



POWER TO REMOVE DIFFICULTIES' CLAUSES IN INDIAN LEGISLATION: HENRY VIII CLAUSES AND THE LIMITS OF EXECUTIVE POWER TO AMEND STATUTES

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ABSTRACT :

*Most major Union statutes now end with a clause that lets the executive 'remove difficulties' in giving effect to the Act. This article argues that the clause is a Henry VIII power in substance: orders made under it have inserted provisos into the Central Goods and Services Tax Act 2017, rewritten a Schedule to the Insolvency and Bankruptcy Code 2016 and, in October 2026, altered the wording of two sections of the Digital Personal Data Protection Act 2023. The Supreme Court's test, settled since *Jalan Trading and Madeva Upendra Sinai*, is sound but rarely applied, while the statutory safeguards are weak: time limits are extended or renewed, and laying before Parliament is a formality. Drawing on the United Kingdom's experience, the article proposes narrower drafting, reasoned orders, affirmative approval for orders that alter statutory text, fixed sunsets and a statutory test.*

1. Introduction

The last three sections of a modern Union statute are predictable. One confers a power to make rules, one requires those rules to be laid before Parliament, and one usually headed 'Power to remove difficulties'—allows the government, if 'any difficulty arises in giving effect to the provisions of this Act', to make by order such provisions 'not inconsistent with' the Act as appear 'necessary or expedient' for removing it.¹ The clause is presented as housekeeping, a way of fixing the small mismatches that every new scheme throws up without going back to Parliament for each of them.

The practice is less modest. Orders under these clauses have inserted new provisos into the text of the Central Goods and Services Tax Act 2017 (CGST Act), added provisos to a Schedule to the Insolvency and Bankruptcy Code 2016 (IBC), and redefined when a limitation period begins to run. In the week this article was completed, the central government used the clause in the Digital Personal Data Protection Act 2023 (DPDP Act) to change the words of two operative sections. In each case, the statute book now reads differently from the text Parliament passed, and the change was made by a notification in the Gazette.

This is the feature that English lawyers have, since 1932, called a 'Henry VIII clause': a provision in an Act that enables the executive to amend or override primary legislation by subordinate instrument.² The research problem is whether, and when, the Indian removal of difficulties power lets the executive rewrite a statute. The article asks three questions. First, what limits has the Supreme Court placed on these clauses, and are they applied? Second, do the statutory safeguards—time limits and laying before Parliament—constrain the power in practice? Third, where does 'removing a difficulty' end and legislating begin, and can that line be stated in a form that drafters, legislators and courts can use?

The method is doctrinal and comparative. The article reads the leading Indian decisions on delegation and on removal of difficulties clauses, examines the text of the orders issued under four recent statutes, and compares the position with the United Kingdom, where the same device has been studied most closely. Its scope is limited in three ways. It covers Union legislation, not the parallel clauses in State Acts. It does not attempt a count of every order ever issued; the case studies were chosen because the orders are published and their effect on the statutory text can be verified. And the comparison is confined to one jurisdiction.

Section 2 sets out the concept and its varieties. Section 3 places the clause within the Indian doctrine of delegation. Section 4 examines the case law,

¹ Central Goods and Services Tax Act 2017, s 172(1). The formula is materially the same in the Insolvency and Bankruptcy Code 2016, s 242(1) and the Digital Personal Data Protection Act 2023, s 43(1).

² Committee on Ministers' Powers, *Report* (Cmd 4060, 1932) (Donoughmore Report).

Section 5 the statutory safeguards and Section 6 the recent practice. Section 7 turns to the United Kingdom. Section 8 assesses the Indian position, Section 9 makes five proposals and Section 10 concludes.

2. Conceptual Framework

The label comes from the Statute of Proclamations 1539, which gave royal proclamations the force of an Act of Parliament.³ The Donoughmore Committee, appointed after Lord Hewart's attack on departmental legislation,⁴ explained that such provisions had been nicknamed after Henry VIII 'because that King is regarded popularly as the impersonation of executive autocracy'.⁵ The committee's own examples were removal of difficulties clauses, including section 78 of the National Insurance Act 1911, which allowed the Insurance Commissioners by order to 'modify the provisions of this Act' so far as necessary to bring it into operation. The removal of difficulties clause is, in other words, the original Henry VIII clause.

Three varieties can be distinguished in Indian statutes. The first is the removal of difficulties clause proper, triggered by a difficulty in giving effect to the Act and aimed at the Act itself. The second is the power to extend an enactment to a new territory 'with such restrictions and modifications' as the government thinks fit, or to adapt existing laws on a reorganisation of States.⁶ The third is the power to amend a Schedule, or to amend or override other enactments, by notification.⁷ This article is concerned with the first, though the cases on the second supply most of the doctrine.

All three differ from ordinary rule-making in direction. A rule-making power works downwards. Parliament enacts the principle and the executive fills in detail 'to carry out the provisions' of the Act; the rule sits beneath the statute and is void if it conflicts with it. A Henry VIII power works upwards. The instrument operates on the parent Act, or on another Act, and to that extent the hierarchy between primary and subordinate legislation is reversed. That is why the modern Indian formula adds the words 'not inconsistent with the provisions of this Act'. Those words do real work, as Section 4 shows, but they do not stop the government from adding to the Act, and an addition to a statute is an amendment of it.

The clause also differs from rule-making in its drafting. A rule-making section usually lists the matters on which rules may be made. A removal of difficulties clause lists nothing. Its only subject matter is 'any difficulty', a word the statutes never define, and its only standard is what appears 'necessary or expedient' to the authority that holds the power. Whether a difficulty exists, and what will remove it, are both left in the first instance to the executive.

3. Constitutional Foundations and the Delegation Doctrine

The Constitution of India contains no express non-delegation rule and no rigid separation of powers. The limit on delegation is judge-made. In *In re Delhi Laws Act*, seven judges delivered seven opinions, but a working rule emerged: the legislature may leave the executive to fill in details and to apply a law to new conditions, but it may not hand over its 'essential legislative function', which consists in determining the legislative policy and enacting it as a binding rule of conduct.⁸ The reference also produced the first holding on executive amendment. The court upheld provisions that allowed the government to extend existing laws to new areas 'with such restrictions and modifications as it thinks fit', but a majority struck down the part of section 2 of the Part C States (Laws) Act 1950 that allowed the government, while doing so, to repeal or amend any corresponding law already in force in the territory.⁹ A power to modify the law being extended was tolerable; a power to repeal other law was not.

The meaning of 'modification' was narrowed three years later. In *Rajnarain Singh v Chairman, Patna Administration Committee*, the court read *Delhi Laws* as permitting only such alteration as does not involve 'any change of policy' or a change in the 'essential features' of the law.¹⁰ The court later confirmed that a power to extend with modifications is exhausted once the law is extended, and cannot be used afterwards to amend it from time to time.¹¹

Harishankar Bagla v State of Madhya Pradesh is often cited as the decision that makes room for overriding powers.¹² Section 6 of the Essential Supplies (Temporary Powers) Act 1946 provided that orders made under the Act would have effect notwithstanding anything inconsistent in any other enactment.

³ Statute of Proclamations 1539 (31 Hen 8 c 8), repealed in 1547.

⁴ Lord Hewart of Bury, *The New Despotism* (Ernest Benn 1929).

⁵ Donoughmore Report (n 2).

⁶ See, for example, Union Territories (Laws) Act 1950, s 2; The Constitution of India, 1950 art 372(2).

⁷ See, for example, Digital Personal Data Protection Act 2023, s 42 (power to amend the Schedule of penalties).

⁸ *In re Delhi Laws Act 1912* AIR 1951 SC 332.

⁹ *ibid*.

¹⁰ *Rajnarain Singh v Chairman, Patna Administration Committee* AIR 1954 SC 569.

¹¹ *Lachmi Narain v Union of India* [1976] 2 SCC 953.

¹² *Harishankar Bagla v State of Madhya Pradesh* AIR 1954 SC 465.

The court upheld it, reasoning that the section did not delegate a power to repeal: it was the legislature itself that had declared its will that existing laws be bypassed to the extent of the inconsistency. The distinction matters. *Bagla* approves a conflict rule written by Parliament. It does not approve a power under which the executive chooses which statutory words to change. The first leaves the text of other Acts intact; the second does not.

Three reasons explain why a power to amend deserves more caution than a power to make rules. The first is democratic. A Bill is read three times in each House, may be amended clause by clause and may be sent to a committee. An order is drafted in a ministry and published. The second is practical. Citizens and courts look for the law in the Act; an order that changes the Act's operation without appearing in it makes the statute book unreliable. The third is structural. The control that makes delegation acceptable is the doctrine of ultra vires: a rule is tested against the parent Act. When the instrument is permitted to operate on the parent Act itself, the standard against which it is to be tested begins to move. The courts' answer has been to say that some part of the Act—its policy and its 'essential provisions'—cannot move at all. Whether that answer holds depends on how it is applied.

It is also necessary to say where the clause sits in the court's own classification. The court distinguishes delegated legislation from conditional legislation. In the latter, the legislature makes a law that is complete in itself and leaves the executive only to decide when, where or to whom it shall apply.¹³ A removal of difficulties clause is sometimes defended as a species of conditional legislation, on the footing that the executive merely determines that a condition (the difficulty) has arisen. The analogy fails at the second step. Once the condition is found to exist, the executive does not simply switch on a rule that Parliament has already written. It writes the rule. The power is therefore delegated legislation, and delegated legislation of an unusual kind, because its object is the Act.

4. Judicial Treatment of Removal of Difficulties Clauses

A. *Jalan Trading and the Finality Clause*

The leading decision of the Supreme Court striking down a removal of difficulties clause is *Jalan Trading Co v Mill Mazdoor Sabha*.¹⁴ Section 37 of the Payment of Bonus Act 1965 allowed the central government, if any difficulty or doubt arose in giving effect to the Act, to make by order such provision, 'not inconsistent with the purposes of this Act', as appeared necessary or expedient; sub-section (2) made every such order final. By a majority of three to two, the court held the section invalid as a delegation of legislative power.

Justice JC Shah, for the majority, gave two reasons. The first went to the standard. Because the order had to be consistent only with the 'purposes' of the Act, the section authorised the government 'to determine for itself what the purposes of the Act are'. A power to remove a doubt or difficulty 'by altering the provisions of the Act' was in substance legislative, and normally it is for the legislature to remove such a difficulty. The second reason went to finality. Sub-section (2) 'accentuates the vice', since it made the government the sole judge of whether a difficulty had arisen, whether it was necessary to remove it, and whether the order was consistent with the Act's purposes.¹⁵

Justice Hidayatullah, dissenting with Justice Ramaswami, thought the functions under section 37 were 'not legislative functions at all'. Parliament had foreseen that a new Act would throw up doubts and difficulties and had chosen not to leave them to the courts 'with the attendant delays and expense'. Any order would have to be made 'within the four corners' of the legislation, and similar powers in the Government of India Act 1935 and in the Constitution had never been thought objectionable.¹⁶

The majority's first reason, taken at full strength, would condemn every removal of difficulties clause. Later courts have not taken it that far. *Jalan Trading* is now read as a decision about two drafting defects, and both have disappeared from the statute book. The modern clause requires consistency with 'the provisions' of the Act, not its purposes, and it contains no finality clause.

B. *From Validity of the Clause to Validity of the Order*

The shift came quickly. In *Gammon India Ltd v Union of India*, a Constitution Bench upheld section 34 of the Contract Labour (Regulation and Abolition) Act 1970, which was drafted in the modern form, and distinguished *Jalan Trading* on exactly these grounds: the power could be used only consistently with the provisions of the Act, and the order was not made final.¹⁷ Since then the question has not been whether the clause is valid but whether a particular

¹³ *Hamdard Dawakhana v Union of India* AIR 1960 SC 554.

¹⁴ *Jalan Trading Co (P) Ltd v Mill Mazdoor Sabha* AIR 1967 SC 691, [1967] 1 SCR 15.

¹⁵ *Jalan Trading* (n 14) 32 (SCR).

¹⁶ *ibid* 58–59 (SCR).

¹⁷ *Gammon India Ltd v Union of India* [1974] 1 SCC 596.

order is within it.

On that question the leading authority is *Madeva Upendra Sinai v Union of India*.¹⁸ The Income-tax Act 1961 was extended to Goa, Daman and Diu from 1 April 1963 by a Regulation which contained a removal of difficulties clause. In 1970 the government issued an order under it which deemed depreciation to have been ‘allowed’ under the earlier Portuguese law in years when none had in fact been allowed. The effect was to reduce the written down value of assets and increase the tax payable. The court held the relevant part of the order ultra vires. Justice Sarkaria described the clause as conferring ‘a very limited power’ to make ‘minor adaptations and peripheral adjustments’ in a statute ‘without touching its substance’.¹⁹ There was no real difficulty in applying the Act’s definition of written down value to the assesseees, and the order changed the scheme of that definition to their detriment.

The court had reached a similar result earlier in *Straw Products Ltd v Income Tax Officer*, where an order made under the removal of difficulties clause of a 1949 Act extending tax laws to the merged States was held unauthorised because no difficulty of the kind the section contemplated had arisen.²⁰

C. The Conditions

Read together, the cases attach four conditions to any removal of difficulties order.

- (i) A difficulty must exist in fact. Its existence is a condition precedent, which the court will examine for itself; the government’s assertion in the recitals is not conclusive.
- (ii) The difficulty must arise ‘in giving effect to’ the Act. Inconvenience to the revenue, a change of policy or a wish that the Act had been drafted differently is not a difficulty in this sense.
- (iii) The order must be consistent with the provisions of the Act and with its scheme.
- (iv) The order must not alter the essential provisions of the Act or its policy. It may adjust the periphery; it may not touch the substance.²¹

This is a coherent test and, as *Madeva Upendra Sinai* shows, it can be applied. Its weakness is that it is applied so rarely. An order is tested only if someone is aggrieved by it and litigates. Orders that relax a deadline or confer a benefit, which is what many of them do, are never challenged, however far they depart from the text. The test also leaves open the hardest case, which is the order that is consistent with the Act and beneficial in effect, but which nonetheless inserts new words into a section. The cases do not say whether that is a peripheral adjustment or an amendment. Recent practice suggests that the executive treats it as the former.

5. Time Limits, Sunset and Safeguards

The standard clause carries two safeguards. The first is a time limit. Early statutes had none: the power given to the president under the Andhra Pradesh and Madras (Alteration of Boundaries) Act 1959 and the State of Nagaland Act 1962 was unlimited in time.²² From the 1970s the proviso became routine, typically two or three years from commencement.²³ The idea is that of the Donoughmore Committee, which recommended in 1932 that such a clause should never be used except for the sole purpose of bringing an Act into operation, and should be subject to a time limit of one year.²⁴ A removal of difficulties power is meant to be transitional.

In recent Union statutes the limit has lengthened and has proved movable. The IBC and the Jammu and Kashmir Reorganisation Act 2019 allow five years.²⁵ The CGST Act originally allowed three years. Section 130 of the Finance Act 2020 changed ‘three years’ to ‘five years’, and the amendment was brought into force on 30 June 2020, as the original period was about to expire.²⁶ The IBC has gone further. When its five-year period had run out, the Insolvency and Bankruptcy Code (Amendment) Act 2026 added a new sub-section to section 242 conferring a fresh power, exercisable for five years from the commencement of the amending Act, to remove difficulties in giving effect to the Code ‘as amended’.²⁷ Each extension was made by Parliament

¹⁸ *Madeva Upendra Sinai v Union of India* [1975] 3 SCC 765.

¹⁹ *ibid.*

²⁰ *Straw Products Ltd v Income Tax Officer* AIR 1968 SC 579.

²¹ *Madeva Upendra Sinai* (n 18); *Jalan Trading* (n 14); *Rajnarain Singh* (n 10).

²² Andhra Pradesh and Madras (Alteration of Boundaries) Act 1959, s 53; State of Nagaland Act 1962, s 31.

²³ See, for example, Esso (Acquisition of Undertakings in India) Act 1974, s 19 (two years); State of Arunachal Pradesh Act 1986, s 50 (three years); Haj Committee Act 2002, s 50 (two years).

²⁴ Donoughmore Report (n 2).

²⁵ Insolvency and Bankruptcy Code 2016, s 242(1) proviso; Jammu and Kashmir Reorganisation Act 2019, s 103(1) proviso.

²⁶ Finance Act 2020, s 130, brought into force by Notification No 49/2020–Central Tax (24 June 2020).

²⁷ Insolvency and Bankruptcy Code 2016, s 242, as amended by the Insolvency and Bankruptcy Code (Amendment) Act 2026

and so raises no question of vires. But a sunset that is extended when it arrives, or restarted with every amending Act, is not a transitional limit. It is a standing power with periodic renewal.

The second safeguard is laying. Every order must be laid before each House ‘as soon as may be’ after it is made. This is laying in its weakest form. Rules made under the same statutes must be laid for thirty sitting days, during which both Houses may agree to modify or annul them.²⁸ No such procedure attaches to removal of difficulties orders. The order takes effect on publication, no motion is needed to keep it alive, and the Act provides no machinery for either House to disapprove it. The result is that the instrument which comes closest to amending the Act receives less parliamentary control than the rules made beneath it.

Two procedural safeguards that are common for rules are also absent. There is no requirement of previous publication or consultation, so those affected by an order learn of it from the Gazette. And although every order recites that difficulties have arisen, there is no obligation to explain what the difficulty is, why it could not have been foreseen, or why an amending Bill would not serve. The recitals in the orders examined in Section 6 are, for the most part, a restatement of the statutory formula.

The Committees on Subordinate Legislation of the two Houses may examine such orders, since their remit extends to ‘orders’ made under delegated powers.²⁹ Their reports are valuable, but they are advisory, they come after the order has taken effect, and the committees have many thousands of instruments to cover.

6. Contemporary Case Studies

A. Section 172 of the CGST Act

Section 172 differs from the standard clause in one respect: the government may act only ‘on the recommendations of the Council’. Between October 2017 and June 2020, more than fifteen orders were issued under it.³⁰ Three illustrate the range.

The first is the Central Goods and Services Tax (Second Removal of Difficulties) Order 2018. Section 16(4) of the Act bars a registered person from taking input tax credit on an invoice after the due date of the September return following the financial year. For 2017–18, the first year of the tax, many taxpayers missed that date. The order recited that this had caused ‘difficulties’ and directed that a proviso ‘shall be inserted’ in section 16(4), and another in section 37(3), extending the period to the return for March 2019.³¹ The policy was sensible and generous. In form, however, the order amended two sections of an Act of Parliament. It is also hard to see the ‘difficulty in giving effect to’ section 16(4). The provision was working as drafted; the complaint was with its result.

The second is the Ninth Removal of Difficulties Order 2019. Section 112 allows an appeal to the Appellate Tribunal within three months of the order appealed against, but the tribunal had not been constituted. The order provided that the period would run from the later of the date of communication of the order and the date on which the president of the tribunal enters office.³² This is the paradigm case for the power. The Act could not be given effect because the forum it assumed did not exist, and the order preserved the right of appeal that Parliament intended. Even so, the order did not merely clarify. It substituted a new starting point for a limitation period fixed by statute.

The third group dealt with the first annual return under section 44, which the Act required to be filed by 31 December following the financial year. Successive orders in December 2018 fixed later dates for 2017–18, first 31 March 2019 and then 30 June 2019.³³ A date fixed by Parliament was thus replaced twice in a month by order. The need was genuine, since the return forms were not ready, but the frequency shows how the power came to be used as the ordinary means of managing the Act’s deadlines.

The extension of the time limit to five years has already been noted.³⁴ Its effect was that a power justified as a means of settling a new tax remained

<<https://ca2013.com/section-242-power-remove-difficulties/>> accessed 11 October 2026.

²⁸ Central Goods and Services Tax Act 2017, s 166. See also Insolvency and Bankruptcy Code 2016, s 241.

²⁹ Rules of Procedure and Conduct of Business in Lok Sabha, rr 317–322.

³⁰ The orders are listed at ‘Section 172: Removal of Difficulties’ (*Tax Management India*)

<https://www.taxmanagementindia.com/visitor/detail_act.asp?ID=24058> accessed 11 October 2026.

³¹ Central Goods and Services Tax (Second Removal of Difficulties) Order 2018, Order No 02/2018–Central Tax (31 December 2018).

³² Central Goods and Services Tax (Ninth Removal of Difficulties) Order 2019, Order No 09/2019–Central Tax (3 December 2019).

³³ See the list of orders (n 30).

³⁴ Finance Act 2020 (n 26).

available until the middle of 2022.

B. Three Other Statutes

The Insolvency and Bankruptcy Code 2016. The first order under section 242 was made in May 2017. It inserted new provisos into the Eighth Schedule to the Code, so that schemes sanctioned under the repealed Sick Industrial Companies (Special Provisions) Act 1985 would be deemed to be approved resolution plans under section 31 of the Code.³⁵ The gap was real: the Code had repealed the machinery for supervising those schemes without replacing it. But the remedy was a deeming provision that changed the legal character of existing schemes and brought them under a different Part of the Code. That is a substantive transitional rule of the kind normally found in a repeals and savings section. The renewal of the power in 2026 has been described above.³⁶

The Jammu and Kashmir Reorganisation Act 2019. Section 103 empowers the president to ‘do anything not inconsistent with’ the Act to remove difficulties, for five years from the appointed day. The orders made under it have validated actions taken between 5 August 2019 and the appointed day, specified which districts make up the Union Territory of Ladakh, provided for the administration of the oath to judges of the common High Court and, in 2021, substituted a new name for that court.³⁷ Reorganisation statutes are where the power is most at home, and some of these matters are plainly transitional. Others, such as the territorial composition of a Union Territory, are not obviously peripheral.

The Digital Personal Data Protection Act 2023. The Digital Personal Data Protection (Removal of Difficulties) Order 2026 was issued on 5 October 2026 and published in the Gazette on 7 October 2026. As reported, it makes two changes described by the ministry as textual and editorial: it inserts the word ‘of’ in section 9(1), so that the provision on verifiable consent refers to the personal data ‘of a child or of a person with disability’, and it replaces ‘audit’ with ‘data audit’ in section 10(2)(c)(ii).³⁸ Both changes are small, and both probably reflect what Parliament meant. They are nonetheless direct alterations of the words of penal provisions: breach of section 9 or section 10 attracts penalties running to hundreds of crores of rupees under the Schedule. The second change also settles a question of scope—what kind of audit a Significant Data Fiduciary must conduct—that would otherwise have been for the Data Protection Board and the courts. Correcting a drafting slip is not the same thing as removing a difficulty in giving effect to an Act.

C. Mohit Minerals and Delegated Tax Powers

Union of India v Mohit Minerals Pvt Ltd did not concern section 172, but it bears on it in two ways.³⁹ The court struck down the levy of integrated tax on ocean freight in CIF imports, imposed by notification, because it conflicted with the scheme of composite supply in the parent legislation. It reaffirmed that the essential elements of a tax must be found in the statute and that a notification, however well supported, cannot go against the Act. The court also held that the recommendations of the GST Council are not binding on Parliament or the State legislatures and have persuasive value. The Council’s recommendation is therefore a procedural precondition to an order under section 172. It is not a source of legislative authority, and it cannot widen what the section permits. An order that amends the Act is no more valid because the Council asked for it.

D. Article 392: The Constitutional Precedent

The device has a constitutional ancestor. Article 392 empowered the president, ‘for the purpose of removing any difficulties’, particularly in the transition from the Government of India Act 1935, to direct by order that the Constitution itself should have effect subject to such adaptations, ‘whether by way of modification, addition or omission’, as he might deem necessary or expedient.⁴⁰ A series of Constitution (Removal of Difficulties) Orders was made under it. This was a Henry VIII power in the fullest sense, and Justice Hidayatullah relied on it in *Jalan Trading* to show that such powers were familiar.⁴¹

The more useful lesson lies in its limits. The power was conferred by the Constituent Assembly, not by an ordinary legislature. It was candid: it spoke of modification, addition and omission, where modern clauses speak only of ‘provisions not inconsistent with this Act’. And it ended on a fixed event that

³⁵ Insolvency and Bankruptcy Code (Removal of Difficulties) Order 2017, SO 1683(E) (24 May 2017).

³⁶ Insolvency and Bankruptcy Code 2016, s 242 (n 27).

³⁷ Jammu and Kashmir Reorganisation (Removal of Difficulties) Order 2019, SO 3912(E); Jammu and Kashmir Reorganisation (Removal of Difficulties) Second Order 2019, SO 3979(E); Jammu and Kashmir Reorganisation (Removal of Difficulties) Order 2020, SO 1233(E); Jammu and Kashmir Reorganisation (Removal of Difficulties) Order 2021.

³⁸ Isharth Kumar, ‘Small Words, Big Consequences: Reading the DPDP (Removal of Difficulties) Order, 2026’ (*CyberPeace*, 9 October 2026)

<<https://cyberpeace.org/resources/blogs/small-words-big-consequences-reading-the-dpdp-removal-of-difficulties-order-2026>> accessed 11 October 2026. The Gazette text of the Order was not available to the author at the time of writing.

³⁹ *Union of India v Mohit Minerals Pvt Ltd* [2022] 10 SCC 700.

⁴⁰ The Constitution of India, 1950 art 392(1).

⁴¹ *Jalan Trading* (n 14) 59 (SCR).

the executive could not postpone. No order could be made after the first meeting of Parliament duly constituted under the Constitution, and every order had to be laid before Parliament.⁴² The framers gave a wider power than any modern statute does and attached a harder sunset.

7. Comparative Perspective: United Kingdom

The United Kingdom has no written constitution to limit delegation, and Parliament may confer any power it chooses. The controls are therefore political and interpretive, and for that reason they are instructive for a system in which the constitutional limit is seldom enforced.

Henry VIII powers are now common in United Kingdom legislation. The Legislative and Regulatory Reform Act 2006 allows ministers to amend or repeal primary legislation by order to remove burdens. The European Union (Withdrawal) Act 2018 gave ministers power to make any provision that could be made by an Act of Parliament in order to ‘prevent, remedy or mitigate’ deficiencies in retained European Union law, and the Retained EU Law (Revocation and Reform) Act 2023 conferred further powers to revoke and restate that body of law.⁴³ The scale of the withdrawal legislation prompted sustained criticism. The House of Lords Constitution Committee objected to the breadth of the correcting power, and a former Lord Chief Justice warned that the device had been ‘resurrected’ as an ordinary tool of government.⁴⁴

Three features of the United Kingdom response are relevant. The first is scrutiny of the clause before enactment. Since the early 1990s, the House of Lords Delegated Powers and Regulatory Reform Committee (DPRRC) has examined every Bill for inappropriate delegation. The government must supply a delegated powers memorandum that identifies and justifies each power, and the committee’s settled position is that a Henry VIII power should be clearly explained and should ordinarily be subject to the affirmative resolution procedure.⁴⁵ In 2021 the DPRRC and the Secondary Legislation Scrutiny Committee published parallel reports warning that skeleton Bills and Henry VIII powers had shifted the balance between Parliament and the executive.⁴⁶

The second is graded procedure and statutory preconditions. An instrument that amends primary legislation is normally made under the affirmative procedure, so that it cannot take effect, or cannot continue, without a resolution of each House. Orders under the 2006 Act may be made only if the minister considers that stated conditions are met—among them that the policy objective could not be secured by non-legislative means, that the effect is proportionate and that the provision is not of constitutional significance—and Parliament may require a ‘super-affirmative’ procedure involving consultation and a longer period of committee consideration.⁴⁷ The correcting power in the 2018 Act was subject to an express list of things it could not do, including imposing or increasing taxation, making retrospective provision and creating serious criminal offences, to a two-year sunset, and to a sifting mechanism under which a committee could recommend upgrading an instrument from the negative to the affirmative procedure.⁴⁸

The third is interpretation. In *R (Public Law Project) v Lord Chancellor*, the United Kingdom Supreme Court held that a power to amend primary legislation by secondary instrument is to be construed narrowly, with any doubt about its scope resolved against the executive.⁴⁹

None of this has stopped the growth of such powers; the 2021 reports are complaints, not celebrations. But it has made them visible. A Henry VIII power in a United Kingdom Bill is identified as one, explained in a published memorandum, reported on by a committee before the clause is agreed, and usually tied to a procedure requiring a vote. In India the clause is boilerplate. The Lok Sabha rules do require a Bill that delegates legislative power to carry a memorandum explaining the proposals and stating whether they are of a normal or exceptional character,⁵⁰ but there is no committee charged with examining delegation clauses before they are enacted, and the memorandum for a removal of difficulties clause is typically a single sentence describing the delegation as normal.

The lessons for India are institutional more than doctrinal. Indian courts already possess a stricter test than the United Kingdom courts, because they can strike down the clause itself. What India lacks is the earlier stages of control: a justification that must be written down when the clause is proposed, a

⁴² The Constitution of India, 1950 art 392(1) proviso and (3).

⁴³ Legislative and Regulatory Reform Act 2006, s 1; European Union (Withdrawal) Act 2018, s 8; Retained EU Law (Revocation and Reform) Act 2023.

⁴⁴ Select Committee on the Constitution, *European Union (Withdrawal) Bill* (HL 2017–19, 69); Lord Judge, ‘Ceding Power to the Executive; the Resurrection of Henry VIII’ (lecture at King’s College London, 12 April 2016).

⁴⁵ Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The Urgent Need to Rebalance Power between Parliament and the Executive* (HL 2021–22, 106).

⁴⁶ *ibid*; Secondary Legislation Scrutiny Committee, *Government by Diktat: A Call to Return Power to Parliament* (HL 2021–22, 105).

⁴⁷ Legislative and Regulatory Reform Act 2006, ss 3 and 18.

⁴⁸ European Union (Withdrawal) Act 2018, s 8(7)–(8) and sch 7.

⁴⁹ *R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, paras 25–28.

⁵⁰ Rules of Procedure and Conduct of Business in Lok Sabha, r 70.

committee that reads it before the Bill is passed, a procedure that requires the Houses to vote on an instrument which alters an Act, and a list in the clause of what the power may not be used for. Each of these can be adopted without constitutional amendment, and most without legislation, by changes to the rules of the Houses and to drafting practice.

8. Critical Analysis

Deference in practice. The Indian test is strict on paper. A real difficulty, arising in giving effect to the Act, removed consistently with its provisions and without touching its essentials, is a narrow gate. Yet since *Gammon India* the court has not, so far as the reported cases show, invalidated a clause in the modern form, and reported challenges to individual orders are few. The reason is not judicial timidity. Review depends on a litigant, and the typical order harms nobody who can sue. A taxpayer does not challenge an order that extends time to claim credit, and a company does not challenge an order that validates its scheme. The stricter the order is with citizens, the more likely it is to be tested, as in *Madeva Upendra Sinai*; the more generous it is, the more freely it may depart from the Act. The doctrine therefore polices the wrong boundary. It asks whether the order hurts someone, when the constitutional question is who made the law.

The form of the orders. The case studies show a consistent drafting habit: orders that direct that a proviso or Explanation ‘shall be inserted’ in a section, or that one word be substituted for another. The clause authorises the government to ‘make provisions’. It does not in terms authorise amendment of the Act, and *Jalan Trading* treated removal of a difficulty ‘by altering the provisions of the Act’ as the mark of legislative power.⁵¹ The practice has moved the clause, without any change in its wording, from a power to supplement the Act to a power to amend it.

Parliamentary oversight. The safeguards described in Section 5 do little. Simple laying informs Parliament but gives it nothing to decide. The committees report after the event. And the one safeguard with real force, the time limit, is in Parliament’s own hands, which in practice means the hands of the government that asks for the extension.⁵² The extension of the CGST period was itself carried in a Finance Act, where it received little separate attention.

Certainty and the statute book. There is also a rule of law cost that does not depend on the merits of any order. A reader of section 16(4) of the CGST Act, or of section 9(1) of the DPDP Act, cannot know from the Act as passed what the provision says. The operative text has to be assembled from the Act and from orders published under a different series of notifications. For statutes that impose taxes and penalties, the citizen is entitled to find the law in one place, and to know that the words which create a liability were settled by the legislature.

Is there a workable line? A line can be drawn, though not in a single phrase. The cases and the practice suggest three markers. The first is the source of the problem. A difficulty is an obstacle to operating the Act as enacted: an institution that does not yet exist, a reference to a repealed law, a gap between two regimes. Dissatisfaction with what the Act requires, including a deadline that has proved too short, is a reason to amend it, not a difficulty in giving effect to it. The second is the effect on rights and liabilities. An order that creates or enlarges a liability, a penalty or an offence, or that operates retrospectively to anyone’s detriment, is legislation whatever its recitals say. The third is the effect on the text. An order that needs to change the words of a section in order to work is, presumptively, an amendment. On these markers the Ninth Order of 2019 is a true removal of a difficulty, though better drafted as a free-standing provision; the input tax credit order is an amendment that Parliament should have made; and the DPDP Order is a correction of the text for which the clause was not designed, however innocuous its content.

9. Findings and Suggestions

The findings can be stated shortly. The removal of difficulties clause operates in India as a Henry VIII power. The judicial test is sound but is seldom engaged. The statutory safeguards are weak, and the principal one, the sunset, is routinely lengthened or renewed. Five reforms follow.

Narrow drafting. The clause should say what it is for. It should be confined to difficulties arising in bringing the Act into operation or in the transition from the previous law, and it should state, as section 8(7) of the European Union (Withdrawal) Act 2018 did, what an order may not do: impose or increase a tax or fee, create an offence or penalty, take away a vested right, or operate retrospectively to the prejudice of any person. The clause should either state that an order may not amend the text of the Act, or say openly that it may, so that Parliament knows what it is conferring.

Reasoned orders and reporting. Every order should identify the provision that cannot be given effect, the circumstances that prevent it, why the ordinary powers under the Act are insufficient and why the matter cannot await an amending Bill. These reasons should be laid with the order. Each ministry

⁵¹ *Jalan Trading* (n 14) 32 (SCR).

⁵² Finance Act 2020 (n 26); Insolvency and Bankruptcy Code 2016, s 242 (n 27).

should also report annually to Parliament on the orders it has made.

Affirmative approval. An order that adds to, alters or suspends the operation of a provision of the Act should cease to have effect unless approved by resolution of each House within a fixed number of sitting days. Purely transitional orders could remain subject to the modification and annulment procedure that already applies to rules. Parliament already uses both procedures elsewhere; the change is one of allocation. It would also give the Committees on Subordinate Legislation a decision to inform.

Strict sunsets. The period should be short, two years at most, and should run from the commencement of the provision concerned. An extension, if truly needed, should be made by a self-standing amending Bill and not through a Finance Act. A clause attached to an amending Act should be confined to difficulties arising from that amendment.

A statutory test. The conditions in the case law should be enacted, preferably in the General Clauses Act 1897 so that they govern every such clause. An order would be valid only if (a) a difficulty exists that prevents a provision of the Act from being given effect in the manner Parliament intended; (b) the difficulty arises from the operation of the Act and not from a change of policy; (c) the order goes no further than is necessary to remove it; and (d) the order does not alter the policy or any essential provision of the Act, impose any liability or penalty, or prejudicially affect any right. The burden of showing these matters should lie on the government. Codification would give drafters a checklist and would tell courts that the question is one of jurisdictional fact, to be decided on evidence and not on the recitals.

10. Conclusion

The power to remove difficulties answers a real need. New statutes, and especially large ones such as a national goods and services tax or an insolvency code, produce gaps that cannot wait for the next session. The Constituent Assembly recognised this when it wrote Article 392. But it also wrote a limit that the executive could not move. The modern clause has kept the power and loosened the limit. Its wording has not changed since the 1970s, while its use has grown from supplementing an Act to inserting words into it, and its time limit from two years to five, and then to five more.

The Supreme Court settled the principle long ago: the executive may make minor adaptations and peripheral adjustments, and may not touch the substance. What is missing is a setting in which that principle is applied as a matter of routine, before an order takes effect and not only when someone sues. Parliament can supply it through narrower clauses, reasons, a vote on orders that alter the Act and a sunset that is kept. The alternative is to accept that the final section of each statute quietly qualifies all the others.