

Even though the legislature empowers the executive to make law, it cannot authorize the executive to make criminal laws which define offences and impose punishments. Hence, power to make criminal law is an essential function and it cannot be delegated to the executive.

### **10. Power to oust the jurisdiction of Courts**

Even though the legislature empowers the executive to remove the jurisdiction of Courts it cannot be delegated to the executive. Thus, power to oust the jurisdiction of Courts is an essential function and it cannot be delegated.

### **(B) Henry VIII Clause**

Henry VIII Clause is a nickname of executive autocracy. King Henry VIII of the 16th Century is known for his dictatorship, was the monarch of England during 1509-1547. During his regime he acted recklessly and ruled against the wishes of Parliament of England and several laws were made empowering the executive even to amend the parent Act. Henry VIII Clause type of delegation permitted delegation of even the essential legislative functions which are not supposed to be delegated. **e.g. In England, National Insurance Act 1911 authorized the Commissioners to alter the provisions of the Act, Factories Act, 1948 authorized its**

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<sup>14</sup> Shama Rao v. Union Territory of Pondicherry, AIR 1967 SC 1480

<sup>15</sup> INDIA CONST, art 265, 1950

**officers to modify or extend the provisions relating the health and safety, etc.**<sup>16</sup> Thus, the executive is authorized to amend the provisions of existing Statute. This type of delegated legislation the executive is given a very broad power to amend a Statute when the legislature passes an Act, it cannot foresee all the difficulties. These unforeseen difficulties may arise during the implementation of such Act. Executive being an implementing agency can remove these difficulties. Henry VIII Clause empowers the executive to remove these difficulties by amending the Statute. The removal of difficulties clause is of two types.

- **Removal of difficulties clause: narrow type-** This type of Clause empowers the executive to exercise the power of removal of difficulties consistent with the provisions of the parent Act, e.g. Section 128, the State Reorganization Act, 1956,

- **Removal of difficulties clause: broad type-** This type of Clause empowers the executive to exercise the power of removal of difficulties to modify even the parent Act or any other Act. e.g. Article 372(2) of the Constitution of India. This Clause does not stipulate that the provisions to be made by the Government to remove the difficulty must not be inconsistent with the parent Act and so it means that the executive can even modify the provisions of the parent Act through a 'removal of difficulty order'. Such a Clause has been held valid subject to certain restrictions

**Mahadeva Upendra Sinai etc. v. Union of India and Others**,<sup>17</sup> it has been observed that the existence or arising of a difficulty' is the sine qua non for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this Clause cannot be invoked. Again, the difficulty contemplated by the Clause must be a difficulty arising in giving effect to the provisions of the Act and not an extraneous difficulty. Hence under the guise of removing a difficulty, it cannot change the scheme and essential provisions of the Act. In **Jalan Trading Co. v. Mill Mazdoor Sabha**,<sup>18</sup> it has been held that Section 37 of the Payment of Bonus Act, 1965<sup>19</sup> as ultra vires on the ground of excessive delegation because it empowered the Central Government to pass orders for the removal of any doubts or difficulties which are final.

- **Limitation-** The Committee on Minister's Powers opined that Henry VIII Clause should never be used except for the sole purpose of bringing the Act into operation but subject to the limit of one year from the date of passing of the Act.

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<sup>16</sup> Dr. R D VIJAYASEKHAR, ADMINISTRATIVE LAW, 50, 6<sup>th</sup> ed. 2019

<sup>17</sup> Mahadeva Upendra Sinai etc. v. Union of India and Others, 1975 AIR 797

<sup>18</sup> Jalan Trading Co. v. Mill Mazdoor Sabha, AIR 1967 SC 691

<sup>19</sup> Payment of Bonus Act, 1965, section 37, No. 21, Acts of Parliament, 1965(India)

### VIII. CONDITIONS FOR DELEGATING LEGISLATIVE POWER

The Indian legislature cannot delegate unrestrained uncanonized and unqualified legislative power on an administrative body. The legislature can delegate legislative power subject to the conditions of laying down principles, standards and policy subject to which the delegate is to exercise its delegated legislative power. Delegation is valid only when it is confined to legislative policy and guidelines. It is equally well settled that a delegate must exercise its jurisdiction within the four corners of its delegation. It has been held in **Payment of Bonus Act, 1965**, whether a power delegated by the legislature to the executive has exceeded the permissible limits in a given case depends upon its facts and circumstances. It depends upon the **nature of power delegated and the purpose intended to be achieved**. In determining whether there is “excessive delegation”, Courts examined that a completely unlimited blanket power where there is neither any guidance to the delegate, nor any procedural safeguards against improper exercise of power by the delegate, can be found to be excessive delegation and declare invalid. A case in point in this context is **H.R. Banthia v. Union of India**.<sup>20</sup> **Section 5(2) (b) of the Gold (Control) Act, 1968**<sup>21</sup> empowered the Gold Administrator for carrying out the purposes of the Act regulating the manufacture, distribution, use, disposal, consumption, etc. of gold. The Supreme Court declared the provision invalid because it was very wide and suffered from the vice of “excessive delegation”. The Courts can use the doctrine to check extreme instances of delegation. The majority view in the **Gwalior Rayon case** has been approved by the Supreme Court thereafter in a large number of cases. As a result of these pronouncements, “*the doctrine of excessive delegation should be regarded as very well established in India*” which means that the Legislature cannot delegate uncanalised and uncontrolled power. The Supreme Court has enunciated the doctrine of excessive delegation in **Registrar, Co-operative Societies V. K. Kunjabmu**<sup>22</sup> as follows: “*The power to legislate carries with it the power to delegate. But excessive delegation may amount to abdication. Delegation unlimited may invite despotism unlimited. Legislate it must, by laying down policy and principle and delegate it may to fill in detail and carry out policy. If guidance is there wherever it may be found, the delegation is valid.*” In **Mahe Beach Trading Co. Vs Union Territory of Pondicherry**,<sup>23</sup> the Supreme Court has stated that abdication of legislative power, or its excessive delegation, or a total surrender or transfer by the Legislature of its legislative functions to another body, is not permissible. The Court has stated in **Kunjabmu** case that

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<sup>20</sup> Harakchand Ratanchand Banthia ... vs Union Of India And Ors, 1970 AIR 1453, 1970 SCR (1) 479

<sup>21</sup> Gold (Control) Act, 1968, section 5(2) (b), No. 18, Act of Parliament, 1968

<sup>22</sup> Registrar, Co-operative Societies V. K. Kunjabmu, AIR 1980 SC 350, 352: (1980) 1 SCC 340.

<sup>23</sup> Mahe Beach Trading Co. Vs Union Territory of Pondicherry, (1996)3 SCC 741, Para 13, p. 746

guidance may be found anywhere in the statute, e.g., in the express provision empowering delegation, or other provisions of the statute, the Preamble, the scheme or even the very subject-matter of the statute. Thus, it is clear that the Courts adopt a liberal stance in letter of bringing out legislative policy and guidelines with a view to uphold delegation of legislative power. Following the principles laid down in **Kunjabmu's case**, the Supreme Court in **St. John's Teachers Training Institute**,<sup>24</sup> held that question “*whether a particular legislation suffers from the vice of excessive delegation, whether has to be examined in the context of subject matter, the scheme, the provisions statute including its Preamble and the facts and circumstances in the background of which statute is enacted.*” It was further held that there is a presumption in favor of the validity of subordinate legislation and if it is open to two constructions, the one which would make it valid has to be adopted and the legislation can also be read down to avoid it being declared **ultra vires**.

- **Section 73 of the Stamp Act, 1899**,<sup>25</sup> as amended by **Indian Stamp (Andhra Pradesh Amendment) Act, 1986 (17 of 1986)**, empowered any person authorized in writing by the Collector to have access to documents in private custody or custody of a Public Officer and to impound the same. It was held that section 73 as amended by A.P. Act 17 of 1986 suffered from the vice of excessive delegation as there are no guidelines as to the persons who may be authorised by the Collector. Thus, whenever a statute is challenged on the ground of excessive delegation, it becomes necessary for the Court to examine the statute and discern policy or guidelines for the exercise of power of delegated legislation.

## IX. VALIDITY OF DELEGATING PROVISIONS

In a large number of cases the Courts have considered the validity of various delegating provisions **with reference to the doctrine of excessive delegation**. The cases have been classified from the point of view of the nature of the power conferred under the following broadheads:

(a) **Skeleton Legislation-** In **Bagla v. State of Madhya Pradesh**,<sup>26</sup> the following two sections of the **Essential Supplies (Temporary Powers) Act, 1946**, was questioned on the ground of excessive delegation:

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<sup>24</sup> St. John's Teachers Training Institute, NCTE, (2003) 3 SCC 321, AIR 2003 SC 1533.

<sup>25</sup> Stamp Act, 1899, section 73, No. 9, Act of Parliament

<sup>26</sup> Bagla v. State of Madhya Pradesh, AIR 1954 SC 465

- **Section 3(1)**- *"The Central Government, so far as it appears to it to be necessary or expedient for maintaining or increasing supplies of any essential commodity, or for securing their equitable distribution and availability at fair prices, may by order provide for regulating or prohibiting the production, supply."* and
- **Section 6**-*"Any order made under section 3 shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act."*

The Supreme Court declared both the sections valid saying that the Act had sufficiently formulated the legislative policy, "maintaining or increasing supplies etc.", in section 3, and gave clear and sufficient guidance to the Government to exercise its power under the Section. Justifying the broad delegation, the Court stated that the *"ambit and the character of the Act is such that the details of that policy can only be worked out by delegating them to a subordinate authority within the framework of that policy."* In this way, the Supreme Court upheld a very broad delegation of power.

In **Bhatnagars & Co. v. Union of India**,<sup>27</sup> was involved in section 3(1) (a) of the **Imports and Exports (Control) Act, 1947** authorizing the Central Government to prohibit or restrict the import or export of goods of any specified description by order. The statute is skeletal and gives no indication as to what considerations and policies are to be kept in view by the Government in controlling imports and exports. The Supreme Court upheld the statute as valid arguing that the underlying policy was to be found in the preceding statute, the Defense of India Act, 1939, whose provisions the statute in question purported to continue.

In **Makhan Singh v. State of Punjab**, the Supreme Court saved section 3 of the Defense of India Act, 1962 from the charge of excessive delegation, Section 3 empowered the Central Government to make rules, as it appears expedient to it, for Defense of India and maintenance of public order and safety.

**(b) Power of Exclusion and Inclusion:** A common legislative practice is to confer power on the Government to bring individuals, bodies or commodities within, or to exempt them from, the purview of a statute. Several formulae are in vogue for the purpose. Thus, the range of operation of the act can be expanded or reduced by making alterations in the schedule through delegated legislation. **The Minimum Wages Act, 1948** has been enacted, as stated in its Preamble, "to provide for fixing minimum wages in certain employments". The Act applies to employment mentioned in the schedule, but the Government is given power to add any other

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<sup>27</sup> Bhatnagars & Co. v. Union of India, AIR 1957 SC 478

employment thereto and, thus, to extend the Act to that employment. The Act lays down no norms on which Government may exercise its power to add any employment to the schedule. In **Edward Mills Co. v. State of Ajmer**<sup>28</sup>, 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 labor in those industries where wages were very low because of unorganized labor or other causes.

**(c) 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. It was held in **Banarasi Das Bhanot case**<sup>29</sup> that power conferred on the State Government by **section 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 Supreme Court upheld the provision against the challenge on the basis of excessive delegation on two grounds:

- It is common to give to the Executive the power to amend schedules and such power has been upheld in a number of cases;
- 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 the Publicity of its intention to amend the schedule and also give an opportunity to interested parties to make representations 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.

In **Mohammed Ali v. Union of India**<sup>30</sup> The Supreme Court upheld a provision in the **Employees' Provident Funds Act, 1952**, authorizing the Central Government to bring within the purview of the Act such establishments as it might specify.

**(d) Power to Exempt:** A statute may grant power to the Executive to exempt from its operation including person, institution or commodity. The reason to include an exemption clause in a statute is that because of the heavy burden of work, the Legislature is not able to

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<sup>28</sup> Edward Mills Co. v. State of Ajmer, AIR 1955 SC 25

<sup>29</sup> Banarsidas Bhanot Vs State of Madhya Pradesh, AIR 1958 SC 909

<sup>30</sup> Mohamed Ali v. Union of India, AIR 1964 SC 980: 1963 Supp (1) SCR 671

devote enough time to consider in detail the hardships and difficulties which may arise as a result of enforcement of the statute. In some cases, a situation may arise where the provisions of the Act may result in great hardships to individuals. The exemption clause helps in removing such hardships without materially affecting the policy of the Act. In **Lohia Machines Ltd.**<sup>31</sup> Case, it was held that where relief or exemption is granted by the statute, the Executive has discretion to work out details of such relief or exemption. It was further held that Legislature's strict vigilance and control over the rule making power is a circumstance showing absence of excessive delegation of power.

**(e) Power to modify the statute:-**

At times, the power to modify a statute is conferred on the Executive because if the matter is taken to the Legislature, it may delay the making of necessary changes in the statute thus a necessity of balancing two factors

- the danger of the executive misusing its power, and
- the need for delegating the power.

In **Baburam Jagdish Kumar & Co.**<sup>32</sup> 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

## **X. UNCONSTITUTIONALITY OF EXCESSIVE DELEGATION**

There are certain factors necessarily essential to draw a conclusion calling it constitutional or unconstitutional. The factors which are required to be considered are as below:

- The exposition of the law at hand;
- Grounds of application of the statute along with its Preamble;
- Scheme of the law;
- The facts and circumstances serving as a background for the law to be enacted.<sup>33</sup>

These grounds were decided in the case of **St. Johns Teachers Training Institute v. National Council for Teacher Education** that helps to decide whether a particular legislation amounts to excessiveness or not. When a statute is under the challenge to prove the constitutionality of the same, it should not be arbitrary by nature and function and therefore should also not be

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<sup>31</sup> Lohia Machines Ltd. Vs Union of India, (1985) 2 SCC 197

<sup>32</sup> Baburam Jagdish Kumar & Co Vs State of Punjab, (1979) 3 SCC 616

<sup>33</sup> P. JAGANATHAN, ADMINISTRATIVE LAW, 56, 2<sup>nd</sup> ed. 2010

violative with any provision of the constitution. The necessary requirement that needs to be abided by is **the principle of reasonableness** that is **Article 14** and **Article 19** of the Indian constitution. It is therefore settled that any rule-making function which acts as a prejudice for any person without the authority or rule of law is to be declared invalid by its nature itself. In all democratic countries, an important segment of the administrative process is delegated legislation. The great increase in delegated legislation in modern times is due to several factors. Though law-making is the primary function of the legislature, yet no country does the legislature monopolize the entire legislative power; it shares the same with the executive. No statute has been passed today by a legislature which does not confer some legislative power on the Administration. As the C.M.P has argued in England, delegated legislation is indispensable in the modern context.

## **XI. THE QUESTION OF CONTROL OF EXCESSIVE DELEGATION**

While accepting the proposition that delegated legislation is indispensable today, the question of control over this activity of the Administration becomes crucial. The question of control arises at two stages.

1. At source, when legislative power is conferred on the Administration by the Legislature in England, Parliament is regarded as supreme and so the courts cannot control Parliament in the matter of delegation of legislative power. But in the USA, the situation is different because of the prevalence of doctrine of separation of power. Therefore the proposition that is followed here is that the legislature ought not to delegate unlimited power to an administrative authority. The legislature should itself discharge the essential legislative functions, to make and lay down the policy of statute, and that only the power to lay down details to effectuate that policy may be delegated.

In **Panama Refining Co. v. Ryan**,<sup>34</sup> the Plaintiffs sued to restrain the defendants, who were the federal officials from enforcing the regulations IV, V and VI prescribed by the Secretary of the Interior under **Section 9(c) of the National Industrial Recovery Act**<sup>35</sup> as an unconstitutional delegation to the President of legislative power and as transcending the authority of the Congress under Commercial Clause. The section purports to authorize the President to pass a prohibitory law. The Supreme Court found no standard in the Act. The code-making authority was held to confer an unconstitutional delegation of legislative power.

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<sup>34</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935)

<sup>35</sup> National Industrial Recovery Act, 1933, section 9(c), U S LABOR LAW, 1933

2. After delegated legislation has been made by the concerned authority in exercise of the power conferred as in. Delegated legislation has come to stay as an important component of the modern administrative process. The question today lies is not whether there should be delegated legislation or not, but is to ensure that power given to the Administration is exercised properly, under proper controls, so that benefits of the institutions may be minimized. This leads to the most important question of **Judicial Control of Delegated legislation.**

## **XII. SPECIFIC POSITION IN INDIA**

In India, in the matter of re: Delhi Laws Act is a seminal case in the area of delegated legislation and majority of judges did play a creative role in evolving doctrine of excessive delegation and was in view that: It is essential that Parliament and State Legislatures should have power to delegate legislative power to the Executive. The Doctrine of Separation of Powers does not substantially prevail in India. One view propounded by Fazl Ali, Das and Sastri, JJ. was to put the limit at **“effacement or abdication” by the Legislature** which means that legislature could delegate to any extent it likes as long as it retains its own legislative power. The other view propounded by majority was that the legislature ought **not to delegate its “essential legislative power” to an outside agency. Determining Suitability Criteria is not a “procedural or administrative” function**

**The landmark National Judicial Appointments Commission Bill-** In the NJAC Bill, there were two types of powers delegated to the Commission:

- Determining suitability criteria, which includes mainly the criteria of suitability with respect to appointment of the Judges [section 5(2) and section 6 (3)].
- Procedural and administrative issues including the ‘manner of eliciting views from Chief Ministers and Governors’ [section 12(2) (e)], ‘procedure for conducting the meetings of the commission’ [section 12(2)(i)]. The second type of delegation, being merely procedural and administrative in nature, can be tolerated. The problem arises specifically with respect to the first type of delegation dealing with **suitability criteria**. Since there was no policy guidance for suitability criteria, instead of passing the bill in haste, the Parliament should have cared to include those details in the Bill itself, rather than leaving it completely to a six-member body, which is comfortably shielded from democratic accountability.

In the matter of **Gwalior Rayon Mills Mfg. (WVG) Co. Ltd. v. Assistant Commissioner of Sales Tax**, Khanna J. stated *“One of the settled maxims in Constitutional Law is that the power conferred on legislature to make laws cannot be delegated to any other body or authority.”*

The Constitution of India confers a power and imposes a duty on the legislature to make laws. It cannot abdicate its functions in favor of another. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether a legislature exceeded such limit.

#### **(A) Comparison of Indian and U.S doctrine**

In the matter of **Ramesh Birch v. U.O.I.**,<sup>36</sup> the conclusions were set out thus,

1. The legislature must normally discharge its primary legislative function itself and not through others.
2. Once it is established that it has sovereign, powers within a certain sphere, it must follow as a corollary that it is free to legislate within that sphere in any way which appears to it to be the best way to give effect to its intention and policy in making a particular law, and that it may utilize any outside agency to any extent it finds necessary for doing things which it is unable to do itself or finds it inconvenient to do.
3. It cannot abdicate its legislative functions, and therefore while entrusting power to an outside agency, it must see that such agency acts as a subordinate authority and does not become a parallel legislature.
4. The doctrine of separation of powers and the judicial interpretation it has received in America ever since the American Constitution was framed, enables the American courts to check undue and excessive delegation but the courts of this country are not committed to that doctrine and cannot apply it in the same way as it has been applied in America. Therefore, there are only two main checks in this country on the power of the legislature to delegate, these being,
  - It's good sense
  - The principle that it should not cross the line beyond which delegation amounts to 'abdication and self-effacement'.

### **XIII. CONCLUSION**

Entrustment of legislative power without laying down policy is inconsistent with the basic concept on which our constitutional scheme is founded. Our Constitution-makers have entrusted the power to legislate to the elected representatives of the people, so that the power is exercised not only in the name of the people, but by the people. The rule against excessive delegation of legislative authority is a necessary postulate of the sovereignty of the people. It is not claimed to be nor intended to be a panacea against the shortcomings of public

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<sup>36</sup> *Ramesh Birch v. U.O.I.*, 1990 AIR 560, 1989 SCR (2) 629

administration. Thus this doctrine serves a useful purpose as there is a great merit in the Legislature laying down policy and standards to control the action of the Executive. The presence of this doctrine enables the court the opportunity to ask whether the duty had been performed. This doctrine has already watered down a great deal and it should not be watered further.

Therefore, it is necessary that the courts apply the doctrine of excessive delegation in a meaningful manner rather than reducing it to a mere formality and an empty incantation.

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