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Singapore Management University School of Law's Shubhankar Dam looks at India's use of the 'ordinance system' for passing laws

Joji Thomas Philip

Shubhankar Dam says the reason there is no debate or discussion on ordinances is because we have normalized it.

Singapore: Shubhankar Dam 's interest in the different ways by which India's executive controls its legislature got him to take a closer look at the country's use of the "ordinance system" for passing laws.

Dam, an assistant professor of law at the Singapore Management University School of Law, realized that there had been no study documenting the pattern of promulgating ordinances since 1952, when this constitutional provision was first used.

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Last month, he published a book, *Presidential Legislation in India: The Law and Practice of Ordinances (Comparative Constitutional Law and Policy)*, studying every ordinance promulgated since 1952.

An ordinance can be used by the government to pass laws when Parliament is not in session. The constitution had intended this provision to be used to take immediate action under exceptional circumstances, but also introduced checks and balances by mandating that every ordinance be approved by Parliament in its next sitting, failing which it would lapse.

"As far as I can say, this is the first national study of ordinances in India. Laws come from Parliament. But there are enormous ways by which the executive can control how and when legislation is made and what is contained in it. When writing it, I realized that there is no full-fledged study on this subject of ordinance—therefore, I got into it," Dam said.
After studying the 615 ordinances issued by Parliament between 1952 and 2006, Dam says he has concluded that this facility has been used by governments to "subvert Parliament" and adds that "with the exception of a single ordinance", every other law could have waited for the next legislative session.

"The only ordinance I think can be justified is the one introduced by former Prime Minister Morarji Desai in 1978—where currency notes in denominations of Rs.1,000/5,000/10,000 were demonetized—because they thought it was one way of dealing with corruption and inflation. Parliament was not in session and it had to be done without letting people know such a measure was going to be in place—because otherwise it would have failed," he said.
According to Dam, out of the 615 ordinances, at least 214 were promulgated just 15 days before Parliament was supposed to be in session while 261 were promulgated within 15 days of Parliament finishing its session. "Just these numbers will suggest there is something else going on. The most outrageous was Indira Gandhi's move to nationalize banks through an ordinance—it was done on 19th July 1969, a day before Parliament came back to session. Over time, ordinance has become a convenient mechanism by which to first enact laws and then deal with the challenges of parliamentary democracy," he said.

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Dam, 32, completed his law degree from the National University of Juridical Sciences, Kolkata, before going to the University of Oxford and Harvard Law School for his Master's degree. He joined Singapore Management University Law School in 2007 and holds visiting positions in universities in Australia, Germany and India.

The Singapore university's interest in research on India, especially on the business side and corporate governance, got him to Singapore. "There is a growing interest in India—Singapore realizes that for all its challenges, India is still a country they will have to deal with commercially and otherwise," he said.

On the quality of legal education in India, Dam said he was concerned as there was a fairly discernable difference between the top institutes and other colleges.
He said that till about a decade ago, law was the last career option. "The National Law Schools have changed this. But there is something to be said about the quality of faculty even here. Now you are beginning to see some of the graduates of National Law Schools having done their further studies abroad coming back to teach in India. That is having an effect. Until recently, most lawyers got in academics only because they did not get into a law firm or succeed in practising in courts," he added.

One of the reasons universities fail to attract top faculty is because they are run like "fiefdoms", he said. "Universities in some ways mirror Indian political parties—there is almost no institutional mechanism. Unless we put in place some systems of everyday governance, these places end up becoming personal fiefdoms of vice-chancellors," he said.
Edited excerpts from an interview:

Do you think that the ordinance-making power of the executive needs to checked in India?
As far as I can say, the executive in India can promulgate any ordinance at any time on anything and it can keep re-promulgating them without getting the approval of Parliament, with the consequence that today there are no legal limits—there may be some political limits—to issuing ordinances. The provision of the constitution says just that—if you introduce an ordinance when Parliament is not in session and if Parliament does not ratify, it lapses. The problem begins when you look at what the Supreme Court has said of this.

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Imagine a situation you have an ordinance that has been in effect for seven or eight months and the executive has done several things in pursuance of this law. Then, when the law lapses, what happens to all the official action that were taken? It should lapse too—that is what the provision says—but the Supreme Court has taken the view that everything that has been done while the ordinance has been in effect remains valid for ever. This creates several problems. Imagine a situation where a university is set up using an ordinance and that ordinance fails—as per the Supreme Court, the university will continue to function if the ordinance does not legally exist.

Why have ordinances become so prevalent—is coalition politics to blame?

The two worst decades in India when it comes to ordinances are the 1970s and the 1990s, but they are also a study in contrast because most of the '70s, you had a single party government, except for the 2-3 years of the Janata Party experiment. The 1990s were all coalition governments. Between 1970 and 1979, there were 135 ordinances and between 1990 and 1999 there were 196 ordinances. If you compare the two decades, it becomes very clear almost immediately that it is not the case that we are likely to have a large number of ordinances only if there are weak or insecure governments, numerically speaking, because the '70s had stable governments and yet they had a large number of ordinances. It seems like numerical stability is not a very good predictor of whether or not you are going to have a large number of ordinances because in the 2000s it has come down dramatically, and in the entire part of the last decade, we have had minority coalition governments. Between 2000 and 2009, we've had only 72 ordinances. If you look at what has changed between 1952, when ordinances were first issued, and now is the idea that ordinances are not exceptional any more. If you look at the criticism, every time an ordinance was promulgated, till the early '80s, there would always be an argument by the opposition that this was a subversion of parliamentary democracy and was not required. I think it is from the early '80s, the slide begins to take place and we have internalized the idea that ordinances are just another way of making laws. If you track how opposition parties have treated ordinances, it is a remarkable shift over time, and the reason there is no debate or discussion on it is simply because we have normalized it. We don't think ordinances are extraordinary any more.

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Why have the courts not intervened and clarified on both the nature and the extent of ordinance making in India?

There are two aspects to what you can challenge before the courts—you can challenge the provisions of an ordinance just like you can challenge the provisions of a parliamentary legislation. With ordinances, you can also challenge the manner in which it was made. You can argue that it was not necessary, the circumstances did not require or justify an ordinance; but the court has always taken the view that these matters are not judicially reviewed, which is whatever the executive decides is final and valid. On the whole, while the Supreme Court has been activist in other matters, when it comes to ordinances, they have been remarkably forgiving when it comes to interpreting the constitution. Can you go to the court and challenge that this ordinance was not required because it was not necessary—the court has said no. What happens if an ordinance lapses—the court has said that everything that was done when the ordinance was in place remains valid. The substance of this is that there are no legal costs to promulgating an ordinance—even if you fail to get parliamentary approval, you don't have to suffer anything—you don't have to undo your decision and so it is not a burden in that sense. Finally, can you re-promulgate? The court in 1983, when asked, said "no"—but at the same time, it created two exceptions—it said that if Parliament was busy, this matter could be re-promulgated and this is the excuse the executive has used repeatedly to re-promulgate ordinances. In fact, let me give you some figures. Until 1991, no ordinances at the national level had been re-promulgated. Between 1991 and 1999, 53 ordinances were re-promulgated and some were re-promulgated at least five times.

What do you think of the activism of India's Supreme Court of late?

The question of what constitutes policy and what constitutes law is a line that is probably less clear than what many would like to believe. Let me give you an example—the government has decided that there should not be a school at a certain tehsil level—can that just be a policy decision? The line is not very clear. With specific reference to 2G, yes, the court invalidated the first-come-first-serve (basis on which spectrum was allocated), but part of the reasoning was based on the fact that the manner in which the policy was implemented, the ways in which some of the changes were retrospectively applied, amounted to irregularity in implementation. Directing the government to auction licences was a mistake and it was perhaps a recognition and good sense of the Supreme Court that

it went back on it and said that auctions need not be the only mechanism. I think it is bit like the lack of distinction between cabinet and Parliament—you can make the same argument between the Supreme Court and the executive—for all practical purposes they have become indistinguishable—whether some policies are from the Supreme Court or from the executive, it is difficult to say. Whether this is good or bad is difficult to say—I guess people who benefit will believe that there is some good to it.

Parliament itself does not debate laws as it should be doing—most Bills today are passed with very little discussion and so it is almost like issuing ordinances. Is time a factor?

Absolutely right. I think the constitution's expectation was that ordinances, if promulgated, over time, will become like parliamentary legislation. But in practice, the reverse is happening; parliamentary legislation has now begun to resemble ordinances simply in the manner by which they are made and the lack of debate. While your question is absolutely correct, it is perhaps a dangerous conclusion to draw. Yet, it does not necessarily mean that ordinances have become less problematic—it means that both legislation and ordinances are problematic—the fact that Parliament does not work does not justify the use of ordinances. The challenge is to figure out ways by which you can strengthen parliamentary democracy. Because of our parliamentary system of governance, we have not been able to distinguish between Parliament and the cabinet. In our political imagination, the cabinet is like a mini-parliament or a representative of the people—when the cabinet does it, we often consider it equivalent of the Parliament approving it. The idea that the Parliament is an independent and meaningful body is yet to grow. This may be why we are not able to distinguish between ordinances and legislation.