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THE HENRY VIII CLAUSE:

NEED TO CHANGE THE COLOUR OF OUR SHADES

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**ABSTRACT**

*The legality of and the need for the Removal of Doubt or Difficulty Clause, also known as Henry VIII clause, has been a bone of contention in multiple jurisdictions, one of the recent controversies being the presence of the Henry VIII clause in the 'Great Repeal Bill' of Britain. In the Indian context, the legality of the broad Henry VIII clause remains an ambiguous issue while the issue of legality of the narrow Henry VIII clause is a decided one. The case laws upon the former aspect of the Henry VIII clause have been incorrectly analysed to a substantial extent both by scholars and in reputed legal commentaries. Hence, the authors wish to put forth the correct legal interpretation of the judicial dictum upon the matter. Further, as per the political environment that exists at present in the Indian set up, given the rising complexities and sheer number of legislations that the Parliament is required to deal with and the complex composition of population of India, the narrow as well as the broad Henry VIII clause become matters of necessity even though they may be viewed with suspicion. Therefore, be it the narrow or the broad Henry VIII clause, these clauses should not be per se declared as void in the eyes of law; rather, the legality of any Henry VIII clause present in the main statute should be assessed by the Indian judiciary on a case to case basis.*

**INTRODUCTION**

Recently, in March, 2017, a great debate began regarding the Great Repeal Bill in the United Kingdom that seeks to 'copy and paste' EU laws as they already exist under the law of Britain on

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the day when Britain separates from the EU.<sup>1</sup> Moreover, the existence of the Henry VIII clause in the Bill has been one of the most controversial aspects of the Bill.<sup>2</sup> With this, once again the debates surrounding the need for and the appropriateness of the Henry VIII clause as a form of delegated legislation comes into limelight.

Henry VIII clause is a provision under a parent legislation empowering the Executive to amend or repeal one or more statutes by way of the latter's enactment of delegated legislation.<sup>3</sup> It is due to this liberating nature of the Henry VIII clause for the Executive that this clause has been an eye sore for the judiciary and other stakeholders in countries,<sup>4</sup> including India.<sup>5</sup>

In the Indian context, the background picture that explains the need for the Henry VIII clause is that for instance, recently, the winter session of the Parliament was rendered nearly non-functional due to the protests of the opposition against the government at Centre for its

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<sup>1</sup> Ben Riley-Smith, *Theresa May to unveil plans for converting EU law via 'Henry VIII clauses' later this month*, THE TELEGRAPH (Mar. 18, 2017), <http://www.telegraph.co.uk/news/2017/03/18/theresa-may-unveil-plans-converting-eu-law-via-henry-viii-clauses/>.

<sup>2</sup> Patrick Daly, *Brexit: Are the secondary 'Henry VIII clauses' a step too far?*, GRIMSBY TELEGRAPH (April 5, 2017), <http://www.grimsbytelegraph.co.uk/brexit-are-the-secondary-henry-viii-clauses-a-step-too-far/story-30249117-detail/story.html>; Andrew Sparrow, *Labour to oppose 'Henry VIII powers' being used to rewrite EU laws*, THE GUARDIAN (Mar. 26, 2017), <https://www.theguardian.com/politics/2017/mar/26/labour-opposes-henry-viii-powers-rewrite-eu-laws-great-repeal-bill>; Stephen Castle, *Britain, Breaking up with E.U., Looks to an Expert: Henry VIII*, THE NEW YORK TIMES (Mar. 30, 2017), [https://www.nytimes.com/2017/03/30/world/europe/brexit-king-henry-european-union-laws.html?\\_r=0](https://www.nytimes.com/2017/03/30/world/europe/brexit-king-henry-european-union-laws.html?_r=0); Jon Rogers, *Theresa May set to use 500-year-old 'Henry VIII clauses' to convert EU law post-Brexit*, Express (Mar. 20, 2017), <http://www.express.co.uk/news/politics/781048/Theresa-May-Henry-VIII-convert-EU-law-Brexit>.

<sup>3</sup> Press Trust of India, *BJP MPs Protest Disruption Of Parliament By Congress Members*, THE INDIAN EXPRESS (05/12/2014), <http://indianexpress.com/article/india/india-others/bjp-mps-protest-disruption-of-parliament-by-congress-members/>.

<sup>4</sup> Countries such as Australia, the UK, New Zealand, the US also share the same experience.

<sup>5</sup> See *Delegating Legislative Power*, Australian Law Reforms Commission, available at [https://www.alrc.gov.au/sites/default/files/pdfs/publications/fr\\_129ch\\_17.\\_delegating\\_legislative\\_power.pdf](https://www.alrc.gov.au/sites/default/files/pdfs/publications/fr_129ch_17._delegating_legislative_power.pdf), last seen on 10/02/2017; See Gerald Ng, *Slaying The Ghost of Henry VIII: A Reconsideration of The Limits Upon The Delegation of Commonwealth Legislative Power*, 38 Federal Law Review 205, 228 (2010), available at <https://flr.law.anu.edu.au/sites/flr.anulaw.anu.edu.au/files/flr/Ng.pdf>, last seen on 10/02/2017.

demonetisation decision.<sup>6</sup> Similarly, in the recent past, there have been frequent instances of interruptions and stalling of the Parliament's work,<sup>7</sup> be it due to the insensitive comments of some prominent leader of the ruling party against the minority communities,<sup>8</sup> or the suicide of a student (Rohith Vemula).<sup>9</sup> Further, prior to this ongoing term of the Lok Sabha, the Parliament's operations continued at a lukewarm pace because of the fragile coalition set-up under the United Progressive Alliance (UPA) government.<sup>10</sup>

Therefore, amidst these circumstances in India, the role of delegated legislation becomes more prominent. It is one of the most crucial topics under the Administrative Law of any country, including India, to correctly identify the thin line that demarcates the divide between permissible and excessive delegated legislation. It is within this larger issue of the permissible scope of delegated legislation, that the legality of the Henry VIII clause has been a bone of contention.

This paper first elaborates upon the attributes of the Henry VIII clause and explains how the clause is distinct from other instances of excessive delegated legislation [Part II]. Further, it explains the different forms in which this clause can be located [Part II] and also, the reasons for viewing the Henry VIII clause with suspicion in Indian context [Part III]. In Part IV, the authors analyse the landmark judicial verdicts under Indian Administrative Law in relation to the validity of the Henry VIII clause, thereby elaborating upon the stance taken in India regarding the *vires*

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<sup>6</sup> PTL, *Parliament Continues To Be Stalled*, DECCAN HERALD (Dec. 05, 2016), <http://www.deccanherald.com/content/584928/parliament-continues-stalled.html>; HT Correspondent, *Parliament: Oppn steps up attack over demonetisation, govt. retaliates*, HINDUSTAN TIMES, (Nov. 16, 2016), <http://www.hindustantimes.com/india-news/parliament-day-1-live-winter-session-begins/story-9kxkvfmkDP5BqaJm8VX6EM.html>.

<sup>7</sup> Kaushiki Sanyal, *Who Gains From Parliamentary Disruptions*, 50:35 Economic and Political Weekly (2015), <http://www.prsindia.org/media/articles-citing-prs/who-gains-from-parliamentary-disruptions-4002/> (last visited on 10/02/2017).

<sup>8</sup> See *supra* note 3.

<sup>9</sup> *Rohith Vemula Case A 'Virtual Murder', Probe Into Suicide 'Farce': Opposition On Smriti Irani's Reply*, ZEE NEWS (Feb. 26, 2016), [http://zeenews.india.com/news/india/live-opposition-seeks-iranis-apology-bjp-demands-discussion-over-chidambarams-remark-on-afzal-guru\\_1859642.html](http://zeenews.india.com/news/india/live-opposition-seeks-iranis-apology-bjp-demands-discussion-over-chidambarams-remark-on-afzal-guru_1859642.html).

<sup>10</sup> Harish Khare, *An opportunity, not a crisis*, THE HINDU, (Sept. 20, 2012) <http://www.thehindu.com/opinion/lead/an-opportunity-not-a-crisis/article3915471.ece>; Meghnad Desai, *Collusive Conflict*, THE INDIAN EXPRESS, (Sept. 26, 2012), <http://archive.indianexpress.com/news/collusive-conflict/993157/>.

of extraordinary clause. The analysis shall highlight how the judicial position upon this matter of legality of the Henry VIII clause has been hitherto partly misunderstood [Part V]. Further, the authors also highlight the scope for improvement that exists for the judiciary in this regard. In this part itself, the authors explain the crucial role that the Henry VIII clause plays or can play, specifically in the present political surroundings. In Part VI, the conclusion to this paper is presented.

### AN IN-DEPTH UNDERSTANDING OF THE HENRY VIII CLAUSE

#### A. Attributes of the Henry VIII clause

A Henry VIII clause refers to the provision in a primary Act which empowers the Executive to make secondary legislation which are inconsistent or can amend, repeal with the primary legislation/legislations.<sup>11</sup>

A historical analysis of the Henry VIII Clause tells us that it was originally contained in the Statute of Sewers. At the time, the clause vested in the Commissioner of Sewers (the Executive), the powers to enact rules having the effect of legislation, to levy taxes and to impose penalties for contravention.<sup>12</sup> Later, the Statute of Proclamations provided for the King (the Executive) to issue proclamations having the force of a statute.<sup>13</sup> Both the statutes were in prevalence during the reigns of an autocratic ruler, King Henry VIII.<sup>14</sup> The King asserted his powers in a purely authoritarian manner & ‘modified’ the provisions as per his subjective understanding.<sup>15</sup>

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<sup>11</sup> See *Henry VIII Clauses*, UK PARLIAMENT, <http://www.parliament.uk/site-information/glossary/henry-viii-clauses/>.

<sup>12</sup> *Henry VIII Clauses & The Rule of Law*, RULE OF LAW, Institute of Australia, <http://www.ruleoflaw.org.au/wp-content/uploads/2012/08/Reports-and-Pres-4-11-Henry-VIII-Clauses-the-rule-of-law1.pdf>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> N.A.K. Sarma, *Henry VIII Clause in India*, 15 *Journal of the Indian Law Institution*, 460, 461 (1973).

Resultantly, even at present, whenever such wide powers are conferred upon the Executive, these are termed as the Henry VIII powers.<sup>16</sup>

The Henry VIII clause is different from the situation where the Executive is conferred by the Legislative with the authority to extend the statute already in operation in one area to another area along with the power of modification which allows for making necessary adjustments to the existing law to better suit the requirements of the new territory.<sup>17</sup> This is because in such cases, modifications are made to the fresh operation of the parent Act in the new area instead of altering the original statute.<sup>18</sup> However, under the Henry VIII clause, the Executive is armed to modify the original statute.<sup>19</sup> Further, the Henry VIII clause is also different from the clause present in the parent legislation vesting the Executive with rule making powers in order to give effect to the parent statute.<sup>20</sup> Moreover, the delegation of legislative authority which takes place by virtue of the Henry VIII clause needs to be distinguished from several other instances of excessive delegated legislation. This is because sometimes it is mistakenly presumed that any clause present in the parent statute, conferring upon the Executive, unguided rule making powers is a Henry VIII clause; or that any and every instance of excessive delegated legislation constitutes the Henry VIII clause.<sup>21</sup> For example, it has often been misunderstood in cases such as *WB Electricity Board*<sup>22</sup> and *Central Inland Water v. Brojo Nath Ganguly*,<sup>23</sup> that the conferment of

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<sup>16</sup> *Id.*

<sup>17</sup> M.P. JAIN & S.N. JAIN, *PRINCIPLES OF ADMINISTRATIVE LAW*, 70 (6<sup>th</sup> ed., 2007).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> C.K. TAKWANI, *Lectures on Administrative Law*, 82-83 (3<sup>rd</sup> ed., 1998); D.D. BASU, *Administrative Law*, 42 (5<sup>th</sup> ed., 1998); Jain, *supra* note 17, at 48-49.

<sup>21</sup> See *Central Inland Water*, AIR 1986 SC 1571 (this case represents a wrong reading of the meaning of the Henry VIII clause) (“No apter description of Rule 9(i) can be given than to call it “the Henry VIII Clause”. It confers absolute and arbitrary power upon the Corporation. It does not even state who on behalf of the Corporation is to exercise that power.”); Dr Ketan Govekar, *Delegated Legislation in India*, Kare College of Law 1, 10, <http://www.grkarelawlibrary.yolasite.com/resources/FM-Jul14-LT-2-Ketan.pdf>.

<sup>22</sup> (1958) 3 SCC 116.

<sup>23</sup> AIR 1986 SC 1571.

arbitrary powers upon the Executive officials due to the presence of a Regulation, makes the Regulation the Henry VIII clause.<sup>24</sup> It is necessary to note that Henry VIII clause is neither equivalent to excessive delegation nor is it always an instance of excessive delegation; though it may, as a clause, be more prone to being an instance of excessive delegation.

Henry VIII clause often exists in the form of 'Removal of Doubt or Difficulties' clause.<sup>25</sup> The clause can be located across a plethora of statutes in India,<sup>26</sup> including in the Indian Constitution<sup>27</sup>.

### **B. Different forms of the Henry VIII clause**

In several scholarly writings and legal commentaries, two types of the Henry VIII clause have been identified: broad and narrow clause.<sup>28</sup> The narrow Henry VIII clause permits the Executive to enact delegated legislation so long such legislation does not contravene or derogate from the provisions in the parent Act.<sup>29</sup> However, in case of broad Henry VIII clause, the Executive is permitted to enact delegated legislation which derogates from the provisions under the parent statute.<sup>30</sup>

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<sup>24</sup> M. S. RAMA RAO, ADMINISTRATIVE LAW, 20. ("W. B. Electricity Board v. Ghosh, the Regulation of removal of permanent employee with 3 months notice or pay in lieu thereof was held arbitrary & void, such a Henry VIII clause has no place, the Supreme Court held."); Dr Ketan Govekar, *supra* 18 ("This hire & fire rules of regulation 34 is parallel to Henry VIII clause. Similar position was held by the court in the case of Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly..wherein rule 9 of the service rules of the CIWTC conferred power to terminate on similar lines as in the case of Desh Bandhu Ghosh the court went on to say that No apter description of Rule 9(i) can be given than to call it "the Henry VIII clause". It confers absolute and arbitrary power upon the Corporation and therefore invalid.").

<sup>25</sup> *Supra* note 12, at 460-61.

<sup>26</sup> Eg., S. 128, The State Reorganization Act, No. 37 of 1956; *supra* note 12, at 462, 485-86.

<sup>27</sup> Art. 372, the Draft Constitution of India, 1949; Art. 392, The Constitution of India, 1950.

<sup>28</sup> *Supra* 14, at 68-69 & 94 (7<sup>th</sup> ed., 2007); Pratik Datta, *Amendments by Stealth MCA Resurrects Henry VIII's Legacy*, 49 EPW. 19, 20 (2015).

<sup>29</sup> Eg., S. 128, The State Reorganisation Act, No. 37 of 1956; S. 470, Indian Companies Act, 2013; S. 29, The Consumer Protection Act, No. 68 of 1986; S. 41, The Pondicherry University Act, No. 53 of 1985.

<sup>30</sup> Jain, *supra* note 17, at 68-69, 94; Datta, *supra* note 28.

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However, authors suggest that for a better understanding of the Henry VIII clause, a three tier system of classification should be followed: broader, broad and narrow Henry VIII clause. Broad Henry VIII clause should imply situations where the clause present in the parent Act empowers the Executive to make delegated legislation not only in contravention of the provisions of the parent statute, but also of any other law in operation at a place; with the only limitation upon the rule making power being that the policy and the essence of the parent law or any other law so derogated from is kept unamended. An example of such clause can be located in the India's Constitution under Article 372.<sup>31</sup>

Furthermore, there are other criteria to identify the different forms of the Henry VIII clauses.

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<sup>31</sup> “372. Continuance in force of existing laws and their adaptation—

(1) Notwithstanding the repeal by this Constitution of the enactments referred to in Article 395 but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution, all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority

(2) For the purpose of bringing the provisions of any law in force in the territory of India into accord with the provisions of this Constitution, the President may by order make such adaptations and modifications of such law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall, as from such date as may be specified in the order, have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any court of law

(3) Nothing in clause ( 2 ) shall be deemed

(a) to empower the President to make any adaptation or modification of any law after the expiration of three years from the commencement of this Constitution; or

(b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said clause Explanation I The expression law in force in this article shall include a law passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas Explanation II Any law passed or made by a legislature or other competent authority in the territory of India which immediately before the commencement of this Constitution had extra territorial effect as well as effect in the territory of India shall, subject to any such adaptations and modifications as aforesaid, continue to have such extra territorial effect Explanation III Nothing in this article shall be construed as continuing any temporary law in force beyond the date fixed for its expiration or the date on which it would have expired if this Constitution had not come into force Explanation IV An Ordinance promulgated by the Governor of a Province under Section 88 of the Government of India Act, 1935 , and in force immediately before the commencement of this Constitution shall, unless withdrawn by the Governor of the corresponding State earlier, cease to operate at the expiration of six weeks from the first meeting after such commencement of the Legislative Assembly of that State functioning under clause ( 1 ) of Article 382, and nothing in this article shall be construed as continuing any such Ordinance in force beyond the said period.”

If objective of delegation is taken as a criterion, the Henry VIII clause may have the objective of facilitating transition from an old legislation to a new law upon the same matter.<sup>32</sup> Further, the Henry VIII clause may also have the objective of allowing flexibility in bringing any new law in its full operation.<sup>33</sup> As a third category, the Henry VIII clause might be a general clause which exists under the parent law in perpetuity to remove 'doubts or difficulties' that may arise at any time after the enactment of the parent law while it remains in force.<sup>34</sup>

Further, if existence of time limit is taken into consideration, then the Henry VIII clause can be of the type limited by time duration: mostly in the initial few years of the enactment of the parent statute.<sup>35</sup> These types of the Henry VIII clauses are also referred to as the sunset provisions.<sup>36</sup> On the other hand, the Henry VIII clauses can have no pre-defined temporal limitations.<sup>37</sup>

If finality accorded is taken as a parameter, then there is one type of the Henry VIII clause that excludes the scope of judicial review of delegated legislation enacted in pursuance of the powers conferred by it,<sup>38</sup> while the other type leaves scope for judicial scrutiny.<sup>39</sup>

Additionally, in some cases, the Henry VIII clause defines the procedure to be followed by the Executive while exercising the powers of delegated legislation conferred by the Henry VIII clause.<sup>40</sup> However, in other instances, no such procedural guidelines are laid down by the Henry

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<sup>32</sup> INDIAN CONST. Art. 392.

<sup>33</sup> *Supra* note 12, at 460.

<sup>34</sup> Eg. S. 34, The Administrative Tribunals Act, No. 13 of 1985.

<sup>35</sup> MIRKO PICARIC, *An Old Absolutist Amending Clause as the 'New' Instrument of Delegated Legislation*, 4 THE THEORY AND PRACTICE OF LEGISLATION (2016).

<sup>36</sup> *Supra* 9, at 3; S. 29, The Consumer Protection Act, No. 68 of 1986; S. 41, The Pondicherry University Act, No. 53 of 1985; S. 27, The Delhi Common Effluent Treatment Plants Act, No. 7 of 2000.

<sup>37</sup> *Supra* note 12, at 475-77.

<sup>38</sup> Art. 372, the Draft Constitution of India, 1949.

<sup>39</sup> See S. 34, The Administrative Tribunals Act, No. 13 of 1985; S. 34, The Indian Contract Labour (Regulation and Abolition) Act, No. 37 of 1970.

<sup>40</sup> For example, the requirement of consent of a certain number of people and of the people specific designation in the Executive before passing any instruction by way of delegated legislation.

VIII clause.<sup>41</sup> Moreover, there exists, on one hand, the Henry VIII clause which requires the laying of the delegated legislation made in exercise of the powers conferred by the Henry VIII clause, before each of the House of the Parliament;<sup>42</sup> and on the other hand, the Henry VIII clause which does not contain such requirements of presentation before each house of the Union legislature.<sup>43</sup>

Lastly, there is another basis to classify Henry VIII clause which shall be discussed in part V of the paper.

### REASONS FOR VIEWING THE HENRY VIII CLAUSE WITH SUSPICION

Lord Mayor once stated the following regarding the validity of Henry VIII clause—

*“You can be sure that when these Henry VIII clauses are introduced they will always be said to be necessary. William Pitt warned us how to treat such a plea with disdain. Necessity is the justification for every infringement of human liberty: it is the argument of tyrants, the creed of slaves.”*<sup>44</sup>

Several reasons have been identified explaining the need for and justification behind viewing the Henry VIII clause with suspicion.

Firstly, the power to amend or repeal any statute is considered to be an essential legislative function and hence the delegation of such power is considered as legally unjustified.<sup>45</sup> This is because delegating the powers to amend or repeal any statute to the Executive may be an unhealthy practice in a democracy, for it is only by way of Parliamentary debates and discussions

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<sup>41</sup> S. 41, The Pondicherry University Act, No. 53 of 1985; S. 65, The Competition Act, 2002, No. 12 of 2003.

<sup>42</sup> Eg., S. 29, The Consumer Protection Act, No. 68 of 1986.

<sup>43</sup> Art. 372, the Draft Constitution of India, 1949.

<sup>44</sup> Standing Committee on Justice and Community Safety, Legislative Assembly, Formal Op. (2017) (discussing Henry VIII Clauses), [http://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0005/434345/HenryVIII-Fact-Sheet.pdf](http://www.parliament.act.gov.au/__data/assets/pdf_file/0005/434345/HenryVIII-Fact-Sheet.pdf).

<sup>45</sup> *Id.*

that amendments or repeals should be introduced to any legislation.<sup>46</sup> Further, it is believed that the Executive should not be given the powers to amend or repeal because unlike the Parliament, it is not directly accountable to public and does not have, instilled within it the fear of loss of public support.<sup>47</sup> Besides, apprehension also exists against the existence of the Henry VIII clause in the parent legislation because the Parliament lacks the authority to directly modify any delegated legislation that has been enacted; nor can the Parliament decide the duration or the commencement of operation of such delegated legislation.<sup>48</sup> Parliament can only disallow the continued operation of any delegated legislation; the Parliament cannot amend/rectify it. Consequently, by the time such decision of discontinuance is taken by the Parliament, much harm would already have accumulated.<sup>49</sup> Moreover, the frequency at which the Henry VIII clause is revoked by the Executive is another matter of concern.<sup>50</sup> Hence, it is opined that the Henry VIII clause should not be allowed as a tool of excuse in the hands of the Executive to perform the work of law-making in a shoddy manner, and thereafter go scot free despite bringing poorly drafted legislations into force.

These are the reasons hitherto identified to justify the opposition against the existence of the Henry VIII clause in parent law.

However, there is another factor that the authors seek to highlight to explain the skepticism that exists against the presence of the Henry VIII clause. The reason has its basis in psychology. The fault lies in the nomenclature ‘Henry VIII clause’ used for the clause present in the parent legislation and which gives broad discretionary powers to the Executive to amend or repeal any provision in parent statute. This is because given the history of the rule of King Henry VIII, not only does the usage of the term ‘Henry VIII clause’ invoke an inadvertent negative bias but also is misleading. The nomenclature is misleading primarily due to three reasons. Firstly, when

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> See *supra* note 9 (“The clauses should only be used exceptionally, not routinely.”).

Henry VIII was conferred the broad Executive powers to amend or repeal the statute to execute his own will, such powers were wide enough to repeal any or all of the statutes enacted within his jurisdiction.<sup>51</sup> On the other hand, the so called ‘Henry VIII clause’ within the confines of present day administrative law, does not usually provide such broad ranging powers to the Executive.<sup>52</sup> Secondly, in his times, King Henry VIII was not barred from amending even the policy or essential features of the parent statute or any other statute in force.<sup>53</sup> However, such limitation ordinarily exists in the so called Henry VIII clause of the present times. Thirdly, King Henry VIII’s wide ranging powers during his reign could not solely be attributed to his powers to amend any statute; instead it happened due to the simultaneous conferment of judicial powers upon him as well.<sup>54</sup> On the other hand, today’s so called Henry VIII clause does not usually confer such adjudicative powers upon the Executive.<sup>55</sup> Therefore, an analogy of the clause which gives broad powers to the Executive to amend or repeal any statute to the tyranny that King Henry VIII exercised during his rule, through this clause, would be misplaced.

#### **THE VALIDITY OF THE HENRY VIII CLAUSE: EXAMINING CASE LAW**

Since the Henry VIII clause exists in the parent Act in the form of ‘Removal of Doubt or Difficulty Clause’, the *vires* of this clause has been contested multiple times in the courts of law. It is widely perceived that the Indian judiciary has accepted the legality of both the narrow and the broad Henry VIII clauses.<sup>56</sup> However, according to the authors, the judiciary has unambiguously accepted the validity of the narrow Henry VIII clause while clouds of ambiguity reign over the validity of the broad Henry VIII clauses. In support of their contention, the authors, in this Section, analyse the landmark verdicts delivered upon this issue.

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<sup>51</sup> *Supra* note 12.

<sup>52</sup> *Id.*, at 461.

<sup>53</sup> *Id.*

<sup>54</sup> *Supra* note 13, at 1.

<sup>55</sup> *See* S. 34, The Indian Contract Labour (Regulation and Abolition) Act, No. 37 of 1970.

<sup>56</sup> *Supra* note 14, at 69.

The first of the landmark cases upon the matter has been *Jalan Trading v. Mill Mazdoor Union*<sup>57</sup> wherein Section 37 of the Payment of Bonus Act, 1965 was challenged on the ground that it was a Henry VIII clause and hence an instance of excessive delegated legislation.<sup>58</sup> Section 37<sup>59</sup> conferred powers upon the Central Government to make provision, not inconsistent with the ‘purposes of the Act’, for the removal of difficulties or doubts, and such exercise of Executive powers could not be subject to judicial scrutiny. Since Section 37 permitted the Executive to go to the extent of amending the parent statute, Section 37 is an example of broad Henry VIII clause.

The majority (3:2) decided in the case that Section 37 was not valid as it was an instance of excessive delegated legislation.

The judgment on behalf of the majority was written by Justice Shah. He stated that:

*“Condition of the applicability of s. 37 is the arising of the doubt or difficulty in giving effect to the provisions of the Act. By providing that the order made must not be inconsistent with the purposes of the Act, s. 37 is not saved from the vice of delegation of legislative authority.... Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of s. 37 which purports to make the order of the Central Government in such cases final, accentuates the vice in sub. s. (1), since by enacting that provision the Government is made the sole judge whether difficulty or doubt had arisen in giving effect to the provisions of the Act, whether it is necessary or expedient to remove the doubt or difficulty, and whether the provision enacted is not inconsistent with the purposes of the Act.”*<sup>60</sup>

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<sup>57</sup> 1967 SCR (1) 15.

<sup>58</sup> *Supra* note 12, at 470.

<sup>59</sup> Section 37 gave power to the Central Government to make orders, not inconsistent with the purposes of the Act as may have been necessary or expedient for the removal of any difficulty or doubt and the order was made final.

<sup>60</sup> *Jalan Trading Co v. Mill Mazdoor Union*, AIR 1967 SC 691, ¶ 24.

This implies that in *Jalan Trading* case, the broad Henry VIII clause was declared as non-permissible on account of it being an instance of excessive delegated legislation by its sheer existence.

Later, in *Gammon India v. Union of India* (hereinafter ‘Gammon India’ case),<sup>61</sup> Section 34<sup>62</sup> of the Indian Contract Labour (Regulation and Abolition) Act, 1970 was challenged arguing that it amounted to excessive delegated legislation. Section 34 (Removal of Doubt or Difficulty Clause) was an instance of a narrow Henry VIII clause because it did not confer upon the Central Government the power to amend the provision of parent statute, on the pretext of removing the doubt or difficulty. The Court while upholding the validity of Section 34 distinguished the facts of the case from the case of *Jalan Trading* stating that unlike in the former case, Section 34 in this case neither contained the finality clause nor did it allow the alterations to be made to the provisions of the parent Act or any other statute.<sup>63</sup>

Therefore, two things demand attention regarding the decision in the *Gammon India* case. First, despite the Bench pronouncing the verdict being the Constitutional Bench itself, it did not overrule the decision of the *Jalan Trading* case; rather, it applied the ratio of the *Jalan Trading* case and distinguished the *Gammon India* case on its facts.<sup>64</sup> Second, it partially misread the *Jalan Trading* case suggesting that the latter case declared Section 37 of Payment of Bonus Act as invalid for two reasons; one that it conferred finality upon the decision of the Executive’s rule making powers and second that it permitted the Executive to alter the statutory provisions. This is because the Court in *Gammon India* meant that as per the ratio of *Jalan Trading* case, mere existence of the broad Henry VIII clause does not *per se* render the clause as invalid, for it to be an instance of excessive delegated legislation; rather, it is only when such clause is coupled with other aggravating factors such as the condition of finality attached to the broad Henry VIII clause

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<sup>61</sup> (1974) 1 SCC 598.

<sup>62</sup> “34. Power to remove difficulties.- 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 appears to it to be necessary or expedient for removing the difficulty.”

<sup>63</sup> *Id.*

<sup>64</sup> *Gammon India Ltd v. Union of India*, AIR 1974 960, ¶ 38.

that the clause becomes invalid on account of being an instance of excessive delegated legislation.<sup>65</sup> However, in sharp contrast to the interpretation of the majority's judgment in *Gammon India* case, the Court in *Jalan Trading* case said "*Power to remove the doubt or difficulty by altering the provisions of the Act would in substance amount to exercise of legislative authority and that cannot be delegated to an executive authority. Sub-section (2) of s. 37 which purports to make the order of the Central Government in such cases finally accentuates the vice in sub. s. (1).*"

A careful reading of the quoted portion from the *Jalan Trading* verdict would reveal that any conferment of power to remove the doubt or difficulty by allowing the alteration of the provisions of the Act in itself is impermissible and that the presence of finality clause under Section 37 in that Case was only an 'accentuating' matter instead of it being a 'causation' of the decision in the case.<sup>66</sup> Therefore, the correct interpretation of *Jalan Trading* case would be that the broad Henry VIII clause is *per se* void for it being an instance of excessive delegated legislation.

After *Gammon India* case, another landmark case upon the issue of legality of Henry VIII clause is identified as *Bengal Iron Corporation v. Commercial Tax Officer*<sup>67</sup> (hereinafter, 'Bengal Iron Corporation'). In this case, Section 42 of the A.P. Act was challenged and it was contested that it paved way for excessive delegated legislation.

Section 42<sup>68</sup> (Removal of Doubt or Difficulty Clause) provided that if difficulty arises in relation to the transition from the old Act to the new law, then the Executive can make rules to remove

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<sup>65</sup> See *supra* note 12, at 470.

<sup>66</sup> *Id.*

<sup>67</sup> 1993 SCR (3) 433.

<sup>68</sup> "42 Power to remove difficulties:-

(1) If any difficulty arises in giving effect to the provisions of this Act in consequence of the transition to the said provisions from the corresponding provisions of the Acts in force immediately before the commencement of this Act, the State Government may, by order in the Andhra Pradesh Gazette, make such provisions as appear to them to be necessary or expedient for removing the difficulty.

the difficulty and can derogate from the provisions of the parent (new) law. However, in every other instance where removal of difficulty is required, the Executive can make rules not inconsistent to the provisions of the parent Act. This implies Section 42 is an example of both the broad and narrow Henry VIII clauses.

The Court while upholding the validity of the Section stated that:

*“However, in a subsequent decision in Gammon India Limited., it has been explained..that the decision in Jalan Trading was influenced by the words occurring at the end of Section 37 of the Payment of Bonus Act to the effect that the direction of the Government issued thereunder was final..It is meant "for giving effect to the provisions of the Act", it was held. Sub-section (2) of Section 42 of the A.P. Act does no doubt not contain the aforesaid offending words, and cannot therefore be characterised as invalid.”*<sup>69</sup>

Therefore, this showcases that the Court in *Bengal Iron Case* read *Gammon India Case* as if it sought to imply that it was ‘solely’ the finality clause in the ‘Removal of Doubt or Difficulty Clause’ that influenced the decision of the Court in *Jalan Trading* case, which due to the reasons stated by the authors in the preceding analysis of the *Gammon India* case, is a fallacious legal interpretation.<sup>70</sup> Therefore, the Court in *Bengal Iron* case misread not only the *Jalan Trading case*<sup>71</sup> but also the interpretation of the *Jalan Trading* case in the *Gammon India* case.

However, it has been laid down in cases such as *Punjab Land Development*<sup>72</sup>, that the *ratio decidendi* of a previous case can be subsequently broadened by the judge before whom the case

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(2) If any difficulty arises in giving effect to the provisions of this Act (otherwise than in relation to the transition from the provisions of the corresponding Act in force before the commencement of this Act), the State Government may, by order make such provisions, not inconsistent with the purposes of this Act, as appear to them to be necessary or expedient for removing the difficulty."

<sup>69</sup> *Id.*

<sup>70</sup> Though the Court in *Bengal Iron case* reads down the scope of Section 42 of the A.P. Act to be stating it cannot permit the amendment to the provision of the statute, nevertheless, it did not explicitly base this assertion on any of the precedents.

<sup>71</sup> *Supra* note 12.

<sup>72</sup> *Punjab Land Development and Reclamation Corporation Ltd., Chandigarh v. Presiding Officer, Labour Court, Chandigarh*, 1990 (3) SCC 682.

is cited as precedent and in such cases the broadened interpretation holds till any further development in law occurs.<sup>73</sup> However, there is no easy answer to the issue as to what extent such expansion is possible. Fidelity to text and *stare decisis* would require that such reinterpretation of the previous verdict does not deviate too far from the original judgment.<sup>74</sup>

Given these rules regarding *stare decisis* and *ratio decidendi* and the interpretation adopted by *Gammon India* case<sup>75</sup> and *Bengal Iron* case<sup>76</sup> of the reasoning given in the *Jalan Trading* case<sup>77</sup>, two distinct conclusions are possible regarding the validity of the broad Henry VIII clause in the Indian context. First, that till the time the Supreme Court in any subsequent case correctly reinterprets the reasoning given in the *Jalan Trading* case behind holding the broader Henry VIII clause as invalid, the reasoning of the *Jalan Trading* case re-interpreted in *Gammon India* and *Bengal Iron* case prevails due to which it can be stated that the broader Henry VIII clause is legal in India.<sup>78</sup> Second, it can be stated that the interpretations of the reasoning given in *Jalan Trading* case to hold the broader Henry VIII clause as invalid in *Gammon India* and *Bengal Iron* are merely *obiter*. This is because in the latter two cases, legality of the broader Henry VIII clause was not an issue; instead in both cases, the issue revolved around the legality of only the narrow Henry VIII clause.<sup>79</sup> Upon the adoption of the second interpretation, inference would follow that broader Henry VIII clause is illegal in India. Several legal commentaries have mostly adopted the former approach though by an extremely superficial,<sup>80</sup> and sometimes an incorrect,<sup>81</sup> analysis.

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<sup>73</sup> *Id.*, ¶ 43.

<sup>74</sup> 1990 (3) SCC 682.

<sup>75</sup> *Supra* note 12.

<sup>76</sup> *Supra* note 68.

<sup>77</sup> *Supra* note 12.

<sup>78</sup> Applying the principle of validity of broadened or narrowed interpretation of ratio decidendi by subsequent bench, as laid down in Punjab Land Development Case.

<sup>79</sup> Central Inland Water Transport Corporation v Brojo Nath Ganguly, AIR 1986 SC 1571; West Bengal State Electricity Board v Desh Bandu Das, (1958) 3 SCC 116.

<sup>80</sup> See TAKWANI, *supra* note 20; JAIN, *supra* note 17, at 48-49.

Further, under the Henry VIII clause, power can be exercised by the Executive only in order to 'remove doubts or difficulties' wherein such doubts or difficulties arise in relation to the parent statute and not *de hors* it;<sup>82</sup> and existence of such doubts and difficulties should be objectively verifiable.<sup>83</sup>

### **LESSONS FOR THE JUDICIARY AND FOR OTHER STAKEHOLDERS**

However, this discussion regarding the permissibility or impermissibility by the Indian judiciary to incorporate broad Henry VIII clause in the parent Act has become largely academic. This is because the legislature has discovered some indirect ways to enforce the broad Henry VIII clause. This is being done in two ways. Firstly, the legislature drafts the main statute in a skeletal manner.<sup>84</sup> Therefore, the individual provisions are broadly termed.<sup>85</sup> This way the Legislature ensures that Executive gets to exercise significant amount of discretion despite using the narrow Henry VIII clause in the main law in the form of 'Removal of Doubts and Difficulties' provision. Secondly, these days, the subtle and newly emerging manifestation of the broad Henry VIII clause is the power under the parent Act to allow the Executive to clarify or interpret the meaning of the provisions given in the parent Act.<sup>86</sup> The clarification clause thereby indirectly empowers the Executive to amend the provisions of the main Act wherever the existence of ambiguity in the parent law provides such scope.<sup>87</sup>

In effect the power that the broad Henry VIII clause could possibly confer upon the Executive is practically being exercised by the Executive, irrespective of the ambiguity that continues to

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<sup>81</sup> See TAKWANI, *Id.*, at 20; See JAIN, *supra* note 17.

<sup>82</sup> *Supra* note 12, at 465.

<sup>83</sup> JAIN, *supra* note 17, at 68.

<sup>84</sup> HOVEYDA ABBAS, RANJAY KUMAR & MOHAMMED AFTAB ALAM, INDIAN GOVERNMENT AND POLITICS 225 (1<sup>st</sup> ed. 2011).

<sup>85</sup> *Id.*

<sup>86</sup> Securities And Exchange Board Of India (Settlement Of Administrative And Civil Proceedings) Regulations, 2013, Regulation 22 (Oct. 2013).

<sup>87</sup> See Seema Ray, *FAQs and Clarifications*, India Corp Law Blog, 2014.

prevail regarding the judicial stance taken with regard to the legality of the broad Henry VIII clause. Hence, it is suggested that the judiciary should unambiguously accept the *prima facie* validity of broad Henry VIII clause. Further, the judiciary should instead adjudicate upon the validity of the broad Henry VIII clause on a case to case basis wherein the decision upon the validity should be influenced by factors, such as nature of the law wherein the Henry VIII clause is incorporated, the form of Henry VIII clause so enacted and the scope of the Henry VIII clause.

Moreover, it is crucial that the validity of the broad Henry VIII clause is recognised, since if the discretion conferred by the Henry VIII clause is not broad enough to permit the Executive to amend the provisions of the law (provided the essence or the purpose of the law remains unamended) then, there is independent utility of the Henry VIII clause will be wholly absent. This is because the narrow Henry VIII clause is in effect similar to 'Power to make rules to bring the provisions of the Act into force'.<sup>88</sup> It is due to this nature of the narrow Henry VIII clause that some scholars refuse to accord the status of Henry VIII clause to the so called narrow Henry VIII clause.<sup>89</sup>

Furthermore, the primary rationale behind incorporating the Henry VIII clause in the parent Act is to provide for contingencies of lack of foresight by the legislature despite it exercising all reasonable care and enquiries<sup>90</sup> and contingencies of technicalities and complexities involved in the new legislation.<sup>91</sup> Therefore, the broad Henry VII clause is a necessary evil to ensure flexibility.<sup>92</sup>

Presently, the Parliament has a variety of issues to enact laws upon and is overburdened with the job of enactment and amendment. It must be borne in mind that the disruptions in the Parliament

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<sup>88</sup> See S. 30 & 31, The Haryana Ceiling On Land Holdings Act, No. 26 of 1972.

<sup>89</sup> DATTA, *supra* note 28, at 20.

<sup>90</sup> Zee News, *supra* note 9, at 2; Madeva Upendra Sinai and Ors. v. Union of India, AIR 1975 SC 797.

<sup>91</sup> TAKWANI, *supra* note 20, at 80.

<sup>92</sup> RT. HON. THE LORD RIPON, *Henry VIII Clauses*, 10 STATUTE LAW REVIEW 205 (1989); CHRISTOPHER FORSYTH, *The Constitution and Prospective Henry VIII Clauses*, 9 JUD. REVIEW 17 (2004).

have become a common landscape,<sup>93</sup> and coalition politics is on rise due to which arriving at the consensus which is required for making or amending laws has become difficult.<sup>94</sup> In the light of these circumstances, the Court ought to unambiguously accord legal recognition to the broad Henry VIII clause.

### CONCLUSION

Ambiguity regarding the validity of broad Henry VIII clause in India continues to prevail. However, the authors opine that no form of the Henry VIII clause should be declared as *ipso facto* invalid by the judiciary. The negative stereotypes related to the Henry VIII clause need to be done away with. The change can begin by amending the nomenclature of the clause in the first place.

Ideally, the Henry VIII clause should have certain limitations regarding its scope imposed upon it. These constraints can exist in the form of temporal restrictions, procedural guidelines, impermissibility to amend the essence or the underlying policy of the parent statute, requirement of laying the delegated law so enacted before the Parliament and/or limiting the power of amendment of provisions in the Act upto one or a few statutes, among other possibilities. Most importantly, the authority which can exercise the powers under the Henry VIII clause on the behalf of the Executive ought to be carefully chosen.<sup>95</sup>

Therefore, the debate under the realm of Indian Administrative Law must shift from asking the elementary question regarding the legality of the narrow and broad Henry VIII clause to adjudicating upon the validity of such clause on case to case basis. This is because deciding upon

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<sup>93</sup> Baijayant Jay Panda, *Has The Indian Parliament Lost Its Relevance?*, BBC (Jan. 7, 2015), <http://www.bbc.com/news/world-asia-india-34992800>; G. Pramod Kumar, *Parliament logjam: Can the Congress beat BJP's record of disruption?*, First Post (Jul. 25, 2015), <http://www.firstpost.com/politics/parliament-logjam-can-congress-beat-bjps-record-of-disruption-2361104.html>; PTI, *Oppn continue protest seeking PM'S presence in Rajya Sabha*, Deccan Herald (Nov. 29, 2016), <http://www.deccanherald.com/content/583771/oppn-continue-protest-seeking-pms.html>.

<sup>94</sup> *Supra note 84*.

<sup>95</sup> The General Council of the Bar, *Bar Council Response To The Constitution Committee Inquiry: The Legislative Process Call For Evidence On The Delegation Of Powers Consultation Paper*, THE BAR COUNCIL (Jan. 18, 2017), [http://www.barcouncil.org.uk/media/516127/bar\\_council\\_response\\_to\\_constituion\\_committee\\_inquiry-delegated\\_powers.pdf](http://www.barcouncil.org.uk/media/516127/bar_council_response_to_constituion_committee_inquiry-delegated_powers.pdf)

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the *vires* of the Henry VIII clause without looking at the context of its application is like reading the label on a pickle bottle which has no meaning on its own unless attached to the bottle on which the label is placed.