Constitutionally Hazardous Ordinances in Pakistan and India

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The Constitutionally Hazardous Practice of Ordinances


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With its furtive origins, the recently promulgated National Accountability Bureau Ordinance (NABO) caused an uproar. Who drafted it? Was the Prime Minister (and the Cabinet) in the know of it? Who authorized it? Why? These are important questions. And they remain largely unanswered. But the controversy has at least turned the spotlight on a chronic, if questionable, practice in South Asia.

Article 89 in Pakistan’s Constitution legitimates ordinances, Article 123 is its counterpart in India. Their use, in both jurisdictions, is endemic. About 67 ordinances were promulgated in India between 2000 and 2009, substantially lower than the 196 ordinances promulgated between 1990 and 1999.

Comparable figures for Pakistan are not easily available. By one count, more than 380 ordinances were in effect between 2000 and 2007, thanks to repeated parliamentary interruptions during General Musharraf’s regime. NABO is the eighteenth this year, 17 others were issued prior to it.

Ordinances are constitutional, but also hazardous. Three things make them so. First, ordinances have a non-deliberative character: They may be promulgated except when Houses of Parliament are in session. Second, they potentially privilege arbitrary satisfaction: The President must be “satisfied” that circumstances exist that renders immediate action necessary. Lastly, ordinances have a transient character: Unless formally enacted into law, they cease to operate after a specified duration.

Ordinances raise challenging questions of constitutional law. And three are particularly noteworthy.

First, satisfaction. Ordinances are premised on presidential satisfaction, which in the South Asian parliamentary context generally implies the Cabinet led by the Prime Minister. That is to say the Prime Minister (and the Cabinet) must be satisfied that circumstances exist that make it necessary for them to take immediate action.

However, do courts have the power to review such satisfaction? That is, do courts have the power to set aside an ordinance on the ground that the Cabinet wrongly came to the conclusion that immediate action was necessary? Or, do courts have the power to invalidate an ordinance on the ground that the Government acted with improper motives in promulgating it?
Consider the circumstances of NABO. According to the Law & Parliamentary Affairs Minister Babar Awan, President Zardari signed the Ordinance into law on Sept. 8, and the same was published in the Gazette on Sept. 16. Less than a week later, on Sept. 20, both Houses of Parliament were notified into session.

These facts are not unique. In October 2001, the Vajpayee-led NDA Government promulgated the controversial Prevention of Terrorism Ordinance (POTO) into effect. And as with NABO, POTO came into effect in India weeks before the winter session of Parliament was notified.

Both situations raise doubts about the necessity for immediate action. Given the proximity to proper parliamentary sessions, was immediate action through ordinances “truly” necessary? Or, do they betray malafide intentions on the part of the Government?

With NABO, that is Senator Zafar Ali Shah’s claim: Authorizing an ordinance days before convening a session of Parliament exposes the Government’s motive. As for POTO, then Home Minister L. K. Advani admitted that the ordinance was, in part, motivated by the absence of a majority support in Parliament. The power to issue ordinances is a remarkable one; it includes the power to compel obedience to laws that may not enjoy requisite parliamentary support.

But do courts have the power to review presidential satisfaction? The Supreme Court in India has repeatedly said no. The content of an ordinance, not its motive, determines its validity. For the Court, the relevant question is what, not why. Provisions of an ordinance may be unconstitutional; Pakistan’s Supreme Court, for example, earlier declared provisions of the NRO relating to presidential pardon unconstitutional. But it is not open for courts, India’s Supreme Court says, to invalidate an ordinance on the ground that immediate action was not necessary, or that it was improperly motivated. It remains to be seen if courts in Pakistan will adopt similar standards of review.

Also, questions of tenure and transience are important. For what duration is an ordinance valid? In India, under Article 123, an ordinance expires 6 weeks from the date of reassembly of Parliament, unless disapproved earlier. Pakistan’s Article 89 extends the tenure of an ordinance to 120 days, unless disapproved earlier. Changes introduced by the 18th Amendment now permit the National Assembly to extend an ordinance for a further period of 120 days. This is surely a regressive step; it lends credibility to governance by fiats.

However, can a failed ordinance be re-promulgated? Between 1967 and 1981, the State of Bihar promulgated 256 Ordinances, keeping them “alive” for periods ranging between one and 14 years. The authorities re-promulgated the ordinances strategically ensuring that they did not outlive their prescribed tenure.

In 1989, the Supreme Court in D. C. Wadhwa invalidated the practice. To re-promulgate is to usurp ordinary legislative procedures. And so, it may be done on very limited grounds; if the Legislature, for example, has too much legislative business, or time at its disposal is short. Five years later, in 1994, Pakistan’s Supreme Court in Collector of Customs, Karachi, on similar reasoning, also invalidated re-promulgation.

The 18th Amendment, it may be argued, undoes a part of Collector of Customs, Karachi. While extending the tenure of ordinances, the amendment in Article 89 specifies that such extension may be for a “further period may be made only once.” In other words, re-promulgation is now allowed, but only once. It is worth nothing that an amendment along similar lines has been proposed in India too.
Finally, transience. What if an ordinance fails? Consider the case of a hypothetical tax ordinance. An ordinance imposing a 5% “education surcharge” is promulgated; it applies to persons beyond a certain income level. In Pakistan, such an ordinance can remain in effect, presumably, for no more than 240 days. What happens if the ordinance, at the end of that period, is not enacted into law? Are people entitled to a refund?

To say that an ordinance has failed, in Pakistan, is to say that it has been “repealed.” Repeal, in law, carries with it an air of legality: When a law is “repealed,” all past transactions are generally deemed valid. So even if the ordinance fails, there would be no refund. All surcharges imposed during its tenure of 240 days remain valid.

While Article 123 in India does not mention “repeal,” courts have nonetheless adopted a similar interpretation. Therefore, a failed ordinance, for the government, is still a success. For that reason too, ordinances are remarkable. They are transient, but with permanent effects.

This aspect of ordinances is especially worth looking into. Both in Pakistan and India, ordinances are a “no cost, high reward” proposition. Because they come with no legal cost so to say, ordinances are a convenient alternative. A legal requirement to undo all completed transactions under a failed ordinance will do much to promote responsible governance while dramatically decreasing the number of ordinances to begin with.

A classic case of governance by fiat, ordinances undermine our (already limited) character of representative methods. Put in place to tide over genuine cases of legislative emergency, they now operate as a parallel legislative procedure. According to a Nation report, a petition challenging NABO has already reached the Supreme Court. Irrespective of the constitutionality of NABO, it may be an opportunity for the Supreme Court to revisit some of the excesses of ordinances in Pakistan.

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