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ANOTHER IN THE CONTINUING ORDINANCE BINGE

INTRODUCTION

Before the three farm laws became full-fledged Acts of Parliament, they were initially promulgated as Ordinances by the President of India ["President"]. Article 123 of the Constitution of India ["Constitution"] empowers President (or rather Council of Ministers headed by the Prime Minister of India) to promulgate Ordinance with a view to meet any unforeseen or urgent situation arising in the country when:

- 1) When both the Houses of Parliament are not in session; and
- 2) Circumstances exist which render it necessary for President to take immediate action.

In the case of three farm laws, certainly the first requirement was met because the Parliament was not in session in the month of June, 2020 when the President promulgated these Ordinances. But how far the second requirement was fulfilled is a big issue to ponder over.

A BRIEF COMPARATIVE LOOK

Article 123 provides for the same provision as was provided to the Governor-General under sections 42 and 43 of the 1935 Government of India Act. Comparatively, countries like Australia, Canada, the United Kingdom and even the United States of America do not have any similar provision, may be for the reason that unlike Indian Parliament the Parliament of these countries sit year long and even when not in session these countries deal with the emergent situation by summoning the legislature urgently. Only 3 parliamentary democracies (Bangladesh, India and Pakistan) as on today provide for such executive legislation. Therefore, many Constituent Assembly members rightly called the provision relating to Ordinance as a relic of foreign colonial rule.

TRENDS: PAST AND RECENT

Since the coming into force of the Constitution of India and until 2020, every year on an average 10.33 Ordinances were promulgated. In other

words, every year around 10 times President satisfied him/herself that circumstances exist to take immediate action. In fact, 3 Ordinances were promulgated on 26th of January, 1950 (the day when the Constitution came into force) and by the end of 1950 the count reached to 21³.

Seeing the frequent reliance of the then Government on Ordinances, even the first Speaker of the Lok Sabha Mr. GV Mavalankar wrote to the first Prime Minister of India Mr. JL Nehru twice but was being ignored⁴. During the tenure of Mr. Nehru, total 102 Ordinances were promulgated by the President. Thereafter, there was no going back and successive Prime Ministers one after the other, have duly resorted to this exceptional provision. To mention few, during the tenure of Mrs. Indira Gandhi (1966-77, 1980-84) 208 Ordinances were promulgated; during Rajiv Gandhi's tenure (1984-89) 37 Ordinances; Mr. PV Narasimha Rao (1991-96) - 108; Mr. Atal Bihari Vajpayee (1996, 1998-2004) - 58; Mr. Manmohan Singh (2004-14) - 61; and during the present government's tenure (2014-continuing) 77 Ordinances as of now (April, 2021) have already been promulgated⁵.

ISSUES

Though the provision is for exceptional and emergency situations, the figures shows that it has been resorted to fairly on a regular basis. It is worrisome that such frequent and unchecked reliance on Ordinance in a democracy like India making the temple of democracy 'Parliament' being ignored and therefore irrelevant. Does that mean that such abuse, misuse, and overuse of Ordinances make the every situation an exceptional and emergent one requiring 'immediate action'. Resorting to Ordinance route certainly amounts to usurpation of legislative power. This is certainly not on the lines of an ideal parliamentary tradition.

It seems that article 123 (or for that article 213 as well) has been resorted to in order to overcome



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¹The Farmers' Produce Trade and Commerce (Promotion & Facilitation) Act, 2020; The Farmers' (Empowerment and Protection) Agreement of Price Assurance and Farm Services Act, 2020; and The Essential Commodities (Amendment) Act, 2020.

²Identical powers have been conferred on the state executive under article 213 of the Constitution.

³https://legislative.gov.in/sites/default/files/legislative_references/listord.pdf.

⁴<https://casi.sas.upenn.edu/iit/shubhankardam>

⁵Please see, Shubhankar Dam, *Presidential Legislation in India - The Law and Practice of Ordinances* (2013 CUP); <https://mpa.gov.in/publication/statistical-hand-book>; http://164.100.47.194/loksabha/writereaddata/Updates/EventLSS_635907162497207518_presidential_address_english.pdf and <https://www.thehindu.com/opinion/op-ed/the-ordinance-route-is-bad-repromulgation-worse/article34361919.ece>.

the Parliament and/or to avoid Parliamentary scrutiny especially when the government knows that the proposed law is controversial and would face opposition from many. On the other hand, increasing enactment of laws through Ordinance route shows that the government wants a quicker way to enact laws rather than taking a longer and cumbersome legislative route. Moreover, if the issuance of promulgation of Ordinances is an issue then the re-promulgation without Parliament's ratification is a bigger one.

The provisions on Ordinance come with a built-in sunset clause and therefore violates the fundamental tenets of rule of law namely, consistency, certainty and stability. So for howsoever good faith and good intent the law may have been promulgated, the purpose gets defeated if there remains uncertainty unless ratified by the legislature.

JUSTICIABILITY OF SATISFACTION OF PRESIDENT

In the year 1970, the Supreme Court of India ["SCI"] in the judgment delivered in the case of *RC Cooper versus Union of India*⁶ refused to get into the question of 'what is immediate necessity?' as it is the executive who has to decide.

The existence of circumstances rendering immediate action has never been probed into by the courts until the state of Bihar went on a re-promulgating spree in the year 1989. Justice Sujata V Manohar's judgment in the *Krishna Kumar Singh and Another versus State of Bihar*⁷ holds relevance, for it laid the foundation for a challenge to an Ordinance on the ground that it is for the government to prove that immediate action was required when the legislature was not in session. Justice DP Wadhwa disagreed and therefore due to split opinion of the Division Bench the matter was referred to a larger bench. Later (though belatedly) in 2017, the 7-judges bench of the SCI decided the matter finally and majority while without laying down any substantive limits on when an Ordinance may be promulgated held that it is mandatory to place the Ordinance before legislature⁸. Both these above-mentioned judgments referred to *DC Wadhwa versus State of Bihar*⁹.

Therefore from the series of judicial pronouncements it seems that despite the landmark judgment of Justice Sujata Manohar in 1998, it is highly unlikely that the courts will delve into the question of sufficiency of circumstances ren-

dering immediate action. However, the court can inquire into the existence of circumstances leading to the satisfaction of the executive but the reason for immediate action is, as yet, not justiciable.

CONCLUSION AND SUGGESTIONS

After being approved by the Parliament, it is now highly unlikely that the three farm laws can be challenged on the ground of sufficiency of Ordinances. The Preamble to the three farm Ordinances merely stated what the Ordinances provide for and did not disclose the circumstances and urgency for immediate action. There is no established convention and practice which requires the President to state the circumstances and necessity to take immediate action while promulgating any Ordinance. As a matter of healthy convention, the Preamble to an Ordinance should clearly spell out the reason(s) for promulgation. This will not only increase the transparency in the exercise of legislative power by the executive but also enable parliamentarians to understand the reason behind bypassing their scrutiny.

The role of opposition political parties gains significance in such a situation, who can keep the sanctity of this exceptional provision relevant by demanding the justification of fulfillment of pre-conditions of the provision from the ruling party whether parliament is in sessions or not. It seems that all the political parties whether in opposition or ruling come together when it comes to promulgation of Ordinance and no one is ready to rise to the occasion. For this reason, the Constitutional provision relating to Ordinances seems to have lost its true meaning and has succumbed to the abuse by the bipartisan political class. True meaning to the provision requires political will and discipline of the highest magnitude.

It also casts a duty on the President (in whose name Ordinances are promulgated) to not blindly assent to the Ordinance approved by the Council of Ministers but to raise question and objection and thereby uphold the Constitutional values and principles.

The passage of the three farm laws through the regular parliamentary session could have addressed the information asymmetry that exists even today and therefore could have assuaged the concerns of farmers and various stakeholders.

⁶AIR 1970 SC 564.

⁷(1998) 5 SCC 643.

⁸(2017) 3 SCC 1.

⁹(1987) 1 SCC 378.