
CONSTITUTIONALITY OF HENRY VIII CLAUSES IN FISCAL LEGISLATION: A STUDY UNDER THE MINISTRY OF FINANCE AND THE DOCTRINE OF SEPARATION OF POWERS

Abisek R, Tamilnadu National Law University (A State University Established by Act No. 9 of 2012) Navalurkuttapattu, Srirangam (TK), Tiruchirappalli - 620009, Tamil Nadu

CHAPTER 1 - INTRODUCTION

Delegated legislation is an important characteristic of the modern administrative state, especially in taxation. With the growing complexity of economic regulation, Parliament delegates law-making powers to the government in order to maintain flexibility. Notably, controversial Henry VIII clauses give the executive power to amend or repeal primary laws by subordinate means. The first of these was introduced in the 1539 Statute of Proclamations, and marks a break with traditional notions of political legitimacy and the separation of powers.¹

In India, Henry VIII clauses are usually found as "removal of difficulties" or "consequential amendment" provisions in Finance Acts and tax statutes. They allow the Ministry of Finance to not only give effect to but also alter primary legislation. These include Section 119 of the Income-tax Act, 1961, which allows the Central Board of Direct Taxes (CBDT) to issue binding circulars and instructions, and "removal of difficulties" provisions in the GST statutes that empower the Central Government to remove inconsistencies through executive orders, potentially overriding the primary legislation.²

The Indian Constitution, although not expressly prescribing a strict separation of powers doctrine, institutionalises the doctrine through its tri-fold classification of governmental power into the legislative, executive and judicial branches. Articles 53, 73, 122, 154, 163, 212 and 245, read with the scheme of the Constitution, show that each organ is to perform its primary constitutional role without usurping the role of another. The power to make laws, under Article

¹N.A.K. Sarma, "Henry VIII Clause" in India, 15 J. Indian L. Inst. 460, 461 (1973); see also Priya Garg & Amrita Ghosh, The Henry VIII Clause: Need to Change the Colour of Our Shades, 3 Contemp. Asia Arb. J. 46, 47 (2017).

²Income Tax Act, 1961, § 119 (India); Central Goods and Services Tax Act, 2017, § 172 (India); see I.P. Massey, Administrative Law 98–102 (9th ed., Eastern Book Co. 2017).

245, is vested in Parliament; delegation of this power to the executive is constitutionally permissible only to the extent permitted by the judiciary.³

The tension created by Henry VIII clauses is thus stark: on the one hand, the intricacy of contemporary fiscal policy justifies flexibility and expediency in legislative change; on the other hand, absolute discretion of the executive to displace the will of Parliament violates the very fabric of democracy and the rule of law. This project engages in an empirical analysis of this tension, by examining the historical antecedents of Henry VIII clauses, their use in Indian fiscal statutes, their constitutional legitimacy vis-à-vis the principle of the separation of powers and the doctrine of excessive delegation, and the sufficiency of judicial scrutiny. It concludes with critical analysis and recommendations for reform.⁴

1.1 RESEARCH OBJECTIVES

1. To examine the use and scope of Henry VIII clauses in fiscal legislation under the Ministry of Finance
2. To analyse their constitutional validity in light of the doctrine of separation of powers
3. To evaluate the role of judicial review in regulating excessive delegation in economic and fiscal governance

1.2 RESEARCH QUESTIONS

1. To what extent are Henry VIII clauses in fiscal legislation compatible with the doctrine of separation of powers?
2. Do such clauses in Finance Acts and taxation laws amount to excessive delegation of legislative power?
3. Has the judiciary developed an effective standard to control delegated powers exercised by the executive in fiscal matters?

³India Const. arts. 53, 73, 122, 154, 163, 212, 245; *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549, 556–57.

⁴Garg & Ghosh, *supra* note 1, at 48; N.W. Barber & Alison L. Young, *The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty*, [2016] Pub. L. 112, 113.

1.3 RESEARCH METHODOLOGY

The research adopts a doctrinal method, relying on primary sources such as constitutional provisions, statutes, and judicial decisions. Secondary sources including books, journal articles, and scholarly commentaries are also used. The study involves analytical and critical evaluation of case laws to understand the constitutional limits of delegated legislation.

1.4 STATEMENT OF PROBLEM

The use of Henry VIII clauses in fiscal legislation enables the executive under the Ministry of Finance to modify or override primary laws through delegated legislation. While justified on grounds of administrative efficiency and technical complexity, such delegation raises concerns of excessive transfer of legislative power. The absence of clear legislative safeguards and a consistent judicial standard to assess such clauses creates uncertainty regarding their constitutional validity, particularly in relation to the doctrine of separation of powers.

1.5 HYPOTHESIS

Henry VIII clauses in fiscal legislation, though justified by administrative necessity and economic complexity, tend to confer broad legislative powers on the executive and may result in excessive delegation in the absence of clear safeguards and consistent judicial control.

1.6 SCOPE AND LIMITATIONS

This study focuses on the constitutional validity of Henry VIII clauses within fiscal legislation administered by the Ministry of Finance, particularly in Finance Acts and taxation laws. It analyses select statutory provisions and judicial decisions to evaluate the limits of delegated legislation in this sector. The research is doctrinal in nature and does not include empirical analysis of implementation or frequency. It is limited to representative examples and does not cover all statutes or other ministries. Comparative analysis and examination of parliamentary debates are restricted to general principles.

1.7 REVIEW OF LITERATURE

1. THE HENRY VIII CLAUSE: NEED TO CHANGE THE COLOUR OF OUR SHADES

– Priya Garg & Amrita Ghosh (2017)⁵

⁵ Priya Garg & Amrita Ghosh, *The Henry VIII Clause: Need to Change the Colour of Our Shades*, 3 *Contemp. Asia Arb. J.* 46 (2017).

This article explores the nature and legitimacy of Henry VIII clauses, both in narrow and broad form. It suggests that although these clauses are problematic due to excessive delegation and overreach of executive power, they cannot be per se unconstitutional. The authors stress that their constitutionality requires judicial oversight and necessity. Additionally, the article notes the increasing need for regulatory flexibility. This article is significant for the current study as it discusses the justification for Henry VIII clauses notwithstanding separation of powers.

2. DELEGATION OF LEGISLATIVE POWER IN INDIA – C.H. Alexandrowicz (1954)⁶

This piece describes the history of delegation in India and points to the tension between constitutional theory and the need for administration. It examines some of the early judicial responses and development of the doctrine of permissible delegation. The author also draws a contrast between rigid and flexible constitutionalism to discuss how delegation works. This article offers a basic introduction to delegation of legislative power to the executive. This article is useful for the current study in setting the context for the problem of excessive delegation in which Henry VIII clauses are located.

3. COMPARATIVE LAW: SEPARATION OF POWERS IN INDIA – P.M. Bakshi (1956)⁷

Bakshi examines the theory of separation of powers in the Indian Constitution and finds it is not rigorously followed. The article outlines the overlap in the functions of the legislature, executive and judiciary and demonstrates that there is a considerable amount of co-dependence between the three. It also clarifies that the Constitution does not strictly rule out a branch of government from performing the functions of another. This is essential in analysing delegated legislation. This article is relevant to this research in determining whether Henry VIII provisions breach or merely flex the doctrine of separation of powers.

4. SEPARATION OF POWER & DELEGATED LEGISLATION: AN IMPLICIT POISE CREATED BY JUDICIAL DETOUR – Pallavi Bajpai & Mohit Vats (2018)⁸

⁶ C.H. Alexandrowicz, Delegation of Legislative Power in India, 3 Am. J. Comp. L. 72 (1954).

⁷ P.M. Bakshi, Comparative Law: Separation of Powers in India, 42 A.B.A. J. 553 (1956).

⁸ Pallavi Bajpai & Mohit Vats, Separation of Power & Delegated Legislation: An Implicit Poise Created by

This article discusses the interplay of delegated legislation and the doctrine of separation of powers in the administrative state. It claims delegation is unavoidable but cautions that centralisation of power in the executive could result in arbitrariness and threaten democracy. It also considers the role of judicial review as a checks and balances mechanism. This article points to the balance between efficiency and constitutional protection. It is relevant to this research in examining the potential impact of Henry VIII clauses on this balance if not constrained.

5. "HENRY VIII CLAUSE" IN INDIA – N.A.K. Sarma (1973)⁹

Sarma offers an overview of the development and application of Henry VIII clauses in India, especially in the form of "removal of difficulties" provisions. The paper notes that these clauses were introduced as a convenience to administration but have more recently resulted in an expansion of executive legislative power. It also highlights the dangers of abuse and absence of checks and balances. The paper assesses their increasing use in post-independent legislation. This article is key to the current research as it focuses on the role of Henry VIII clauses in India and its constitutional concerns.

6. THE RISE OF PROSPECTIVE HENRY VIII CLAUSES AND THEIR IMPLICATIONS – N.W. Barber (2016)¹⁰

This article examines the growth of Henry VIII clauses, particularly those enabling future statutes to be amended by subordinate legislation. It discusses how these clauses pose a threat to the idea of parliamentary supremacy and the constitution. The author raises concerns about why such extensive powers should be given to the executive. The paper stresses the balance between supremacy of Parliament and administrative convenience. The article is relevant in the context of the current study in examining the constitutional dangers and delegation of power through Henry VIII clauses.

7. ADMINISTRATIVE LAW – I.P. MASSEY¹¹

Massey explores the notion of delegated legislation and constitutional considerations such

Judicial Detour, 6 Int'l J. Creative Res. Thoughts 923 (2018).

⁹ N.A.K. Sarma, "Henry VIII Clause" in India, 15 J. Indian L. Inst. 460 (1973).

¹⁰ N.W. Barber & Alison L. Young, The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty, [2016] Pub. L. 112.

¹¹ I.P. Massey, *Administrative Law* (9th ed. 2017).

as the doctrine of separation of powers. The book discusses the need for delegation in a welfare state and the dangers of over-delegation. It also examines the judicial control over executive actions and delegated legislation. The author highlights the need for principles and limits to delegation. This book is helpful for the current study in examining the constitutional restrictions and safeguards against abuse of Henry VIII clauses.

8. HENRY VIII CLAUSES FACT SHEET – Parliamentary Research Service (2013)¹²

This paper defines Henry VIII clauses and how they work in legislation. It identifies why such clauses are not favoured, mainly because of their effects on the scrutiny and due process of law-making. It outlines the principle of primary legislation being debated and scrutinised, while delegated amendments may not be subject to the same. It also discusses the institutional reasons why such delegation may be problematic. This article is helpful to this study in providing a clear and succinct overview of the structure and criticisms of Henry VIII clauses.

9. SOME FINANCIAL EXPEDIENTS OF HENRY VIII – W.C. Richardson (1954)¹³

This article explores the fiscal policies under the reign of Henry VIII, including the resort to extraordinary executive powers for raising revenue in times of financial strain. It underscores the reliance of the Crown on extraordinary measures like forced loans, asset sales and regulatory measures to resolve revenue deficits. This is significant to the current study in the historical context of Henry VIII clauses and the continued dominance of the executive in the field of finance with regard to the issue of separation of powers and control of parliament.

10. THE NEW DESPOTISM – LORD HEWART (1929)¹⁴

This book explores the emergence of executive law-making in the form of delegated legislation and the loss of parliamentary control. It contends that the wide delegation of powers, such as Henry VIII clauses, allows the executive to avoid legislative oversight. This is relevant to this study as it offers an initial critique of excessive delegation and raises

¹² Parliament of Australia, Parliamentary Research Service, Henry VIII Clauses, Flagpost No. FL2013-06 (2013).

¹³ W.C. Richardson, Some Financial Expedients of Henry VIII, 7 Econ. Hist. Rev. 33 (1954).

¹⁴ Lord Hewart, *The New Despotism* (Ernest Benn Ltd. 1929).

concerns about the doctrine of the separation of powers.

CHAPTER 2 – DOCTRINE OF SEPARATION OF POWERS IN INDIA

2.1 Historical and Theoretical Foundations

The doctrine of separation of powers, which is fundamental to modern constitutionalism, finds its roots in Aristotle's *Politics* and was articulated by Montesquieu in *The Spirit of the Laws* (1748). The doctrine rests on the basic principle that liberty is ensured by separating the powers of government (legislative, executive and judicial) among different bodies, with each keeping the others in check.¹⁵

The doctrine was not embraced in its pure, classical form in India, as in the US, but adapted to a parliamentary system of government and a welfare state.¹⁶ The Constituent Assembly rejected a strict separation of the functions of the organs, preferring a functional overlap that would enable efficient administration and guard against the concentration of power. Dr. B.R. Ambedkar conceded that although the Constitution doesn't embody the doctrine, it does establish a regime where no organ can encroach upon the essential functions of another.¹⁷

The Supreme Court has approved of this position in *Ram Jawaya Kapur v. State of Punjab*, which has said that while the Constitution does not make a rigid demarcation of functions, it certainly distinguishes between legislative, executive and judicial powers.¹⁸ This doctrine was written into the Constitution in *Kesavananda Bharati v. State of Kerala*, where the Court declared that the doctrine is part of the basic structure of the Constitution, and cannot be removed.¹⁹

However, this doctrine of flexibility does not have unlimited scope. Overlap permitted by the Constitution does not involve one organ taking over the primary functions of the other. Specifically, where the executive can amend or repeal primary legislation (such as in Henry VIII clauses) the balance of power envisaged under the doctrine is distorted. These provisions have the potential to conflate the legislative and executive functions, and may have

¹⁵ Aristotle, *Politics* bk. IV, ch. 14 (Benjamin Jowett trans., Oxford Univ. Press 1905); Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* bk. XI, ch. 6 (Anne M. Cohler et al. trans., Cambridge Univ. Press 1989) (1748).

¹⁶ C.H. Alexandrowicz, Delegation of Legislative Power in India, 3 Am. J. Comp. L. 72, 73 (1954).

¹⁷ 7 Constituent Assembly Debates 953–54 (Dec. 17, 1948).

¹⁸ *Ram Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549, 556.

¹⁹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 578.

repercussions for the constitutional framework.

2.2 Delegated Legislation and Its Constitutional Limits

Delegated legislation is an integral part of the modern administrative state. Parliament, due to its constraints of time, expertise and the need for flexibility, frequently delegates its legislative powers to the executive for detail and administration.²⁰ However, this delegation is not without constitutional limits.

In the landmark *In re Delhi Laws Act, 1912*, it was held that while there is delegation of legislative power, Parliament cannot completely surrender its legislative role.²¹ It held that the policy-making and norm-making function are central legislative functions and cannot be delegated, and the executive can only be trusted with subsidiary functions.

This doctrine was further developed in *Harishankar Bagla v. State of Madhya Pradesh* which brought in the principles of "intelligible differentia" and legislative guidance.²² Delegated legislation is only permitted where the legislation that delegates provide sufficient policy directions and criteria for executive action.

The doctrine of delegated legislation safeguards against parliamentary abdication. But Henry VIII clauses undermine this protection by enabling the executive to not only supplement, but also to amend or replace primary legislation to change the policy of the law.

This risk is especially concerning in taxation where delegation to the Ministry of Finance impacts on citizens' rights and obligations. Consequently, such provisions should not only be considered delegation, but also potential abuses of the prohibition on legislative abdication.

2.3 Judicial Approach: Balancing Flexibility and Constitutional Limits

The Indian judiciary has been pragmatic in its approach to delegated legislation, particularly in economic and fiscal legislation. Recognising the technicality and complexity of the issues, the courts have been rather deferential to the legislative and executive branches.

In *Gwalior Rayon Silk Manufacturing Co. v. Assistant Commissioner of Sales Tax*, the Supreme

²⁰ Alexandrowicz, supra note 16, at 74–75.

²¹ *In re Delhi Laws Act, 1912*, AIR 1951 SC 332, 389–90.

²² *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465, 468.

Court acknowledged that in fiscal matters, there is a need for flexibility and delegation may be more permissible in economic matters.²³ Similarly, in *D.S. Garewal v. State of Punjab*, the Court upheld delegation but noted that although delegation is permitted, it must be accompanied by legislative policy, and cannot be a free pass to do as one pleases.²⁴

However, this judicial deference is not without limits. The Court has been steadfast in its view that even in matters of finance, the legislature must be in control of the policy. In *A.K. Roy v. Union of India*, the Court reiterated that the delegation cannot be to enable the government to decide the substance of the law.²⁵ This principle becomes particularly relevant in evaluating Henry VIII clauses, which often blur the line between permissible delegation and impermissible transfer of legislative power.

Notwithstanding doctrinal protections, courts have recently been more deferential towards broad delegations, especially in fiscal legislation. Too much deference may allow the executive to exercise unfettered quasi-legislative power, undermining the separation of powers.

Hence, the judiciary must reconcile efficiency and sound constitutionalism. Flexibility is important, but not at the expense of the separation of powers. Judges need to more closely scrutinise provisions enabling the executive to amend primary laws.

These considerations underpin the analysis of the constitutional propriety of Henry VIII provisions in tax laws.

CHAPTER III: HENRY VIII CLAUSES IN FISCAL LEGISLATION

3.1 Historical Origins of Henry VIII Clauses

A "Henry VIII clause" is a reference to the Statute of Proclamations 1539 enacted during the reign of English King Henry VIII. The statute allowed the king to create laws in the form of proclamations, which had the force of law.²⁶ The clause was a departure from the supremacy of parliament in that it allowed the executive to alter the law without it being debated by parliament.

²³ *Gwalior Rayon Silk Mfg. Co. v. Asst. Comm'r of Sales Tax*, (1974) 4 SCC 98, 108.

²⁴ *D.S. Garewal v. State of Punjab*, AIR 1959 SC 512, 516.

²⁵ *A.K. Roy v. Union of India*, (1982) 1 SCC 271.

²⁶ Statute of Proclamations, 1539, 31 Hen. 8 c. 8 (Eng.).

The statute was repealed shortly after the reign of Henry VIII, but the concept it embodied - the executive making changes to primary law - is alive today in administrative law. Today Henry VIII clauses are those in statutes which permit the executive to change provisions of primary legislation through subordinate legislation.²⁷

In India, the use of these clauses dates back to colonial legislative practices when the extensive powers of the executive were justified for reasons of administrative convenience.²⁸ After independence, these provisions were retained and amended, particularly in economic and fiscal laws. At first, these provisions were employed to address procedural or administrative shortcomings in laws. But over the years, their application has expanded, leading to questions regarding their legitimacy.

The history of Henry VIII clauses demonstrates that powers given to the executive to address administrative expediency become institutionalised and result in a shift of power from the legislature to the executive. This history is relevant in analysing their contemporary use in fiscal laws.

3.2 Typology of Henry VIII Clauses in Indian Fiscal Law

Indian fiscal laws have two types of Henry VIII clauses based on the scope of power granted to the executive: narrow and broad Henry VIII clauses.

(a) Narrow Henry VIII Clauses

These are generally confined to authorising the executive to make minor or consequential amendments to the primary Act for its smooth implementation. They are often expressed as "removal of difficulties" clauses, and are usually temporary and narrow in scope. For instance, Section 172 of the Central Goods and Services Tax Act, 2017, authorises the Central Government to make orders removing difficulties in the implementation of the Act. While these provisions are ostensibly limited to removing ambiguities, their vaguer formulations provide greater flexibility.

(b) Broad Henry VIII Clauses

²⁷ I.P. Massey, *Administrative Law* 102–03 (9th ed. 2017).

²⁸ C.H. Alexandrowicz, *Delegation of Legislative Power in India*, 3 Am. J. Comp. L. 72, 74 (1954).

Broad clauses not only allow for technical amendments but also substantive changes to primary legislation. Such clauses can allow the modification of rights, liabilities and obligations without express legislative consent.

For example, Section 25 of the Customs Act, 1962, empowers the Central Government to exempt goods from customs duty via notifications.²⁹ Although this power is presented as a conditional and policy-oriented one, the broad nature of this power allows the executive to change the incidence of taxes, suggesting a weakening of the power of parliament.

Likewise, Section 119 of the Income-tax Act, 1961 gives the Central Board of Direct Taxes (CBDT) the authority to issue binding instructions or circulars to tax authorities. While these circulars are designed to guide tax administration, court interpretations have acknowledged the impact of these circulars on tax interpretation.³⁰

(c) Retrospective and Prospective Clauses

A further distinction is made between retrospective and prospective Henry VIII clauses. Retrospective clauses allow the executive to make changes to legal obligations with effect from a point in the past, which may affect vested rights. Prospective clauses can provide for changes to future legal frameworks, thereby raising more fundamental issues. The rise in their inclusion in fiscal legislation is a move from delegated legislation to executive law-making. This requires a constitutional assessment, especially with regard to the doctrine of separation of powers.

3.3 Justifications for Henry VIII Clauses in Fiscal Governance

Those who support the inclusion of Henry VIII clauses in fiscal laws make a number of arguments based on the need for administrative flexibility and economic efficiency.

(a) Technical Complexity

Tax law and other forms of fiscal legislation are complex and frequently require amendment to resolve interpretative and other problems.³¹ Parliament may not be able to keep up with this complexity, and so delegation may be required to expert executive agencies.

²⁹ Customs Act, 1962, § 25 (India).

³⁰ *UCO Bank v. Commissioner of Income Tax*, (1999) 4 SCC 599.

³¹ Massey, *supra* note 11, at 105.

(b) Economic Urgency

Economic policy requires flexibility in responding to economic factors like inflation, market volatility and budget deficits.³² Henry VIII clauses allow the government to respond to changing circumstances without the need for legislative action.

(c) Legislative Incompleteness

No statute can anticipate every possible contingency. Henry VIII clauses provide a mechanism to address unforeseen gaps and ensure effective implementation of legislative intent.³³

These arguments have practical value, but need to be weighed against constitutional considerations. Convenience of administration cannot trump the need for democratic accountability, especially when it comes to taxation and public finance matters.

3.4 Constitutional Implications of Henry VIII Clauses in Fiscal Law

Inclusion of Henry VIII clauses in tax legislation raises constitutional questions, particularly relating to the doctrine of the separation of powers and the rule of law. First, such clauses blur the roles of the legislative and executive branches of government through executive action on primary legislation. This is contrary to the doctrine of separation of powers under Article 245 of the Constitution, which provides for the legislative power of Parliament.

Second, Henry VIII clauses are anti-democratic. Tax measures affect people's rights and obligations, and derive their authority from the democratic process. Any action of the executive that alters these measures undermines democracy.

Third, there are concerns that these clauses are contrary to Article 265 of the Constitution, which states that no tax shall be levied or collected except by authority of law. If the executive action taken under a Henry VIII clause alters the amount or incidence of taxation without specific legislative authorisation then the validity of executive action is challenged.

Finally, the concentration of legislative and executive power in the Ministry of Finance is unconstitutional

³² Alexandrowicz, *supra* note 28, at 76.

³³ Sarma, *supra* note 9, at 463.

Consequently, although Henry VIII clauses may be excused on the grounds of efficiency, their widespread exercise threatens the constitutional system.

CHAPTER IV: JUDICIAL CONTROL OVER HENRY VIII CLAUSES IN FISCAL LEGISLATION

4.1 Doctrinal Framework for Judicial Review

In India, judicial control over Henry VIII clauses is exercised within the framework of certain constitutional doctrines, particularly the doctrine of excessive delegation, legislative policy and guidance, and substantive ultra vires.

The starting point of this framework is the doctrine against excessive delegation, authoritatively laid down in *In re Delhi Laws Act*.³⁴ The Supreme Court declared that delegation of legislative power is allowed but not delegation of the essential legislative function of the legislature. This includes the function of formulating legislative policy and laying down norms. Delegation that would allow the executive to change these essential elements would be unconstitutional.

Henry VIII clauses need to be considered in this context. Such clauses go beyond delegated legislation in that they often grant the executive not only power to implement its policy but also to amend or repeal the legislation. The question that arises is: are such clauses a delegation of legislative power or surrender? If the executive is empowered to alter the law that gives it power, the delegation might cross the constitutional line into legislative abdication.

The second doctrinal element is that of policy guidance. In *Harishankar Bagla v. State of Madhya Pradesh*, delegation was upheld by the Court on the basis that the law provided "enough guidance" and a legislative policy.³⁵ The existence of such guidance ensures that executive discretion is exercised within defined limits.

But in the case of Henry VIII provisions, the need for guidance is more robust. The provision must not only state a general purpose, but also define the nature and extent of the executive power to amend the statute. The use of vague phrases like "to remove difficulties" or "to give effect to the Act" may not impose any limits, allowing arbitrary use of power.

³⁴ *In re Delhi Laws Act, 1912*, AIR 1951 SC 332, 389–90.

³⁵ *Harishankar Bagla v. State of Madhya Pradesh*, AIR 1954 SC 465, 468.

Doctrine three is substantive ultra vires, where courts may consider not only the validity of the provision authorising the power, but also its exercise. Even if a Henry VIII provision is valid, the exercise of power thereunder may be invalid if it goes beyond the parent Act or is inconsistent with any of the constitutional provisions, such as Articles 14, 19 or 265.³⁶

Therefore, there are several doctrinal avenues for judicial review. But it is dependent on the judicial willingness to apply these doctrines when they are relevant, which has been low in the realm of tax law.

4.2 Judicial Treatment of Henry VIII Clauses

India does not have a distinct and well-developed doctrine of Henry VIII clauses. Rather, they have been analysed within the context of delegated laws. This has led to a jurisprudence that is conservative but not always rigorous.

In *Vasantlal Maganbhai Sanjanwala v. State of Bombay*, the Supreme Court upheld the validity of a "removal of difficulties" clause, concluding that such provisions are not per se unconstitutional if they are employed to give effect to the object of the statute rather than to change its essential features.³⁷ The Court stressed that it should be used only within the confines of the Act and not to create substantive changes.

Likewise, in *St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education*, the Court was more cautious, noting that a provision delegating the power to the executive to amend the Act would be unconstitutional if it goes beyond adaptation.³⁸ The judgment reflects judicial recognition of the dangers inherent in excessive delegation.

The courts have been more forgiving in tax matters. In *Gwalior Rayon Silk Manufacturing Co. v. Assistant Commissioner of Sales Tax*, the Court noted that delegation in economic legislation might be justified based on its technicality.³⁹ This has given the legislature more room to confer powers on the executive in fiscal legislation.

However, such deference is not absolute. In *Commissioner of Income Tax v. Vatika Township Pvt. Ltd.*, the Court highlighted that tax measures that create new obligations must be clearly

³⁶ India Const. arts. 14, 19, 265.

³⁷ *Vasantlal Maganbhai Sanjanwala v. State of Bombay*, AIR 1961 SC 4, 10–11.

³⁸ *St. Johns Teachers Training Inst. v. Reg'l Dir., Nat'l Council for Teacher Educ.*, (2003) 3 SCC 321, 334.

³⁹ *Gwalior Rayon Silk Mfg. Co. v. Asst. Comm'r of Sales Tax*, (1974) 4 SCC 98, 108.

authorised and cannot be implied.⁴⁰ This rule is especially pertinent in assessing Henry VIII clauses that could potentially change tax obligations.

The judicial approach thus reveals a tension: while courts recognise the need for flexibility in fiscal governance, they also acknowledge the constitutional limits on delegation. However, the absence of a clear doctrinal standard specifically tailored to Henry VIII clauses has resulted in inconsistent outcomes.

4.3 Limits of Judicial Deference in Fiscal Matters

Judicial deference is sometimes justified in fiscal matters by the argument that economic policy is highly technical and not within the purview of the courts. While practical, this is unhelpful in relation to Henry VIII clauses.

First, high deference may allow the executive to make quasi-legislative decisions since lack of scrutiny of large delegations of legislative power may lead to legislative inactivity.

Second, it erodes the rule of law in that Article 265 requires that taxation be done by law made by the legislature; executive action that changes tax obligations may breach this.

Third, it skews the balance of power by enabling the Ministry of Finance to play both policy maker and law maker, contrary to the separation of powers doctrine.

So, while some deference is inevitable, it should be constrained and judges should ensure that flexibility does not lead to executive encroachment on the legislature.

4.4 Comparative Perspective and Need for Doctrinal Clarity

The experiences of other constitutional jurisdictions offer lessons for the control of Henry VIII clauses.

In the United Kingdom, where they are relatively prevalent, committees scrutinise the use of such clauses. Parliamentary committees like the Delegated Powers and Regulatory Reform Committee review draft laws and highlight those that grant excessive powers to the government.⁴¹ This ex-ante scrutiny serves as an important check on the misuse of Henry VIII

⁴⁰ *Comm'r of Income Tax v. Vatika Township Pvt. Ltd.*, (2015) 1 SCC 1, 18–19.

⁴¹ House of Lords Select Comm. on the Constitution, *Delegated Legislation and Parliament* (HL Paper 23,

clauses.

In the US, the non-delegation doctrine has traditionally placed constraints on the delegation of legislative authority, albeit with varying degrees of success. The recent case of *Loper Bright Enterprises v. Raimondo* marks a move towards increased judicial oversight.⁴² The US case law highlights the need for constitutional checks and balances between the law-making and executive branches of government.

The Indian position, in contrast, relies heavily on judicial review without equivalent parliamentary safeguards. It increases the need for courts to create a doctrinal framework to assess Henry VIII provisions.

This should involve:

- identification of the core legislative functions
- greater scrutiny of provisions that allow the amendment of primary legislation
- proportionality and necessity tests
- requirement for procedural safeguards and legislative scrutiny

In the absence of such clarity, control of Henry VIII clauses will continue to be unpredictable, and executive power will continue to grow in subtle ways at the expense of constitutional values.

CHAPTER V: CRITICAL ANALYSIS, CONSTITUTIONAL CONCERNS, AND RECOMMENDATIONS

5.1 Constitutional Concerns: The Case Against Broad Henry VIII Clauses

The inclusion of Henry VIII clauses in fiscal laws raises a basic constitutional question: they allow the executive to undertake a legislative act. Such provisions enable the executive to alter or override primary legislation and so re-invert the relationship between Parliament and the

2021).

⁴² *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2262 (2024).

executive.

First, this subverts the superiority of the law enshrined in Article 245 of the Constitution. Parliament is the repository of legislative power, which can be delegated but not to authorise the executive to amend the law. Once subordinate legislation is given precedence over primary legislation, the hierarchy breaks down, weakening the Constitution.

Second, Henry VIII clauses undermine democratic accountability. Tax law is legitimated by the deliberative processes of Parliament. The maxim of "no taxation without representation" is implicit in Article 265 of the Constitution, which prescribes that no tax shall be levied or collected except by law. Where the government is authorised to amend tax obligations in delegated legislation, the taxation-democracy nexus is broken.

Third, these clauses result in a concentration of power in the executive, especially the Ministry of Finance. The authority that creates tax policy is given the power to change the law that supports tax policy. This assimilation of legislative and executive powers is the very scenario the doctrine of separation of powers seeks to avoid.

Fourth, Henry VIII clauses may infringe upon fundamental rights. Modifications by executive action that change tax and compliance obligations may lead to arbitrary classifications, thereby violating Article 14. Further, such changes may impose new obligations without statutory authority and thus violate the rule of law (Article 265) or property rights (Article 300A). The Supreme Court's insistence in *Commissioner of Income Tax v. Vatika Township Pvt. Ltd.* that fiscal burdens must have clear statutory authority underscores this concern.⁴³

Therefore, though Henry VIII clauses might be justified for administrative convenience, their unbridled use is a serious concern for constitutional order.

5.2 Critique of the Judicial Response

Indian courts have adopted an approach to Henry VIII clauses that has been pragmatic, albeit at the expense of doctrinal rigour.

The judiciary has tended to deal with these clauses within the context of delegated legislation,

⁴³ *Comm'r of Income Tax v. Vatika Township Pvt. Ltd.*, (2015) 1 SCC 1, 18–19.

asking whether there is ultra vires delegation. This offers a point of departure, but is not sufficient to deal with the distinct constitutional threat of Henry VIII clauses. These provisions do not simply delegate power, but allow the executive to change the law that gives it power.

One of the problems with the court's approach is the absence of a framework for review. The doctrine of excessive delegation, as outlined in *In re Delhi Laws Act*, offers broad guidance, but does not explicitly cover cases in which the executive is given the power to amend primary law.⁴⁴ Consequently, courts have tended to employ vague terms like "legislative policy" and "guidance".

Another limitation is the judiciary's deference in fiscal matters. Courts have tended not to interfere with the decisions of legislative and executive branches in cases involving economic regulation, given their technical nature. But in the context of Henry VIII clauses, this may enable excessive delegation. Without robust scrutiny, vaguely worded clauses can apply in an unchecked manner. Moreover, judicial efforts to read down provisions rather than invalidate them has led to doctrinal uncertainty.

Further, the judicial strategy of reading down provisions rather than striking them down has contributed to doctrinal ambiguity. While reading down preserves legislative intent, it often fails to provide clear guidance for future cases, thereby allowing similar provisions to persist.

Consequently, the current judicial approach, though well-intentioned, is inadequate to address the structural concerns posed by Henry VIII clauses. We need a more targeted approach to address the constitutional issues arising from modification of primary legislation by the executive.

5.3 The Problem of Prospective Henry VIII Clauses

Prospective Henry VIII provisions, enabling the executive to amend future and ongoing legislative schemes, are a serious concern. They protect executive action from retrospective scrutiny by Parliament and, by allowing for alteration of future legislative schemes or conferring continuing executive power, weaken Parliament's primacy as the law-maker.

While such provisions are not predominant in Indian fiscal laws, there is a growing trend

⁴⁴ *In re Delhi Laws Act, 1912*, AIR 1951 SC 332, 389–90.

towards delegation through retrospective amendments, wide notification powers and unconstrained "removal of difficulties" provisions. This could put executive law-making on par with, or above, statutory law-making.

This will have significant implications for the Constitution, by undermining the doctrine of separation of powers and shifting the balance between the legislature and executive. To avoid this, the courts and legislatures need to be alert.

5.4 Recommendations

Based on the above analysis, this chapter offers recommendations to restore the balance between the Constitution and efficient administration.

(a) Legislative Standardisation

Parliament should pass legislation outlining detailed rules for delegated legislation, including a requirement to prominently identify and explain Henry VIII clauses in legislation. These should be as specific and limited in scope as possible. Further, any provision authorising changes to primary legislation should be subject to the affirmative resolution process, with both Houses of Parliament agreeing to the change.

(b) Sunset Clauses

Henry VIII provisions in tax laws should be subject to sunset provisions, requiring their renewal by Parliament after a certain period. This would avoid the "normalisation" of emergency powers.

(c) Strengthened Parliamentary Oversight

A specialised parliamentary committee, such as the United Kingdom Delegated Powers and Regulatory Reform Committee, should be set up to oversee all delegated legislation. This would serve as an ex-ante safeguard against excessive delegation, and improve legislative accountability.

(d) Judicial Doctrinal Development

The courts should establish a framework for reviewing Henry VIII clauses, including principles

of proportionality and necessity.

Courts should examine:

- whether the delegation is for a legitimate legislative purpose
- whether there is a need to amend primary legislation
- whether there are less intrusive options
- whether the adequate safeguards are provided

This would alleviate the vagueness of the excessive delegation doctrine in judicial review and produce a clearer doctrine.

(e) Constitutional Safeguards

Ultimately, thought should be given to constitutional recognition of limits on the scope of Henry VIII clauses. Although this may not be required to be formalised in the Constitution, the Supreme Court, in its interpretative role, can lay down clear principles limiting the application of such clauses.

LIST OF ABBREVIATIONS

Abbreviation	Full Form
ADM	Additional District Magistrate
AI	Artificial Intelligence
Art.	Article
BSA	Bharatiya Sakshya Adhiniyam
CPC	Code of Civil Procedure, 1908
ECHR	European Convention on Human Rights
EU	European Union
FMR	Forced Migration Review
FT	Foreigners Tribunal
GoI	Government of India
ICCPR	International Covenant on Civil and Political Rights
IJCL	Indian Journal of Constitutional Law
ILO	International Labour Organization
SC	Supreme Court
SCC	Supreme Court Cases
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
U.S.	United States

BIBLIOGRAPHY

A. Books

I.P. MASSEY, *ADMINISTRATIVE LAW* (9th ed. 2017).

P.M. BAKSHI, *THE CONSTITUTION OF INDIA* (15th ed. 2021).

LORD HEWART, *THE NEW DESPOTISM* (1929).

B. Journal Articles

C.H. Alexandrowicz, Delegation of Legislative Power in India, 3 AM. J. COMP. L. 72 (1954).

N.A.K. Sarma, "Henry VIII Clause" in India, 15 J. INDIAN L. INST. 460 (1973).

Priya Garg & Amrita Ghosh, The Henry VIII Clause: Need to Change the Colour of Our Shades, 3 CONTEMP. ASIA ARB. J. 46 (2017).

N.W. Barber & Alison L. Young, The Rise of Prospective Henry VIII Clauses and Their Implications for Sovereignty, [2016] PUB. L. 112.

W.C. Richardson, Some Financial Expedients of Henry VIII, 7 ECON. HIST. REV. 33 (1954).

C. Cases

In re Delhi Laws Act, 1912, AIR 1951 SC 332.

Ram Jawaya Kapur v. State of Punjab, AIR 1955 SC 549.

Harishankar Bagla v. State of Madhya Pradesh, AIR 1954 SC 465.

Vasantlal Maganbhai Sanjanwala v. State of Bombay, AIR 1961 SC 4.

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

Gwalior Rayon Silk Mfg. Co. v. Asst. Comm'r of Sales Tax, (1974) 4 SCC 98.

D.S. Garewal v. State of Punjab, AIR 1959 SC 512.

St. Johns Teachers Training Inst. v. Reg'l Dir., Nat'l Council for Teacher Educ., (2003) 3 SCC 321.

Comm'r of Income Tax v. Vatika Township Pvt. Ltd., (2015) 1 SCC 1.

D. Statutes

INDIA CONST.

Central Goods and Services Tax Act, 2017 (India).

Customs Act, 1962 (India).

Income-tax Act, 1961 (India).

Statute of Proclamations, 1539, 31 Hen. 8 c. 8 (Eng.).

Statutory Instruments Act, 1946, 9 & 10 Geo. 6 c. 36 (U.K.).

E. Reports and Parliamentary Materials

House of Lords Select Committee on the Constitution, *Delegated Legislation and Parliament* (HL Paper 23, 2021).

Parliament of Australia, Parliamentary Research Service, *Henry VIII Clauses*, Flagpost No. FL2013-06 (2013).