



## NOTES AND COMMENTS

### VALIDITY OF RETROSPECTIVE DELEGATED LEGISLATION—THE COURT DEVELOPS A NEW PRINCIPLE

THE COURT cases often reveal sociological facts which empirical research may fail to discover. This is aptly illustrated by *B.S. Yadav v. State of Haryana*,<sup>1</sup> recently decided by the Supreme Court. The case conspicuously shows how badly the executive sometimes exercises its rule-making power. *Yadav* is a five-bench decision in which the opinion of the court was delivered by Chief Justice Y.V. Chandrachud.

The case involved the rules governing seniority between direct recruits and promotees appointed to the superior judicial services of the States of Punjab and Haryana. The Punjab Superior Judicial Service Rules were promulgated by the State of Punjab in 1963 under article 309 of the Constitution. They were amended from time to time, at times retrospectively. When the State of Haryana was created on 1 November, 1966, the Punjab rules as amended till that date were adopted by the State of Haryana. It also amended the rules from time to time, also at times retrospectively.

Administrative law scholars felt secure in their belief that since delegated legislation was an order of *general applicability* it did not need as much safeguard against abuse by the executive as an administrative order. But the *Yadav* case gives a jolt to this conviction. How the executive abused its rule-making power is depicted by the several observations of the court. Thus:

The frequent amendments to the rules which are often given a long retrospective effect, as long as seven years, makes the High Court's administrative task difficult.<sup>2</sup>

Further,

There was a change in the Government which evidently led to a change in the rules, as if service rules are a plaything in the hands of the Government.<sup>3</sup>

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1. A.I.R. 1981 S.C. 561.

2. *Id.* at 568.

3. *Id.* at 569.



Furthermore,

Neither promotees nor direct recruits felt secure about their existing rank or seniority because the rules were being amended from time to time, sometimes, just to suit the convenience, sometimes to tide over a temporary crisis, sometimes to appease a class of officers who shouted louder and at least once in order to strike at an individual.<sup>4</sup>

What complimentary remarks by the highest court of the land on the two state executives for exercising the way in which they acted in their rule-making power!

Without trying to unravel the tortuous course that the rules took from time to time, and without being lost in the labyrinth of the series of amendments, and that too retrospectively quite often, let us directly come to the amendment which led the court to evolve a new principle to test the validity of the retrospective operation of the rules.<sup>5</sup> On 31 December, 1976 the Punjab rules were amended retrospectively with effect from 9 April, 1976. Till that amendment the position was that seniority of the members of the judicial service depended on the date of confirmation, but by the aforesaid amendment the seniority was to be determined by the length of continuous service in a post in the service irrespective of the date of confirmation. Retrospective operation of this rule was held to be bad, as there was no nexus or rational relationship between the rule and its retrospectivity. In the words of the court:

Since the Governor exercises a legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear, either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case. No such nexus is shown in the present case on behalf of the State Government.<sup>6</sup>

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4. *Ibid.*

5. Soon after the judgment in *Yadav* was delivered by the court, the author was apprehensive that the important law point made by the court in respect of retrospective operation of delegated legislation may be lost in the prolixity of facts of the case. This apprehension seems to have come true as this law point finds no mention in the headnotes of the A.I.R., the only law report in which the case had been reported till the writing of this note. The other law reports which the author checked and which did not report the case till then are: S.C.C., S.C.J.; and S.L.R.

6. *Supra* note 1 at 586.



This principle is of great significance. Till this development, the legal position in the matter of retrospective operation of delegated legislation was as follows. There is no prohibition in the Constitution against *ex post facto* laws, except in the area of criminal law. The legislature is free to enact retrospective non-criminal law. The courts did not allow the same freedom to the executive to promulgate delegated legislation retrospectively, unless the parent statute gave it power to do so either expressly or by necessary implication. The courts would declare retrospective rules invalid, in the absence of an authority to that effect in the parent statute.<sup>7</sup> This was the only limitation. As far as article 309 is concerned, in *B.S. Vadera v. Union of India*,<sup>8</sup> it was held by the Supreme Court that the article was wide enough to include the making of rules with retrospective effect.

Under the *Yadav* ruling it is not enough for the executive to say that the parent statute authorises it to make the rules retrospectively. In addition it must show that there was sufficient or reasonable or rational justification to apply the rules retrospectively. This holding acts as a check on administrative arbitrariness to make rules retroactively. The power of retrospectivity has to be exercised in the interest of justice and equity.<sup>9</sup> This is a welcome development in administrative law, particularly in the area of delegated legislation.

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7. See M.P. Jain and S.N. Jain, *Principles of Administrative Law* 63-64 (1979).

8. A.I.R. 1969 S.C. 118.

9. Cf. *Government of Andhra Pradesh v. D.J. Rao*, A.I.R. 1977 S.C. 451.

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