

HENRY VIII CLAUSE IN INDIA- SUSPICION ON EXECUTIVE

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The purpose of this paper is to analyse Henry VIII clause in India. It is a provision in the primary act which enables the Executive to repeal, amend, alter the primary act itself for the purpose of extension as secondary legislation in some other place¹. Historically Henry VIII clause was enacted in statue of sewers². The clause vested commissioners(executive) of sewers power to enact rules to levy taxes and to impose penalties which had effect of legislation³. Such clauses were present during the reign of King Henry VIII. The executive at that time was despotic and ran its power in authoritarian manner and modified provisions as per his whims and fancies⁴. Metaphorically when broad powers are granted to executive it is termed Henry VIII powers. Henry VIII clause is different from excessive delegated legislation because over here modifications are not only limited to the time of extension⁵, but modification can also amount to even change the original act.

Judicial interpretation of Henry VIII clause in India and Ambiguity regarding it.

Justice Fazl Ali in *In-Re: The Delhi Laws Act*⁶, 1912 discusses the idea of RODC. He cites Sir Thomas Carr⁷ to explain the nature of the Henry VIII clause. In case of *Laxmi Narain v. Union of India*⁸ argument was made that the impugned legislation has Henry VIII clause and amendment can be done within one year of the extension. The argument was not accepted by the court and section 2

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¹ Henry VIII clauses, UK PARLIAMENT.

² Ibid.

³ Ibid.

⁴ N.A.K. Sarna, Henry VIII clause in India, 15 Journal of the Indian Law institute. 460, 461 (1973)

⁵ Garg P and Ghosh A, "THE HENRY VIII CLAUSE: NEED TO CHANGE THE COLOUR OF OUR SHADES" (2017) 3.3 Comparative Constitutional Law and Administrative law Quarterly <<http://docs.manupatra.in/newslines/articles/Upload/19665761-FF5B-456F-88CB-140FE3C98742.pdf>>

⁶ (1951) AIR 332

⁷ "Of all the types of orders which alter statutes, the so-called 'Henry VIII clause' sometimes inserted in big and complicated Acts, has probably caused the greatest further in England. It enables the Minister by order to modify the Act itself so far as necessary for bringing it into operation. Anyone who will look to see what sort of orders have been made under this power will find them surprisingly innocuous. The device is partly a draftsman's insurance policy, in case he has overlooked something, and is partly due to the immense body of local Acts in England creating special difficulties in particulars areas. These local Acts are very hard to trace, the draftsmen could never be confident that he has examined them all in advance. The Henry VIII clause ought, of course, to be effective for a short there only." In *Re: The Delhi Laws Act, 1912*

⁸ (1976) AIR 714

of the impugned legislation was distinguished from Henry VIII clause. The basis was that power of modification under section 2 of the impugned legislation was only at the time of extension whereas in Henry VIII clause such power of modification can be there even after extension.

The first landmark judgement which discusses the validity of Henry VIII clause in India is *Jalan Trading v. Mill Mazdoor Union*⁹. In this case validity of section 37 Payment of Bonus Act, 1965 was contested on the basis that it was Henry VIII clause. Section 37(2) provided that such powers cannot be subject to judicial scrutiny (finality clause). The majority (3:2) in this judgement termed section 37 to be invalid as it was instance of Henry VIII clause¹⁰. The rationale of the court was that the section by providing power to remove difficulty either by altering or amending the provisions to give effect to the legislation even though not going against the purpose of the act would in substance amount to legislative function and in essence is delegation of legislative authority and the same cannot be delegated to an executive body. Further, section 37(2) provides for finality of such executive decision and that it cannot be challenged in court of law. The court said that by being a sole judge whether difficulty or doubt had arisen, accentuates the vice in section 37(1). It is important to note that in this case Henry VIII clause was termed invalid of it being excessive delegated legislation by its sheer existence.

The second landmark judgement *Gammon India v. Union of India*¹¹ created ambiguity regarding the law on Henry VIII clause. In this case section 34 of the India Contract Labour Act, 1970 was challenged as amounting to excessive delegated legislation. However, this provision in the act did not confer power upon the central government to amend the provisions of the parent statute unlike *Jalan Trading case* on the pretext of removing difficulty. They uphold the validity of the impugned section on two grounds. Firstly, it has no finality clause. Secondly, it does not provide for alterations of the provisions of parent act. The case is problematic because it being a constitutional bench did not overrule the *Jalan trading judgement* rather it applied the ratio of the judgement and distinguished it on basis of facts. In *Jalan trading case* these two reasons were ancillary issues and the judgement was not based on them. The Court in *Gammon India case* interpreted law laid down by *Jalan trading* as Henry VIII clause *per se* is not invalid, it is only when the clause is coupled with other aggravating factors such as finality clause it becomes a ground of excessive delegation. However,

⁹ (1967) SCR (1) 15.

¹⁰ Ibid.

¹¹ (1974) 1 SCC 598

court in *Jalan trading* clearly said¹² that the grant of power itself to remove difficulty by altering would in substance amount to exercise of legislative authority. Section 37(2) the finality clause just accentuates the vice in sub section 37(1) instead of it being the causation of the decision. This ambiguity is still there around Henry VIII clause, where in *Jalan trading case* the court is saying that the Henry VIII clause *per se* is ultra vires the scheme of delegated legislation. On the other side *Gammon India case* is saying that not the mere presence of the clause but other factors like finality clause and whether in effect the alterations of the parent act will render Henry VIII clause invalid.

In another judgement *Bengal Iron Corporation v. Commercial Tax officer*¹³ the court did not term RODC as invalid as the act did not provide for finality clause. This further showcase that court in Bengal Iron case upheld the ratio of Gammon India case as if it was the finality clause which was solely the basis of judgment in Jalan Trading case. In this case as well the court not only misread the judgement of Jalan trading case but also its interpretation in the Gammon India case. In *Patna University v. Amita Tiwari*¹⁴ the decision of chancellor was challenged. It was argued by the chancellor that his decision was safeguarded by removal of difficulty clause. The court held that scope of removal of difficulty clause is very limited in India and it has to be consistent with the act and university statutes. In guise of removal of difficulty scheme essential provisions of the act cannot be changed. In *Krishna Deo Mishra v. State of Bihar*¹⁵ there was no time limit set to usage of removal of difficulty clause. The Bihar government did not create rules for eleven years but issued orders and regulations under the RODC. The court held this to be invalid and misuse of RODC.

Suspicion with Henry VIII clause

Henry VIII clause grants power to amend, repeal, alter any provision of the primary act to extend it as secondary legislation in some other place and thus it grants too much power to the executive. For this reason, the clause is looked by suspicion from the judiciary and is bone of contention. We have seen that the idea of delegated legislation is that due to extended burden on the legislation and state growing to be a welfare state a lot of administration function has increased. Every time it is not pragmatic for the legislature to pass a legislature and thus the idea of delegation evolved.

¹²“Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of s. 37 which purports to make the order of the Central Government in such cases final, accentuates the vice in sub-section 37(1)”

¹³ (1993) SCR (3) 433.

¹⁴ (1997) 7 SCC 198

¹⁵ (1998) AIR Pat. 9.

However, it is essential to note that characteristics of Henry VIII clause is not only limited to delegated legislation but encompasses the concept of the delegation to even do legislative function. Thus, in essence it is argued that Henry VIII clause or RODC is invalid because executive is performing legislative function. The idea of executive performing legislative function is problematic or is looked with suspicion is because it increases the possibility of abuse of power. Legislature in a democratic country like India is elected and legislation has force of people or backing of people with it. Whenever legislative function is performed it is done only in way of parliamentary debates and discussions. Further, executive unlike parliament is not accountable to people and it has no fear of loss of public support. The argument which is made in favour of Henry VIII clause is of necessity that in essential for the particular legislation to work out that such modifications to change the nature of parent act is essential¹⁶.

This becomes a tool in the hand of executive to circumvent legislation and perform legislative function. Another reason to look Henry VIII clause with suspicion is its epistemological basis. The clause in itself looked as a tool of despotism by the tyrant king. Therefore, certain scepticism is there regarding this clause.

Critical analyses of Henry VIII clause in India and Conclusion

It is seen from the judicial interpretation of the above-mentioned cases that judiciary have erred in giving a concrete law about Henry VIII clause. The ambiguity w.r.t Henry VIII still prevails. In *Jalan trading* case their mere presence of the RODC clause is termed as delegation of legislative function. While in case of *Gammon India* it is not the *per se* presence, but further presence of aggravating factors is considered problematic. The purpose of having Henry VIII clause or removal of difficulty clause is to extend and modify legislation as per requirement so that it has effective implementation. It can be argued that executive cannot foresee each and every problem which may arise with extension of legislation and that is why it is often refereed as tool for intelligent draftsman. There should be cushion granted to executive to make sure smooth implementation of legislation and for that modifications can be done as and when requirement

¹⁶ Standing Committee on Justice and Community Safety, Legislative Assembly, Formal Op. (2017) (discussing Henry VIII Clauses), http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-FactSheet.pdf.

“You can be sure that when these Henry VIII clauses are introduced, they will always be said to be necessary. William Pitt warned us how to treat such a plea with disdain. Necessity is the justification for every infringement of human liberty: it is the argument of tyrants, the creed of slaves.”

arises. We can argue for Henry VIII clause for its pragmatic purpose but again we cannot forget the anxieties with the executive and past experience of abuse of power, the principles of democracy and the importance of parliament. Argument in favour of the clause is that in current circumstances where parliamentary proceedings are stalled by opposition important legislations are not passed and this makes legislature ineffective. But the whole point of debates, discussions, stalling in parliament acts a safeguard to prevent from enacting a draconian legislation. In my opinion there needs to be balance of considerations between different factors. Henry VIII clause *ipso facto* should not be termed invalid. There can be certain checks on the power of Henry VIII clause like, it cannot go against the policy of parent act, certain temporary restrictions, appeal mechanism, the implementing authority etc. There should be a case to case basis enquiry as to the validity of RODC and its mere presence should not render it invalid.