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Interview with Shubhankar Dam, author of Presidential Legislation in India: The Law and Practice of Ordinances

By V. Venkatesan
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By Special Arrangement Shubhankar Dam: "Article 123 should be read in a way that makes it difficult for the executive to resort to ordinances."

SHUBHANKAR DAM, Assistant Professor of Law at Singapore Management University School of Law, is the author of Presidential Legislation in India: The Law and Practice of Ordinances (Cambridge University Press, 2014), which has received wide acclaim among scholars of constitutional law. Against the backdrop of his insightful critique on the necessity of ordinances in a democracy, Professor Dam discusses in this interview the recent controversy triggered by the Bharatiya Janata Party (BJP) government’s decision to promulgate ordinances in order to facilitate the auction of coal blocks and raise the foreign direct investment (FDI) cap in insurance.

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In your book, you call the promulgation of ordinances by the Central government under Article 123(1) of the Constitution of India and by State governments under Article 213(1) "institutionalised surrogacy that reduces the legislative process to a private affair". How do you think such an aberration has obtained constitutional sanction?

By the time the provision on ordinances came up for debate in the Constituent Assembly, it had been part of India's legislative architecture for nearly 90 years. The mechanism was introduced in 1861. Until 1947, about 400 ordinances were promulgated. Initially, they were few and far between; no more than 19 were promulgated in the first 50 years. Thereafter, they increased exponentially. And that legacy cast its spell on the Constituent Assembly.

In fact, the Assembly hardly debated the provision. [Jawaharlal] Nehru, [B.R.] Ambedkar, B.N. Rau, among others, insisted on a provision of this kind, and most members agreed. It was a "necessary evil" they said; and "trust us", they added, "it wouldn't be misused". Even the voices against ordinances did not oppose it completely; they only sought greater safeguards. Ironically, the same people had argued against ordinances when the British resorted to them. Nehru, for example, once called them a "charter of slavery". But suddenly his views changed. What was immoral, undemocratic and dictatorial, overnight became "necessary".

After more than 60 years, it is obvious that the founding trust was misplaced. "Give us more powers; we promise not to misuse them" is a bad argument for doing anything, and the abuse of the ordinance mechanism amply demonstrates that.

You have claimed in your book that ordinances have become the preferred method even in situations when legislation is entirely possible.

I should clarify that by "preferred method" I do not suggest that there are more ordinances compared with Acts. It is not a "numeric" preference. Rather, I mean a methodological preference: opting for ordinances even though the parliamentary route is available. Nehru's three terms between 1952 and 1964 are the best examples of this. He had brutal majorities in both Houses of Parliament. Any law he wanted, he could have achieved through the normal procedure. Yet he authored as many as 66 ordinances in those 12 years. G.V. Mavalankar, India's first Speaker of the Lok Sabha, counselled against this indiscriminate use. "It would set a poor precedent for Parliaments in future," he wrote to Nehru, but his advice went unheeded. Nehru died in 1964, and

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by then the ordinance script had been etched in stone. It would take a Herculean effort to undo it. Fifty years and 14 Prime Ministers later, we still await that constitutional Hercules.

Thus far on ordinances, the Modi government is not saffron; rather, it wears a Nehruvian shade and its justifications for the recent ordinances are not new. Indira Gandhi as far back as 1969 and minority Cabinets since have relied on this alibi of "legislation not being possible". Often, this is a code. It may mean many things. First, it may mean that the government does not have a majority in the two Houses of Parliament but wants a particular piece of legislation anyway. Therefore, the ordinance. Many of the ordinances V.P. Singh, Chandra Shekhar, [H.D.] Deve Gowda, and Inder Gujral authored are good examples of this.

Second, it may mean that the government must negotiate with the opposition to secure a majority— something it is unwilling to do. Therefore, the ordinance. Many of the ordinances of Morarji Desai, [P.V.] Narasimha Rao, A.B. Vajpayee and Manmohan Singh are good examples of this.

Third, it may mean that the government first wants to have the law put in place and only then debate it in Parliament as an afterthought. Many of the ordinances of Nehru, Indira Gandhi since 1971, and Rajiv Gandhi are good examples of this. Rarely does the justification mean what it says.

What I find interesting about these coded versions of "legislation not being possible" argument is that they turn the justification for ordinances on its head. Article 123 was meant to redress legislative urgencies that could not await parliamentary resolution.

Now governments time ordinances; they salivate at the prospect of the Houses being prorogued or dissolved—or do so purposefully —such that legislative "urgencies" come about. It is almost as if Parliament is an obstacle to the lawmaking process.

The recent ordinances have apparently been promulgated to send strong signals that the government is committed to accelerating the pace of economic activity—an extraneous ground, unrelated to the commonly expressed justifications for ordinances. Would this stand legal scrutiny?

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Article 123 says that an ordinance may be promulgated if the President is "satisfied that circumstances exist that render it necessary… to take immediate action". In 1970, the Supreme Court held that governments are the sole judge of "necessity"; the courts will not get into this question. It is outside the scope of judicial review. In other words, when a government says that an ordinance is necessary, legally speaking, that is the end of the matter.

The ordinance on coal appears to have been necessitated by the Supreme Court's verdict in September resulting in cessation of mining in some coal blocks by the end of the financial year. In your book, you have been rightly critical of the constitutional scholar H.M. Seervai's defence of ordinances because of judicial review and B.R. Ambedkar's misplaced optimism about the unlikely misuse of the ordinance power by the governments.

I don't agree with the first part of the question. The Supreme Court's verdict did not necessitate an ordinance; the verdict only required that the law be changed or a new law be put in place. How to bring about that change was up to the government; it could have legislated through Parliament or could resort to an ordinance—as it has done.

Seervai did have these sorts of situations (the coal blocks verdict and the subsequent ordinance) in mind when he argued that a mechanism for ordinances is necessary. He said: If a legal system makes provision for judicial review of parliamentary legislation—as India does—then there must be a mechanism for ordinances. Why? If judicial review exists, then courts may occasionally invalidate legislation; they may declare laws unconstitutional. Some of these decisions may come at a time when Parliament is not in session. And the executive would be compelled to introduce stopgap measures to fill the void when a law is invalidated. For that reason he felt that judicial review and ordinances must go together; if a legal system has the former, it must provide for the latter.

The argument fails, and for obvious reasons. There are many legal systems, the United States being the most notable, which provide for judicial review but make no provision for ordinances like we have in India. In these countries, if a piece of legislation is urgently needed, only the relevant legislature can fill that void.

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So what should change in India? Ideally, Articles 123 and 213 should be deleted from the Constitution. But politicians are unlikely to take this route. If the provision cannot be deleted, at least the interpretations surrounding the provision should change. And that's doable; the Supreme Court needs to revisit its judgments.

Let me give you a brief overview of how the provision was meant to function. Two conditions must be met before an ordinance may be promulgated. At least one House of Parliament should not be in session, and the President must be satisfied that circumstances are such that an ordinance is immediately necessary. Once both Houses come back to session, the ordinance must be presented in Parliament as a Bill. If it is ratified and receives presidential assent, it becomes an Act, and the controversy ends there. If an ordinance is not presented before Parliament, or Parliament votes it down, then the ordinance "ceases to operate".

Supreme Court interpretations

The Supreme Court's interpretations, however, have turned the provision into a monstrosity. Take the first two conditions. If both Houses are in session, can the government simply prorogue one House to make an ordinance technically possible? The Supreme Court has said yes. Consequently, the executive is also the sole judge of when the Houses of Parliament are in session or when they should be in session. The court will not review this matter. So what happens when Parliament resumes? Let us say that an ordinance is presented before Parliament and it is voted down. Can the executive repromulgate the same ordinance that was voted down? In 1987, the Supreme Court said yes. While repromulgation is generally invalid, it may be constitutional under certain—mostly unspecified—circumstances. That judgment effectively makes a parliamentary vote on ordinances redundant. Irrespective of whether Parliament wants that law or not, the executive can keep the ordinance in force simply by repromulgating it.

Finally, what happens if the government stops repromulgating a failed ordinance, and allows it to die? Under Article 123, the ordinance "ceases to operate". But what does that really mean? Imagine a situation where an ordinance was in effect for, say, six months. During that period many official actions would have been taken under the ordinance. What happens to all those actions? Do they also "cease to operate"? Do they get wiped out because the ordinance itself is dead? The Supreme Court has said no; the actions do not get wiped out. All actions initiated or completed during the time an ordinance is validly in force will remain permanently valid, the court explained.

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Think about the implications. What this means is that even if an ordinance fails, it can produce permanent legal effects. The recent Insurance Laws Amendment Ordinance, for example, increases the threshold for FDI in the insurance sector from 26 per cent to 49 per cent. As the law currently stands, even if this ordinance fails—that is, it does not become an Act of Parliament—this change in the law will remain permanently valid. Why do we need Parliament then?

I believe the court should reconsider these decisions. Article 123 should be read in a way that makes it difficult—legally costly—for the executive to resort to ordinances.

President's role

Could the President have refused assent to the ordinances?

The President's authority to assent to parliamentary legislation is provided for in Article 111 of the Constitution. It says: "When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom." What happens if the President refuses assent? Article 111 further says that if the President refuses assent, he must return the Bill to the Houses of Parliament "as soon as possible", stating his objections to the Bill. The Houses have three options. First, they may consider the President's objections and say: "We agree with the President, this Bill is flawed, not necessary, etc. and, therefore, we will not pursue it any more. Let the Bill lapse." Second, the two Houses may consider the President's objections and reject them. The Bill then goes back to the President's desk. Third, the two Houses may consider the objections and partly agree with the President. Here too the Bill goes back to the President.

If the two Houses return the same or amended Bill, what can the President do? Article 111 says: "The President shall not withhold assent therefrom." Article 123 says that ordinances are similar to Acts of Parliament—they have "the same force and standing". The rules that apply to Bills and Acts with respect to presidential assent also apply to ordinances. The President may return an ordinance to the government once. If the Council of Ministers sends it back a second time, assent must be given. President [Pranab] Mukherjee could have returned the coal and insurance ordinances once. If the [Narendra] Modi government insisted on them for a second time, Mukherjee would have been bound to give his assent. This is the conventional view.

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I disagree with it. I am of the opinion that different rules apply to parliamentary Bills and ordinances. While the President is bound to give assent to a Bill if it is returned by the two Houses, he or she is under no such obligation with respect to ordinances. In other words, [in my opinion] a President may return a Bill to the Houses only once; he or she may return an ordinance to the government as many times he or she wishes. What explains the difference in treatment?

The President is an integral part of Parliament. India's Parliament has three organs: The President, the Upper House and the Lower House.

When the two Houses pass a Bill, it acquires some properties. At least in theory, it would have been publicly debated by a large number of elected officials and publicly voted upon. And so if the two Houses reiterate their legislative preference for a second time, there are good reasons why that collective preference should prevail over the President's original objections. There are good reasons why the President should "stand down".

But ordinances do not have those features. Usually, they are written up in private (that is, in secret) by a small group of men and women (that is, the Cabinet), and by definition are never voted upon publicly. If Bills reflect the "will of the two Houses of Parliament", ordinances at best reflect the "will of the government". In fact, an ordinance may be the whim of just one person, the Prime Minister. Some of Indira Gandhi's ordinances never went before the Cabinet. They went from the PMO [Prime Minister's Office] straight to the President's desk. When the President's views on a proposed ordinance clash against the government's, there are no good reasons why the President should give way. As the only nationally elected public official in the country, the President has enough "representative width" to stand his ground—to volley an ordinance back on to the government's court. Indeed, he or she may do so endlessly.

Your view that ordinances make legislative intransigence more likely and that they render parliamentary opposition to legislation ineffective appears very convincing. Within the current system, how do you think we can create incentives to negotiate on legislative issues among parties in legislatures?

Ordinances obstruct parliamentary negotiations. Look at the current controversy. Reports indicate that the Congress Party had already pledged its support on the coal and insurance laws; it voted for the Bills in the Standing Committees. The government had the numbers in the Rajya Sabha to

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get the Bills passed. But then "side issues" appeared: first, Sadhvi Niranjan Jyoti and her … comment, then Sakshi Maharaj and his paeans to Godse, and finally the controversy about conversions and "ghar wapsi". The opposition ganged up, and the Congress joined in. Together, they wanted Prime Minister Modi to make a statement. He obliged; he condemned Jyoti's comments in Parliament. But on conversions, he didn't budge; he kept his silence while the opposition stalled proceedings in the Rajya Sabha and precious time was lost.

Prime Minister Modi wanted some laws. A clarification on the reconversion controversy (most likely) would have placated the opposition and he could have had the laws he wanted. But he knew. He could maintain his silence and still have his laws—the ordinance route was open. Without this possibility, I suspect Modi would have immediately clarified his position on reconversion, obliged the opposition, and moved on with his economic and governance agenda. Finance Minister Arun Jaitley charged the opposition in the Rajya Sabha of demonstrating an arrogance of numbers. But ordinances, one may say, reflect the arrogance of alternatives.

Ordinances since the 1970s

Ordinances exponentially increased during Indira Gandhi's decade: the 1970s. One hundred and thirty-five ordinances were promulgated then; she was responsible for 107 of those. Then came the late 1980s: the age of minority governments. Thus far, India has had 12 minority governments; 10 of them since the late 1980s.

In fact, since 1989, India only had minority governments until the Modi government broke that trend. Ordinances now reached new heights, even surpassing Indira Gandhi's egregious numbers. Narasimha Rao alone promulgated 106; Deve Gowda and Inder Gujral of the United Front added 23 each during their short tenures as Prime Ministers. In fact, a close analysis of two United Front governments would show that they were practically dysfunctional. Ordinances kept them going; it helped mask their legislative incompetence. Governance mattered little; minority governments then were judged on the length of their office rather than the strength of their performance. Of course, India has matured since.

Now one can see why minority governments are particularly vulnerable to ordinances. By definition, they are small in the Lower House. Often, they are small in both Houses. That makes lawmaking effectively impossible. They have two options: negotiate with the opposition or take the

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ordinance route. The latter is simpler. Narasimha Rao, in fact, added a further twist. The disease of repromulgation hadn't infected Central governments till 1991. It stayed quarantined in the State capitals. Narasimha Rao, however, brought it to New Delhi. He normalised repromulgations at the Centre and rendered parliamentary negotiations even more redundant. Every Prime Minister since has followed him.

In practice, haggling with the opposition to enact legislation should not be difficult in India. Principled differences among our political parties are rare, if any. Most have malleable—or if you will, convenient —policies; they can swim with the prevailing political currents. But one also mustn't romanticise negotiations; they don't always produce healthy outcomes. Negotiations in India are often of the petty kind.

The greatest disincentive to parliamentary negotiations on legislative matters is the law on Article 123 and the interpretations courts have offered. If the latter change, governments will be compelled to negotiate. Ordinances must trigger political pain. Otherwise, habits won't change. In the Constituent Assembly a proposal was offered: if an ordinance is promulgated, it must immediately initiate a parliamentary session so that the law may be properly debated. The proposal wasn't accepted. In hindsight, it should have been.