

Business Standard

Governance by disguised legislation

The tyranny of circulars must end to ensure democratic legitimacy of laws and ease of doing business

M S Sahoo | Sumit Agrawal |



Illustration: Binay Sinha

A judgment dated April 4 of the Bombay High Court struck down a few clauses of a circular issued by the Insolvency and Bankruptcy Board of India (IBBI) on the grounds that these clauses prescribed legal norms beyond the liquidation process regulations. It, however, observed that it would indeed be feasible for the IBBI, in its legislative wisdom, to propose the contents of those very clauses as an amendment to the regulations, following the due process of making regulations. An order dated April 10, 2024, of the Karnataka High Court obliterated a circular issued by the Central government that imposed a blanket ban on “ferocious” breeds of dogs, as it travelled beyond the rules. It, however, observed that such obliteration would not come in the way of the Central government introducing an amendment to rules, following the due process of law. These two recent rulings reinforce that a circular cannot exceed the rules/ regulations, which are the only instruments through which the executive can prescribe legal norms.

About a year ago, the Securities Appellate Tribunal set aside an order of the Securities and Exchange Board of India, inter alia, on the grounds that the circular relating to the pledge of securities, which was the basis of the order, did not apply to the appellants. It noted that a circular is issued to specific addressees, and therefore, applies only to them. Others have no obligations/ compliances under the circular even when they are dealing with the addressees or undertaking transactions covered by the circular. By implication, if the provisions of the circular were specified through regulations, the order could have been upheld. The Apex Court has been alerting to the inherent limitations of circulars for prescribing legal norms. It has settled that a circular presents the issuer's understanding of a legislative provision. It does not have legal standing if such understanding is incorrect/ inconsistent with the legislation. However, an inconsistent circular is binding on the issuer if it benefits the stakeholders compared to the legislation. Therefore, most enactments do not envisage the prescription of legal norms through circulars.

There are only two forms of legislation for prescribing legal norms, namely, primary legislation (Acts) and secondary/ subordinate/ delegated legislation (rules and regulations). The former is enacted by the legislature, while the latter, which is subordinate to the former, is made by the executive (rules by government and regulations by regulators), as a delegate of the legislature. However, a plethora of disguised legislation has emerged, nationally and internationally, which are made by the bureaucracy (typically a senior officer), as sub-delegates of the executive, to sneak in legal norms. These take different forms such as determination, direction, instruction, order, arrangement, scheme, strategy, guidelines, guidance notes, practice notes, codes, standards, protocols, notifications, notices, announcements, advanced rulings, clarifications, press releases, FAQs, and the ubiquitous circular. In the Indian context, subordinate legislation is subject to several procedural and substantive safeguards to ensure democratic legitimacy for laws made by the unelected. Take the example of regulations. Primary legislation: (a) defines the contours of regulations in terms of the matters and purposes, (b) mandates only the governing board of the regulator to make regulations, at times with prior approval of the Central government, (c) requires public consultation on the proposed regulations, preferably with the help of ex-ante assessment of the proposal, (d) requires a gazette notification of regulations for everyone to take notice of, and (e) provides for parliamentary scrutiny of regulations. None of these apply to disguised legislation. Thus, a circular could be issued to forbid a market participant from wearing a red cap on Tuesdays!

Primary legislation envisages only regulations for making laws. It prohibits the regulator from delegating regulation-making to anyone. However, there is no explicit prohibition on a regulator from using disguised legislation, although the legislation does not envisage it. The rigour of lawmaking (in terms of its authority and process) is directly related to its democratic legitimacy. The legitimacy is highest in the case of primary legislation, which is the most rigorous to make. It is somewhat less for subordinate legislation. It is the least for disguised legislation, which does not go through the sacrosanct process of checks and balances that the subordinate legislation is subject to. This probably explains why authorities prefer disguised legislation to subordinate legislation for prescribing legal norms, despite its doubtful legal sanctity.

In both depth and spread, the volume of subordinate legislation relating to markets far exceeds that of primary legislation. The volume of the disguised legislation dwarfs the aggregate of primary legislation and subordinate legislation. This reflects a shift in the balance of power from the legislature to the executive, and from the executive to the bureaucracy. This has prompted a worldwide call for restoring the balance of power to the legislature, reducing reliance on subordinate legislation, and an absolute ban on disguised legislation, except during emergencies like Covid-19.

In two hard-hitting reports in November 2021, two Select Committees of the House of Lords expressed grave concern about the increasing subordinate and disguised legislation that effectively bypasses the legislature. While calling for the restoration of power to Parliament, they noted that further delegation of legislative power by the delegate-executive is potentially a more egregious erosion of democratic accountability than the delegation to the executive to make subordinate legislation.

The only excuse often advanced in favour of circulars is that the executive may need to intervene urgently to address an imminent emergency. This is addressed by empowering the executive to issue emergency subordinate legislation, which has a limited shelf-life, without following the normal process for making them. This is not to argue that there is no place for circular-like instruments. Instead of prescribing legal norms, they could be used to guide the implementation of regulations and facilitate compliance.

It is high time that Parliament put a complete ban on disguised legislation of any form, and required the executive, including regulators, to use only subordinate legislation to prescribe legal norms henceforth. They must be obliged to either move the existing disguised legislation to rules/ regulations, if they are relevant,

following due process, or withdraw them within a definite time frame. Circular Raj must end in the interest of democratic legitimacy of laws and ease of doing business.

The writers are legal practitioners

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