2015

Repromulgation Game

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Repromulgation Game (The Hindu, June 03, 2015)

Repromulgation began in 1992, with the Narasimha Rao Cabinet, and soon started a trend, that has since been over-exploited

The Narendra Modi government has repromulgated the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014 a second time. Originally introduced on December 31, 2014, the ordinance was repromulgated on April 3, 2015, and then again on May 30.

Article 123 of the Constitution authorises the President to promulgate ordinances if a law is "immediately necessary" and at any time, except when both Houses of Parliament are in session. But ordinances aren't permanent. They lapse unless they are converted into Acts within a specified duration. The Land Ordinance would have lapsed on June 3. To avoid that, the Modi government repromulgated it. But the question is, is this legal?

The Wadhwa decision

This is not a new question. The Supreme Court addressed it in *D. C. Wadhwa v. State of Bihar* (1986), when it held that it is unconstitutional to repromulgate ordinances, unless in exceptional circumstances. Ordinances themselves are an exception, the Court noted. The primary authority to enact legislation is the legislature. It is only to tide over a temporary urgency that the executive resorts to an ordinance. But to repromulgate it is to circumvent the legislature's primacy; it is an underhanded way of prolonging the life of an ordinance.

In a book, authored by the petitioner about the verdict, D.C. Wadhwa documented how the Bihar Assembly had effectively stopped functioning. The executive had taken over, and ordinances were being systematically repromulgated to keep them in effect, at times, for as long as 15 years. Aghast at this misuse of power, five judges hurriedly declared repromulgation unconstitutional or a "fraud on the Constitution".

This was in 1986, before which, interestingly, the Central government had never repromulgated ordinances. The practice began only in 1992 when the Narasimha Rao Cabinet resorted to it, thus starting a trend. During the 1990s, 196 ordinances were promulgated in all; almost 25 per cent of them (53 ordinances) were repromulgated. How could a practice that had already been declared unconstitutional, a fraud no less, be so common?

The Wadhwa exception

This was because, unfortunately, the general rule in the Wadhwa verdict came with an exception. It was stated that the government may, occasionally, be unable "to introduce and push through" a Bill to convert an ordinance either because "the Legislature [has] too much legislative business" or the time at its disposal is short. In such a case, the verdict stated, the President may "legitimately find

that it is necessary to repromulgate the Ordinance". And such "repromulgation of the Ordinance", the Court said, "may not be open to attack".

This makes little sense. In our system of government, the executive has complete control over parliamentary sessions, their durations, and the business agenda. Ministers (occasionally in consultation with the Speaker, Chairman and others) decide which legislative matters to list and when. If there are important matters to be dealt with, surely the proper response is to lengthen the parliamentary session and not resort to ordinances?

Because of the Wadhwa exception, the executive today may justify repromulgating an ordinance by simply withholding it from a parliamentary vote and then declaring that time was too short to deal with it in Parliament. The formula is simple: don't present an ordinance before the two Houses, and keep the sessions short. Apparently, a "fraud on the Constitution" may alchemise into lawful action through sheer inaction.

The Wadhwa verdict has encouraged, rather than prohibited repromulgations, and incentivised shorter parliamentary sessions. The 1990s speak for themselves. After Mr. Rao, Deve Gowda, I.K. Gujral and Atal Bihari Vajpayee ran minority coalition governments. Unable to enact legislation properly, given their lack of numbers, these governments took to Article 123 as an alternative. Political expediency, not legislative urgency, motivated and spiked these ordinances.

Governments, though, were always careful to claim the 'proper' excuse: the Houses were too busy to deal with the ordinances. In *Gyanendra Kumar v .Union of India* (1997), 10 repromulgations of the Rao Cabinet were put under the scanner. Two lawyers petitioned the Delhi High Court to pierce the Cabinet veil and see the ordinances for what they were: a "fraud on the Constitution". The government quickly took refuge in the Wadhwa exception: because of "heavy and urgent" workload, "the Bills could not be debated upon" in Parliament. Therefore, repromulgations were necessary, it argued. The Court bought it, without testing the veracity of those claims. Merely uttering the exception, it seems, is sufficient to satisfy the exception.

The Wadhwa exception must be reconsidered, an opportunity for which is at hand. A petition challenging the constitutionality of the Land Ordinance 2015 is pending before the Supreme Court. The petitioners argue that the ordinance was repromulgated in April simply because the government didn't have the numbers to properly enact it. Even the Modi government acknowledges this. The Court must settle the issue. And in doing so, it would do well to remember that Parliament is a not a constraint on the lawmaking process; rather, it is the only way by which laws may be properly made.

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