Amendments by Stealth
MCA Resurrects Henry VIII's Legacy

PRATIK DATTA

The Ministry of Corporate Affairs, in charge of implementation of the Companies Act, 2013, has overstepped its constitutional mandate by passing orders that amend the provisions of an Act of Parliament. The MCA can only formulate rules and clarify provisions in the Act, and does not have the power to amend an Act. Recent "general circulars" issued by the MCA are extralegal, and are further complicating an already complicated piece of legislation.

Pratik Datta (*prat.nujs@gmail.com*) is a consultant with the National Institute of Public Finance and Policy, New Delhi.

Students of history may remember Henry VIII as the monarch with six wives, who broke with the papacy in Rome to establish the Church of England, and initiate the Reformation. But for students of jurisprudence, the very name Henry VIII evokes the image of a true "impersonation of executive autocracy".[1] The legal masterstroke of his autocratic aspirations was Section 59 of the Statute of Wales, 1542, which allowed the king to "alter the laws of Wales and to make laws and ordinances for Wales, such alterations and new laws and ordinances to be published under the great seal and to be as of good strength, virtue and effect as if made by the authority of Parliament" (Bourke 1991). With this one clause, Henry VIII sought to "legitimately" usurp the legislative power of the Parliament. As a tribute to such ingenious legal drafting, modern administrative law refers to statutory clauses empowering the executive to alter parliamentary statutes as the "Henry VIII clauses" – a cautious reminder of the fine legal balance between democracy and autocracy.

Primary and Secondary Laws

A liberal democracy is based on separation of powers. The Parliament makes laws, the executive implements them, and any dispute arising out of the making or implementation of such laws is solved by the judiciary. Laws passed by Parliament in the form of an "Act" are primary laws. Since parliamentarians cannot envisage all future eventualities while drafting the Act, they delegate to the executive limited powers to make detailed secondary laws. Examples of secondary laws include rules, regulations and orders. However, such delegation cannot be so excessive as to violate the separation of powers between Parliament and the executive. The unelected executive cannot substitute the elected Parliament as a lawmaker. Therefore, secondary laws cannot replace primary laws.

In India, the executive has limited primary legislative powers.[2] Usually, such powers are in unoccupied fields – where Parliament has not legislated.[3] Further, the Constitution permits the President, the head of the executive, to issue ordinances.[4] Ordinances can amend parliamentary statutes. But even these ordinances are valid only for six months at a stretch.

Against this backdrop, it is hard to imagine a government officer of the rank of joint secretary single-handedly amending parliamentary statutes permanently. And yet, this is happening today in the garb of secondary laws. Henry VIII's legacy seems to have found a new adherent – the Ministry of Corporate Affairs (MCA).

MCA Affairs

The MCA administers company law in India.[5] The primary law in this subject is the new Companies Act, 2013 (henceforth "the 2013 Act"), which replaces the old Companies Act, 1956. As with any such major transition from an older legal

regime to the newer, it was supposed to be a complex Herculean task for the central government. To ensure smooth transition, Section 470 was inserted in the 2013 Act titled "Power to remove difficulties". In the event of any difficulty in giving effect to the 2013 Act, this section empowers the central government to issue "orders", within five years of the commencement of the 2013 Act, to "make such provisions" as may be necessary. However, these "provisions" should not be "inconsistent with the provisions of the Act".[6] The Act also requires such orders to be laid before both houses of Parliament as soon as they are made.

Initially the MCA was using Section 470 to issue orders in the nature of clarifications to the 2013 Act.[7] These were being issued by officers of the rank of joint secretaries. But subsequently from February 2014 onward, even subordinate officers like deputy and assistant directors started clarifying provision of the 2013 Act by issuing another set of instruments – "General Circulars".[8] Unlike orders under Section 470, these circulars do not have any legal basis under the 2013 Act. Being extralegal instruments, these are not even laid before Parliament. Consequently, the subordinate officers of MCA have ended up issuing a wide variety of "General Circulars" further confusing market participants (Goswami 2014).

Since the MCA is now clarifying the 2013 Act through these legally dubious "General Circulars", one would have assumed that the option of issuing orders under Section 470 for clarifications would be rendered useless. But MCA has found a new use for these orders. Orders are now being issued to amend the 2013 Act itself and not just to clarify it. For example, on 24 July 2014, MCA issued the Companies (Removal of Difficulties) Sixth Order 2014, asserting that clause 2 therein is an "amendment of section 2" of the 2013 Act.[9] The Sixth Order, though seemingly innocuous, is crucial because it sets a dangerous precedent in breach of the fundamental tenet of democracy – separation of powers. The use of Section 470 by MCA to amend the 2013 Act is illegal, contrary to a catena of judgments of the Supreme Court, and is antithetical to the notion of rule of law.

Clauses like Section 470 of the 2013 Act giving "power to remove difficulties" to the government are not uncommon in Indian laws. There are 354 central legislations in India with such clauses.[10] These can broadly be classified into two categories – narrow clause (not Henry VIII clause), and broad clause (Henry VIII clause):[11]

Not Henry VIII Clause

This variety is most commonly used in Indian laws. It empowers the government to "remove difficulties" consistent with the provisions of the statute. It does not empower the government to modify any provision of the parent statute itself. A typical narrow clause is worded as:

> If any difficulty arises in giving effect to the provisions of the scheme, the Central Government may by order do anything, ***not*** *inconsistent with such provisions* which appears to it necessary or expedient for the purposes of removing the difficulty.[12]

The words "not inconsistent with such provisions" or such similar phrases are the unique identifier of the narrow clause. This essentially means that orders issued under this clause cannot be used to amend any provision of a primary law. Therefore, this is not a "Henry VIII clause".

The Henry VIII Clause

This variety is a rarer species that authorises the government to modify primary laws. It lacks the unique identifier of the narrow clause. In other words, it does not state that the government order should "not be inconsistent with the provisions of this Act". Consequently, such orders can be used to amend the Act itself. But even such broad powers cannot be used by the government to alter the essential features of the Act.[13] At times, these clauses are used to empower the government to extend the territorial application of the original law with suitable modifications subsequent to its enactment. Section 2 of the Union Territories (Laws) Act, 1950, is an example.

Section 470 Is a Narrow Clause

The language of Section 470 clearly indicates that it is a narrow clause and not a broad "Henry VIII clause". Orders issued under it were intended to be in the nature of clarifications, supplying the omissions in the 2013 Act for its effective implementation. Had Parliament intended these orders to amend the 2013 Act (like in broad clauses), it would never have explicitly stated that the orders should "not (be) inconsistent with the provisions of this Act". Moreover, because these orders were supposed to be in the nature of clarifications, the 2013 Act did not envisage the additional issuance of "General Circulars" for clarifying provision of the 2013 Act. Consequently, there is no provision in the Act empowering the central government to issue "General Circulars". Therefore, it is submitted that under Section 470, the MCA cannot issue orders to amend any part of the 2013 Act. Currently, the MCA is misusing this narrow clause as if it were a "Henry VIII clause" in gross disregard to the law laid down by the Supreme Court.

Supreme Court's Views

Initially, the Supreme Court had taken a strict stand holding narrow clauses to be unconstitutional. In 1967, the Court in *Jalan Trading vs Mill Mazdoor Union*,[14] struck down the narrow clause in Section 37 of the Payment of Bonus Act, 1965, observing that "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".

In a modern nation state, it is prudent to let the executive have limited power to issue secondary laws to effectively implement the parliamentary statute without having to approach Parliament frequently to provide every detail. This consideration seemed to have weighed with the Court in diluting its stand in *Jalan* and accepting the narrow clause in later cases. In 1974, the Court in *Gammon India vs Union of India*,[15] upheld the validity of Section 34 of the Indian Contract Labour (Regulation and Abolition) Act, 1970, since the provision did not contemplate alteration of the Act itself by the central government. The same position was reiterated in 1994 in the *Bengal Iron Corporation vs Commercial*

Tax Officer,[16] and in 2005 in *Pratap Singh vs State of Jharkhand*.[17]

It is therefore a settled position under Indian law that the narrow clause in a primary law can be used only to supplement and clarify the primary law by way of secondary law. It cannot be used like a broad "Henry VIII clause" to issue orders amending or modifying the primary law itself. The language of Section 470 is in conformity with the views of the Supreme Court on narrow clauses; but MCA's practices are not. These current illegal practices of MCA also generate inefficient outcomes at macro level.

Costs of Complicated Laws

Orders and circulars are ad hoc legal instruments. At any point of time, they can be issued by the authorities on any matter and can be withdrawn subsequently. Naturally, there is no incentive to spend much effort and resources on drafting these when compared to legal instruments which are of more permanent nature, like primary legislations, even rules and regulations. Further, circulars are often drafted by junior officers who are not even trained lawyers. Consequently, the language used in these ad hoc instruments is not always legally precise and not susceptible to the established rules of interpreting laws.[18] Therefore, the more ad hoc instruments are issued, the more confusing and imprecise the law becomes.

Uncertainty in the law raises the cost of doing business.[19] It also makes legal compliance for smaller firms and businesses difficult. A comparative study across 85 jurisdictions found that heavier regulation on entry of start-up firms is generally associated with corruption (Djankov et al 2002). By giving government officers a free hand in issuing ad hoc instruments without proper supervision, Indian company law will negatively impact small-scale entrepreneurial ventures.

Chaotic Legal Structures

For an economist or a social scientist, the skills of navigating a database and retrieving the right data are absolutely indispensable. The same applies for lawyers hunting for applicable laws. But for this, a systematic database has to exist. This would require defined legal instruments with precise functions. The laws must be arranged according to clear predefined rules. When the MCA starts issuing "General Circulars", of which there is not even a whisper in the 2013 Act, the predefined rules of the database fail to capture them. When the MCA unexpectedly starts amending primary laws through "orders", instead of placing a bill before Parliament, the predefined rules are rendered useless.

Consequently, the legal database fails to remain systematic and organised when the lawmaking authority itself breaks the rules of the game and issues undefined extralegal instruments. Only few "experienced" and "well-connected" lawyers with prior experience in dealing with the authorities can, with a reasonable degree of certainty, make better informed guesses about the applicable law. Therefore, the issuance of ad hoc and imprecise secondary legislation (like orders and circulars) makes the structure of laws chaotic and unduly benefits only those lawyers who get to regularly interact with the government officials.

Conclusions

The Companies Act, 2013, is possibly the first serious attempt to replace a substantive piece of commercial legislation. The transition may not be smooth, fraught with unintended mistakes, and oversight. However, it is a learning curve in policymaking that we as a nation must undergo. Irrespective of calls from various quarters to redraft the 2013 Act, it remains the law in force. And the government is obliged to follow the letters of the law. Grievances against the law in force cannot be a justification for the executive to go beyond it and reshape it, howsoever tempting and innocuous it may seem.

Well-intentioned extralegal short-sighted measures by the government will in the long run jeopardise the nation's confidence in rule of law. Abiding by rule of law today may be painful, but the gains are indisputable. Instead of knocking at Henry's door for a quick fix, the government will do well to recall the optimistic slogan that would, not too long ago, greet the impatient commuter at every dusty Delhi metro construction site: "Today's pain, tomorrow's gain"!

NOTES

1 See the Donoughmore Committee on Ministers' Powers, Report Presented by the Lord High Chancellor to Parliament by Command of His Majesty (1932) Cmd. 4060.

2 See Articles 73 and 162, Constitution of India, 1950.

3 See *Rai Sahib Ram Jawaya Kapur and Ors vs The State of Punjab*, AIR 1955 SC 549.

4 See Article 123, Constitution of India, 1950.

5 See First Schedule, Government of India (Allocation of Business) Rules, 1961.

6 Section 470 of the Act reads:
(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, *not inconsistent with the provisions of this Act*, as appear to it to be necessary or expedient for removing the difficulty: Provided that no such order shall be made after the expiry of a period of five years from the date of commencement of section 1 of this Act.
(2) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament (italics added).

7 See Companies (Removal of Difficulties) Order, 2013 dated 20 September 2013; Companies 2nd (Removal of Difficulties) Order, 2014 (date unavailable).

8 See General Circular No 3/2014 dated 14 February 2014; General Circular No 4/2014 dated 25 March 2014. Both were issued by officers of the rank of assistant directors.

9 Prior to this, on 9 July 2014, MCA issued the Companies (Removal of Difficulties) Fifth Order, 2014, which also sought to substitute certain words in the Act. This is also a de facto amendment of the primary law.

10 This is based on information available from Manupatra legal database viewed on 30 July 2014.

11 See M P Jain and S N Jain (2013): *Principles of Administrative Law* (LexisNexis) in Chapter IV.

12 See Section 45(10), Banking Regulation Act, 1949.

13 This was observed by the Allahabad High Court while upholding the validity of Section 33 of the UP Secondary Education Services Commission and Selection Board Act, 1981. See *Kumari Radha Raizada vs Committee of Management, Vidyawati Darbari Girls Inter College and Ors*, MANU/UP/0525/1994.

14 See AIR 1967 SC 691.

15 See (1974) 1 SCC 596.

16 See 1994 Supp (1) SCC 310.

17 See (2005) 3 SCC 551.

18 This was pointed out by, J Streatfield in *Patchett vs Leathem*, (1949) 65 TLR 69, 70.

19 One of the major risks facing individuals and firms is the uncertainty of legal change. This risk is not even insurable. See Steven Shavell (2014), "Risk Aversion and the Desirability of Attenuated Legal Change", NBER Working Paper No 19879, 1.

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