

## Fiats in haste

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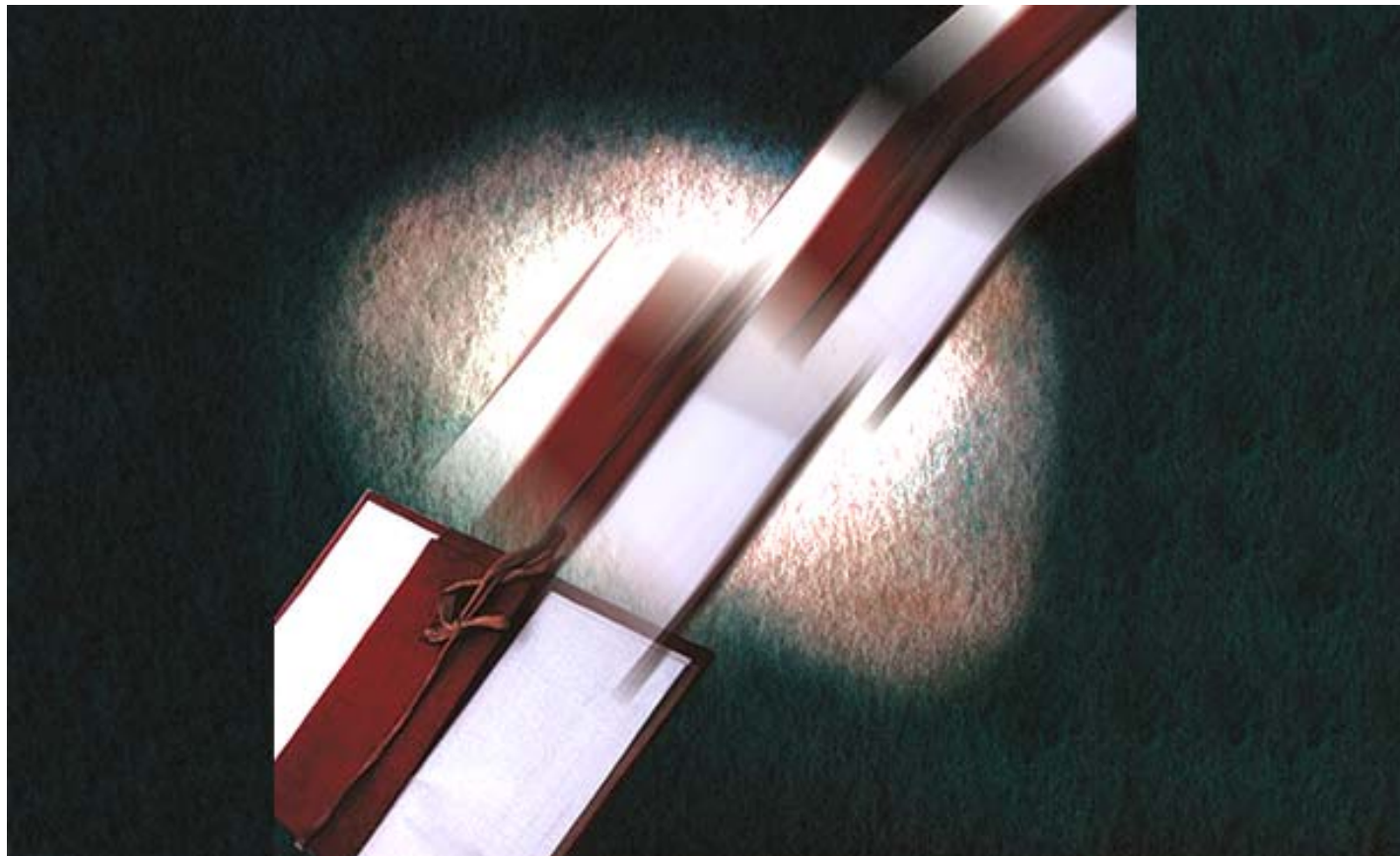


ILLUSTRATION: BHASKARAN

Narendra Modi bowed low at the steps of the Parliament House when he went there to be elected parliamentary leader of the BJP. A pious gesture.

But his first act as PM was not so pious towards the principle of parliamentary paramountcy in law-making. He got the President proclaim an ordinance, an act that constitutional purists frown upon.

First the facts of the case. Modi wanted to appoint Nripendra Misra his principal secretary. Misra had been TRAI chairman, and the TRAI Act barred its chairmen from seeking post-retirement jobs. The bar had to be removed by amending the TRAI Act.

Parliament, which is vested with the power of making, amending and repealing laws, was to convene in a few days, but Modi would not wait. He got the President to promulgate an ordinance removing the bar, which would be replaced by an Act of Parliament when it assembled. As Oliver Cromwell, who professed the cause of Parliament but marched with muskets into the house and got it dissolved, said, “necessity hath no law.”

Modi kept his word—minus the muskets. He got the ordinance replaced with an Act last week, but in the process faced opprobrium from the opposition.

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To be sure, Modi bore no mala fide, no mens rea, nor anything that could be called malicious in legal Latin. He wanted a good man in his office and Misra is eminently suited for the job. Even the opposition, not counting Mani Shankar Aiyar, said so. What left a bad taste in the mouths of juridical purists is something that is best expressed in plain English—an unholy haste.

Now the law of the case. In the bad old days, the king's word was the law. But ever since a troop of unwashed English nobles rode into Runnymede 800 years ago, and made King John put his seal on the Great Charter (John, illiterate, didn't 'sign' the Magna Carta), the power to make laws has been progressively transferred to councils of nobles and then commoners who evolved parliament.

The king continued to be allowed to make laws in emergencies when parliament was not in session. Such king-made laws, since called ordinances, would later have to be okayed by parliament. Taking the principle forward, Article 123(1) of our Constitution empowers the President to make laws through ordinances when the houses are not in session, and when "circumstances exist which render it necessary for him to take immediate action".

Were there circumstances in this case that called for "immediate action"? Indeed, principal secretary to the PM is the fulcrum on which the whole machinery of the PMO functions. But as is said in Latin, "Mater artium necessitas". Plain English: "Necessity is the mother of invention." Alternate arrangements could have been made till Parliament met and removed the bar in the TRAI Act. Heavens did not fall when Rajiv Gandhi ran his PMO without a principal secretary, January to July 1985, till his chosen one, P.C. Alexander, returned from a UNIDO job.

Not that the Congressmen, now preaching parliamentary virtuosity, are angels. Shubhankar Dam, who has done the most comprehensive study of India's ordinance raj after D.C. Wadhwa did in the 1980s, has found that hardly a handful of the 615 ordinances issued since 1952 till 2009 (average 10.6 a year) were dictated by exigent circumstances [Presidential Legislation in India: The Law and Practice of Ordinances, Cambridge University Press, 2014]. They were mostly acts of "legislative surrogacy", aimed at pushing the executive's will with "no discussion, debate or vote". Simply put, short-changing Parliament.

**TAILPIECE:** Nehru was a critic of ordinances when the British resorted to them, comparing them to suppression of civil liberties. But Dam has found that he got 99 decrees issued from independence till the republic's inauguration.