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Shubhankar Dam, SMU School of Law
Anuj Agrawal On January 20, 2014

Shubhankar Dam, an Assistant Professor of Law at the Singapore Management University School of Law, recently published a book on the history of ordinances in India. In this conversation with Bar & Bench, he talks about the common perception that ordinances enjoy, the role of the judiciary and the administrative challenges of a national law school.

Bar & Bench: One-sixth of all federal legislations between 1952 and 2009 are in the form of ordinances. That's a disturbing statistic. Were you surprised at this finding?

Shubhankar Dam: I must say that I wasn't really surprised by that. I began looking at ordinances at the national level having read D. C. Wadhwa's book on ordinances in Bihar. And his findings for the state were quite staggering. The state of Bihar had promulgated nearly 256 ordinances between 1967 and 1982, some of which had been kept in force (by repeatedly repromulgating them) for as long as 14 years.

While the numbers at the national level are deeply problematic, they haven't assumed Bihar-like proportions. What did surprise me was the fact that more than 45 per cent of all ordinances at the national level were promulgated by single-party *majority* cabinets. In other words, even cabinets that had comfortable majorities in Parliament resorted to this mechanism in large numbers – something I didn't expect to find.

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B&B: In the Introduction to the book, you write,
"It seems to me that the idea of parliament as a *legislative* body…. is yet to be fully internalized in India … While [political] parties are often concerned about the membership profile of parliament (especially with reference to caste and religion) they do not appear particularly concerned about its legislative achievements."
Do you think this is a reflection of the relative youth of Indian democracy? How do you think this can be changed?

SD: This is an excellent question – one that I have been asked repeatedly. Perhaps I should mention one caveat before I respond to your question fully. There is some evidence to suggest that India's Parliament in the 50s and even in the early 60s functioned both responsibly and effectively. Members took their task of debating matters of local and national importance and enacting legislation rather seriously. But somewhere down the line this thoughtful approach to parliamentary functions was lost. Does it mean that we had internalised the idea of 'parliament as a legislative body' initially and lost it thereafter? I doubt it.

I happen to take the view that the halo of independence helped drive that initial success. Put another way, I think it was the parliamentary *moment* rather than parliamentary values that accounted for its early success. As the moment lost its immediacy, the quality of parliamentary functioning also dissipated.

So to return to your question: is this a reflection of the relative youth of Indian democracy? Your question assumes that Parliament as a legislative body will improve as Indian democracy matures. I doubt it. Note that the parliamentary system (in the form we currently practice) was a British implant, and I don't think we have succeeded in "Indian-izing" the arrangement in any meaningful way. I think the biggest challenge lies in the fact that in India today, Parliament (with respect to its legislative functions) stands for nothing – it doesn't symbolize anything, or reflect any civilizational idea.

Take the case of Britain: Parliament's success there is not an accident. And I think it has something to do with how Parliament evolved. It all began in the thirteenth century when a few men chosen by the king came together to parley about "national affairs". Over the course of the next four centuries, this rudimentary arrangement was powerfully altered. The men asserted their independence, deviated from the king's commands and charted a course of action they thought fit. They insisted on their right to decide what the law should be, and when it should be made. As their influence grew, the king gradually receded into the background. What started out as a small group of king's men talking about important things, over time, became the epicenter of anti-regal activities. And that's what Parliament came to stand for – it stood for independence, and against royal despotism. The king was the "other" that Parliament came to oppose. The British Parliament in that sense was not just a court and a legislature. It became a powerful national icon – one that symbolized centuries of hard won battles against regal tyranny.

In contrast, what does India's Parliament stand for? Civilizationally speaking, what does it symbolize? Nothing, as far as I can tell. It is in this sense I suggest that we haven't

internalized the idea of Parliament as a *legislative* body; it is not part of our national character. Parliament for us is just a representative body – as long as the profile of members satisfies our sense of "representative equity", we too are satisfied.

How can it be changed? I have no easy answers. Or perhaps I should say: I have no answer at all. Tweaking parliamentary rules, forcing members to attend a minimum number of days, providing them better resources to take their legislative activity seriously etc. can only go so far. These changes may be valuable; I don't discount their potential. But a more deep and characteristic change can only come from a revolution – a revolution of ideas that recognizes the centrality of Parliament in our social and constitutional order.

B&B: In the first chapter, you explore how legal systems can function perfectly well without the existence of ordinances. What about situations requiring the "immediate action" contemplated in Article 123(1) of the Constitution?

SD: What constitutes "immediate action" is a tricky question. Constituent Assembly debates shed almost no light on the matter; members who argued in favor of Article 123 said almost nothing about what they had in mind in this respect. Perhaps the assumption was that Parliament isn't always nimble enough in enacting laws, and an additional legislative route is necessary to make sure laws that are necessary can be brought into effect. The problem is that the empirical record does not fit in with this expectation. My analysis suggests that cabinets hardly ever promulgated ordinances because they were, legislatively speaking, necessary. Rather cabinets promulgated them for ancillary reasons: They wanted to avoid parliamentary scrutiny, at least initially; they did not have the numbers to enact it through Parliament; they did not think Parliament was an important body where the matter needs to be debated and so on. As you can see, "immediate requirement" was hardly ever the reason why ordinances were promulgated.

B&B: Another aspect highlighted in your book is the unusually long life ordinances enjoy, far beyond what the Constitution had envisaged. Ordinances are re-promulgated with alarming regularity - *53 ordinances were re-promulgated between 1991 and 1999*. Even in the D.C. Wadhwa's judgment, the judiciary did allow for situations where ordinances can be repromulgated.This hasn't really been challenged before the judiciary, has it?

SD: No it hasn't. The judgment in the D C Wadhwa case is problematic. On the face of it, the court outlawed the practice of repromulgating ordinances. But Bhagwati J. also carved out – rather gratuitously, one might say – two exceptions when a cabinet would be justified in repromulgating ordinances. He said if Parliament is too busy with other things, or if a session is too short because of which a government is unable to convert an ordinance into act, then it may be promulgated. Cabinets have relied on these excuses to repromulgate ordinances. In fact, there are some instances where cabinets have repromulagated the same ordinance four or five times.

B&B: In this paper published in 2011, you give the example of the Indian Medical Council (Amendment) Ordinance that was, in the words of a Joint Secretary,

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"dictated line by line by an Additional Secretary". Do you think such incidents are on the rise?

SD: It is hard to tell for sure; I think it is quite common. Though it doesn't necessarily mean that such incidents are *on the rise*. In fact, there is some evidence to suggest that many ordinances are drafted over long periods of time, feedback is sought from different groups of people and the matter carefully thought through. The National Human Rights Commission Ordinance is a good example. NHRC was initially established through an ordinance. When it was promulgated, the Law Secretary boasted of the law's "deliberative" credentials. "It had been drafted over 7 months", he said at a press conference. "All shades of public opinion had been consulted". The problem is that in such a situation it is difficult – perhaps impossible – to then go on and claim that the matter is so urgent that it must be immediately promulgated. It is difficult for me to see how something debated, drafted and reviewed over a seven-month period can claim the mantle of "urgency".

Consequently, ordinances raise problems at both ends. In situations where they are dictated by some bureaucrat and promulgated at the dead of night, ordinances raise a whole host of problems. But the problems are just as pressing when they are promulgated over months of careful scrutiny and thought – it is as if cabinets regard Parliament as an inconsequential body. Either way, I think there are challenging problems.

B&B: Another aspect where the Indian judiciary's interpretation has been critiqued is in the interpretation of legal consequences following the lapse of an Ordinance. In the book, you say that Indian courts have "made it all too easy" for government to promulgate ordinances. What do you think are the possible reasons behind the judiciary's reluctance to address this issue?

SD: That's a great question. While courts in India, it is commonly said, have been "activist" in many matters, with regard to ordinances they have demonstrated a remarkable degree of reticence. Doctrinally, I think it's the result of equating cabinets with Parliament. Courts have repeatedly taken the view that in promulgating ordinances, a cabinet acts in a substitutive capacity – it substitutes itself for the two houses of Parliament. Now that is clearly not the case. There are many differences between a cabinet and the two houses of Parliament – they are numerically different, their representative quotient is different and they function differently. Equating the two, I think betrays a poor understanding of the Constitution, and the political mechanisms provided for in the Constitution.

B&B: Your next book is titled, *Governing With a Pen: India's Alternative Parliament in a Comparative Perspective*. Can you tell us a bit more about the book?

SD: The project is still in its initial phase. It is in some sense a continuation of my current research. But my objective is to widen the scope of the discussion and write an account of ordinances that may be of interest to political scientists, economists and readers generally interested in aspects of governance in India. *Presidential Legislation in India* is primarily a constitutional account of ordinances with some chapters that may interest historians or readers from other disciplines. But in *Governing With a Pen* I set aside the legal questions;

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I aim to write a thoroughly empirical account of ordinances that tells the story for a wider audience. The book's central objective is to explain how this "Alternative Parliament" emerged over the decades – the personalities, processes and patterns that lie behind this curious constitutional phenomenon in India. My hope is that the two books put together will offer a comprehensive account of ordinances at the national level in India that accounts for - and explains - its legal and political dimensions.

B&B: Alumni members from your alma mater, concerned with a decline in academic standards, have recently petitioned the Chief Justice of India to intervene. Do you think this will bring about a positive change?

SD: I doubt it, though I hope I am wrong. I doubt it because the institution faces a set of challenges that I do not think can be resolved simply by waving a magic wand. Institutional norms matter, and they take time to evolve. I do not think the Chief Justice can resolve these issues simply by commanding that the matters be resolved. After all, he has rather limited involvement with the day-to-day functioning of the university. How about approaching Professor N. R. Madhava Menon to return for 2-3 years, either as the VC or as a "Mentor VC"? It's hardly unheard of; Narayan Murthy too has come out of retirement to head Infosys again.

Elsewhere I have suggested that Indian universities mostly function like Indian political parties – the leader runs it as if it is his (or occasionally, her) personal fiefdom. In universities, I think VCs have taken on this role. The lack of institutional norms and practices seems staggering to me. The ease with which new VCs are able to undo previous rules and policies, enforce new ones without consulting the faculty or seeking its approval almost guarantees the sorts of problems NUJS is currently facing. I think there is a strong case to be made for vesting significant decision-making powers in the faculty rather than in the VC or the Executive Council or some other outside body. Of course, these bodies can – and will – have some say. But faculty councils need to be retrieved from irrelevance. Additionally, there are no established mechanisms by which to take students' views into account while making important decisions. I think it is time law schools take their students seriously when appointing VCs, faculty members and so on.

B&B: How do you think academic research and academic writing can be encouraged in Indian law schools?

SD: I doubt there are any magic pills! Perhaps it should be compulsory for all faculty members to publish at least one or two articles a year. I suppose the requirement is already in place in some law schools. But I don't think that is the case in most law schools. Of course, a compulsory requirement to publish is no guarantee that the publications will satisfy the demands of quality. But one has to start somewhere. That said, I should also point out that on the whole those who teach at law schools – especially at national law schools – are burdened by significant amounts of teaching requirement. And it is not readily obvious to me that faculty members who wish to write necessarily have the time and the resources to pursue their research interests.

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Law schools in the US and in some other countries often make a distinction between research professors who are primarily required to produce quality scholarship, and "teaching" professors who are expected to be good at teaching. Of course, these are not watertight compartments: Research professors also teach, and "teaching" professors also write. But the focus varies, and each person is annually evaluated based on their primary output – scholarship or teaching. Perhaps this distinction is worth looking into for introducing some kind of division of labor in Indian law schools.

Shubhankar Dam is an Assistant Professor of Law at Singapore Management University School of Law. He is the author of the recently published Presidential Legislation in India: The Law and Practice of Ordinances *(Cambridge University Press).*