Riding on the ordinance highway: Why the Supreme Court should step in

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The Modi government has repromulgated the 2014 land bill ordinance for a second time.

President Pranab Mukherjee signed the ordinance into law on June 1. Without this, the ordinance would have lapsed on June 3.

Article 123 of the Indian Constitution authorises the President to promulgate ordinances if at least one house of Parliament is not in session.

Such ordinances are temporary. To become permanent, they must be ratified by Parliament. The Modi government has tried to get around this limitation by repromulgating the land ordinance twice. To be fair, this government isn’t the first to do so. At the Centre, governments led by P V Narasimha Rao, H D Deve Gowda, IK Gujral, Atal Bihari Vajpayee and Manmohan Singh have all done it.

However, the Delhi-based Grameen Samaj has challenged the repromulgation of the land ordinance in the Supreme Court.

The matter will come up for hearing soon.

Justices JS Kehar and SA Bobde will hear the attorney general to decide if the plea should be admitted. And this gives us an opportunity to think through the issue that will likely come up for consideration: Is repromulgation lawful?

To repromulgate is to artificially breathe life into an ordinance that should have died; it is an affront to the legislative process. The power to repromulgate renders Parliament irrelevant; it makes the executive the permanent lawmaker. Why bother with Parliament if the Cabinet can make law by itself?

For these reasons, the Supreme Court in the DC Wadhwa case (1986) declared repromulgation an unconstitutional practice.

However, it isn’t always unconstitutional. In DC Wadhwa, the court sliced out an exception. Repromulgation is permissible, the court held, if the legislature is too busy with other work to take up the ordinance for consideration or time at its disposal is too short.

The exception was ill-conceived and, indeed, unnecessary. And ordinance-related data incontrovertibly shows that it has impoverished our parliamentary system.

The number of repromulgated ordinances has increased after the decision, especially at the Centre; governments have found it all too useful. Unheard of until 1992, repromulgation became the norm in the last two decades.
But as with the land ordinance, governments repromulgated usually because they were unable to convert ordinances into ratified acts.

Busy Parliament was just an alibi; in fact, parliamentary functioning has worsened since the early 1990s. The increase in the number of repromulgated ordinances is an unfortunate legacy of the *DC Wadhwa* verdict.

All this is ironic, especially because the Supreme Court concluded its decision with a plea.

*We hope and trust that (repromulgation) shall not be continued in the future and that whenever an ordinance is made and the government wishes to continue the provisions… a bill will be brought before the legislature for enacting those provisions into an act.'*

Otherwise, there shall be ‘Ordinance raj in the country’, the SC had warned.

Unfortunately, governments never heeded the warning.

Two things should happen now that a petition is pending before the Supreme Court. First, judges must admit the matter. The constitutional question is too important; it demands a full hearing. They must also promptly place it before the Chief Justice of India because a bench of six or more judges should hear the matter. Note that *DC Wadhwa* was decided by five judges. The SC, as I have explained, left open a sliver of exception. That must be reconsidered. But only six or more judges sitting together may do so.

Second, *DC Wadhwa* was inordinately delayed. The petitioner approached the Supreme Court in January 1984. He wasn’t heard until November 19, 1986. Chief Justice PN Bhagwati finally delivered the verdict a month later; it was his last day in office. The delay was roundly criticised, but never explained. A similar fate shouldn’t befall Delhi Grameen Samaj.

When Grameen Samaj initiated a petition, the court had scheduled the next hearing for early July.

But hearings, Judges Kehar and Bobde clarified, would commence only if the ordinance didn’t become an act of Parliament by then.

Clearly, the court favoured a parliamentary resolution -- something that hasn’t materialised yet.

Repromulgated for a second time on May 31, the land ordinance, it is clear, won’t become an act soon; the Congress-led opposition is firmly against it.

Now the court must hear the petition without quarrying for new excuses.

Importantly, even if the ordinance were to become an act, that is no reason to dismiss the matter. Was the Modi government wrong to repromulgate the ordinance? Did it succeed in converting the ordinance into an act? These are altogether separate questions; the latter has no bearing on the former.
The Delhi Grameen Samaj alleges that the Modi government resorted to repromulgation simply because the votes didn’t add up in the Upper House; there was no legislative urgency.

And this, they say, is a fraud on the legislative process. Notice carefully the alleged wrong: It is the repromulgation of an ordinance which happened in April, and again in May. This wrong, if it is one, cannot be righted simply by converting the land ordinance into an act.

Repromulgation is a perennial malaise; and judges must clarify -- indeed, revisit -- the rules that govern this practice. They must do so even if the land ordinance becomes an act before hearings conclude.

To refuse to hear the petition would be to encourage, once again, the very practice that is under challenge.

The Supreme Court shouldn’t do so.