Past Expiry: The tenuous grounds for re-promulgating ordinances

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On the last day of 2014, the Narendra Modi-led government promulgated the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Ordinance, 2014. The ordinance, a law put into effect by the cabinet without the approval of the legislature, undid key features of the original land acquisition law, enacted in 2013. The revised rules benefited both government departments and private entities by increasing the categories of acquisition for which consent would not have to be obtained, and social impact assessments carried out.

These were controversial changes. The Congress party and its allies immediately objected; so did some constituents of the ruling National Democratic Alliance. In March, the government tried to make the ordinance permanent by presenting it for consideration before the parliament, but an unlikely coalition stared it down. The proposed bill passed in the Lok Sabha, where Modi’s Bharatiya Janata Party has a comfortable majority. In the Rajya Sabha, however, where the BJP is in the minority, it was blocked by other parties.

The Modi government dug its heels in, and insisted on keeping the ordinance alive. It was re-promulgated twice in the next three months. Nine months after it was initially enforced, the land ordinance remains in effect, though its parliamentary fate is still uncertain.

The Indian constitution authorises the president to promulgate ordinances at the behest of the cabinet, provided at least one house of parliament isn’t in session and a law is urgently needed. But such promulgations are meant to be temporary measures. An ordinance lapses if it isn’t ratified by both houses within six weeks of them reconvening. The Modi government sidestepped this important limitation in March, by cutting short the Rajya Sabha session so it could re-promulgate the land acquisition ordinance. Though this action had constitutional basis, a look at legal history shows that the validity of re-promulgation rests on a subtle detail of law, which dates back to a 1986 case in the state of Bihar.

In 1979, Diwan Chand Wadhwa, a Pune-based agrarian economist, stumbled upon a peculiar legal trail while researching land reforms in eastern India. He noticed that an amendment to the Chota Nagpur Tenancy Act, 1908, was being repeatedly promulgated in Bihar. (By law, governors can promulgate ordinances for their state on the advice of the chief minister and cabinets.) The text of the amendment never changed; essentially, the same ordinance was repeatedly being reinstated. This, Wadhwa discovered, was part of an epidemic. Between 1967 and 1983, as many as 265 ordinances had been re-promulgated in Bihar. Of these, 60 remained in effect for a year or less; about 50 were promulgated over and over again for between five and ten years; and, astonishingly, 13 had been kept active for between ten and 15 years without ever subjecting them to a vote in the state legislature.

This was a scam of monstrous proportions, and public departments in Bihar had perfected a method for making it possible. After every session of the state assembly, the legislative affairs department, which manages the legislative agenda, dutifully circulated a note to officials, noting dates on which ordinances were to expire and reminding them to flag any ones they wanted extended. Immediately, wish lists would pour in. Officials of the law department, which drafts bills and ordinances, forwarded these to the governor for assent. The reasons for re-promulgating the ordinances were never mentioned, and the governor did not bother to insist on any. There was an eerie efficiency to the arrangement. But for Wadhwa’s accidental discovery, India may not have learnt of it at all.

Wadhwa described all of this in a book, Re-promulgation of Ordinances: A Fraud on the Constitution of India, published in 1983. Newspapers wrote glowingly about the monograph, and more than 200 popular and specialised outlets reviewed it. Parliament, too, debated Wadhwa’s findings. Rarely has a piece of academic work commanded such public attention in India.
Buoyed by the acclaim, in January 1984 Wadhwa approached the Supreme Court with complaints against what he saw as an illegal practice that had taken root in Bihar’s corridors of power. High-profile lawyers—first Nani Palkhivala, and later Soli Sorabjee—represented him in the matter. But hearings were repeatedly postponed, with the court granting multiple adjournments to the state of Bihar. Almost three years went by. Editorials voiced impatience, many activists urged action, and some speculated about the reasons for the ingrate. Finally, in mid November 1986, a bench of five judges, headed by Chief Justice PN Bhagwati, heard arguments. The verdict came a month later, on 20 December—Bhagwati’s last day in office.

Relying almost entirely on Wadhwa’s research and reasoning, the judgement invalidated the practice of re-promulgating ordinances. It noted that, under the constitution, parliament and state legislatures are the country’s principal law-making bodies, and, ordinarily, laws must come from them. The executive may occasionally promulgate ordinances, the judgement said, but it must use this power only under exceptional circumstances, and should not usurp the legislature. The court emphasised that ordinances were meant to have limited lifespans under the constitution. Re-promulgation, it held, violates those constitutional axioms.

These conclusions apart, the court’s choice of language was noteworthy too. Bhagwati was scathing. The “enormity of the situation,” he said, was “startling.” He described the practice of serial re-promulgation as “reprehensible,” “nothing short of usurpation,” a “subverting of the democratic process,” a “subterfuge,” and “a fraud on the constitutional provision.”

But, despite declaring re-promulgation unconstitutional in principle, the judgement also created a loophole that could justify its practice. There may be situations when a government is unable to convert an ordinance into permanent legislation, Bhagwati conjectured, because the legislature had “too much legislative business in a particular session” or insufficient time. The executive may, under such constraints, “legitimately find that it is necessary to re-promulgate” an ordinance. In such cases, Bhagwati reasoned, the practice “may not be open to attack.” Still, he expressed a “hope and trust” that repeated re-promulgation “shall not continue in the future ... There must not be Ordinance Raj in the country.”

In effect, that single sentence overrode nearly everything else in the verdict. Bhagwati’s exception made little sense. In India’s system of government, the executive has complete control over the durations and agendas of parliamentary sessions. Ministers, occasionally in consultation with presiding legislative officers and the opposition, decide what matters to present for consideration, and when. If important business remains pending, the executive can lengthen a parliamentary session, or reshuffle the agenda. But, as a result of Bhagwati’s ruling, today the executive can justify re-promulgating an ordinance simply by withholding it from parliament and then declaring that there was too little time to deal with it.

When he wrote the judgement, Bhagwati noted that the phenomenon of re-promulgation was restricted to the states. The president has the same powers to issue ordinances as governors do, he wrote, but at the central level “there is not a single instance in which the President has, since 1950 till today, repromulgated any Ordinance after its expiry.”

But in the 1990s, politicians availed of Bhagwati’s exception to do exactly this. Prime ministers—most significantly Jawaharlal Nehru and Indira Gandhi—had promulgated ordinances before. But, on 2 January 1993, Narasimha Rao broke new ground when his cabinet re-promulgated seven ordinances that should have come up for scrutiny and vote in the preceding session of parliament.

That session had been extraordinarily brief. The Lok Sabha met for only 18 days against the backdrop of the Ram Janmabhoomi movement, which led to the unalignment of the Babri Masjid. Legislative business wasn’t a priority, and many proposed bills were put on the backburner—setting the stage for the executive’s unprecedented action. All succeeding prime ministers—HD Deve Gowda, Inder K Gujral, Atal Bihari Vajpayee and Manmohan Singh—resorted to this practice. They now had precedent to lean on. Each re-promulgated ordinances on several occasions, and almost always because he did not command the numbers to get his legislative preferences approved by parliament. By the end of the 1990s, 53 re-promulgations had been inked. The 2000s witnessed fewer of them, but the unspoken belief that this was an acceptable way to conduct legislative business had taken hold.

Modi’s repeated re-promulgation of the land acquisition ordinance is rooted in this history. But while previous governments were careful to mouth appropriate excuse—that parliament was too busy to deal with the ordinances in question—the Modi government has spoken of the need to “ensure continuity” in legislation applying to farmers whose land has been acquired. This argument is not backed by Bhagwati’s judgement, and has no legal basis. The government itself seems to have given up on it, with most reports suggesting that it will back down on its proposed changes to the original land acquisition law.

Meanwhile, petitions alleging that the Modi government has improperly re-promulgated the land acquisition ordinance—one filed by the Delhi Grameen Samaj in April, and another by the Bharatiya Kisan Union in July—are pending before the Supreme Court. Judges must squarely confront two simple questions. First, is re-promulgation unconstitutional? We know it is: the Supreme Court has said so. Second, is it always unconstitutional? Currently, it isn’t. But it should be.

Ordinances are inherently problematic: they turn the whims of a handful of individuals into laws that a billion people must bow to. Re-promulgations are considerably more dubious: they impose such whims on the country for far longer periods than envisioned by the constitution. More alarmingly, they render parliament irrelevant. Why have a legislature at all if a small group of ministers can make laws by themselves, and keep them in place indefinitely? Re-promulgation must end, by law and in practice.