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AN UNSCRUPULOUS MEANS FOR BYPASSING LEGISLATIVE SCRUTINY?

BY- ANANYA AGRAWAL

National University of Juridical Sciences (NUJS), Kolkata

In the backdrop of the *Budget Session*, of Parliament, with the freshly elected BJP government trying to push 10 ordinances into laws, one begins to witness the scenario with '*political emergencies*'.[1] The *Companies (Amendment) Ordinance, 2019* was recently converted into a bill by the government, withholding one provision for further review.[2] The withheld provision was to criminalise non-compliance of *Corporate Social Responsibility* (**'CSR'**), attracting a jail term of up to 3 years for the defaulting company's officials.[3] Despite strong corporate backlash, the government held the view that criminalising corporations will lead to greater deterrence, as compared to civil sanctions.[4] In due time, post deliberation at the center, the *Ministry of Corporate Affairs* decided not to criminalise CSR provisions.[5] This accentuates how the ordinance route bypasses the legislative scrutiny, giving those at the helm of affairs a free hand to impose as per their whims and fancies.

This paper has given an overview of how ordinances have come to be developed overtime. The critical evaluation shows various political ideologies that have used ordinances to escape scrutiny. Further, it delves into the mechanism of *Judicial Review* as a way to plug the

[1] New bills introduced in Budget Session 2019 of Parliament, PRS http://www.prsindia.org/sessiontrack/bill-legislation/842097, last accessed on 25/08/19.

[2] The Companies (Amendment) Act, 2019.

[3] The Economic Times, *Companies to face penal action for not meeting csr rules*, available at: 'https://economictimes.indiatimes.com/news/company/corporate-trends/companies-to-face-penal-action-for-not-meeting-csr-rules/articleshow/70471926.cms?from=mdr, last accessed on: 20/08/19.

[4] Ananya Agrawal, *Corporate Social Responsibility: An imposition or volition*, Journal of Indian Law and Society (JILS), available at https://jilsblognujs.wordpress.com/2019/08/31/corporate-social-responsibility-a-volition-or-an-imposition/, last accessed: 31/08/19.

[5] *Government not to treat CSR violations as criminal offence*, Hindu Businessline, available at https://www.thehindubusinessline.com/economy/govt-not-to-treat-csr-violations-as-criminal-offence-nirmala-sitharaman/article29234104.ece, last accessed 2/09/19.

loopholes. With the comparison between *Judicial Review* of various international jurisdictions, examining what fits best in the Indian scenario. Next, the paper criticizes the *Triple Talaq Ordinance* promulgated; evaluating the shift from ordinance to enacting legislation. The conclusion highlights the importance of use of ordinances as was intended by our constituent assembly, who did not anticipate such misuse of the power.

Ordinances; or as Shubhankar Dam calls them, '*Legislative Surrogacies*'[6] can be promulgated by the President of India under *Article 123 of the Constitution of India* ('**COI**')[7] or the governor of a state under *Article 213 of the COI*.[8] What was supposedly a red button in the Constitution, only to be used in times of '*grave emergency*' for matters which require urgent legislation in the absence of a sitting house of parliament, has been exploited to bypass legislative scrutiny. Two of the biggest national bodies in India were set up by the way of ordinance, i.e the *National Human Rights Commission* ('***NHRC***')[9] and *SEBI*.[10] Keeping in mind that an ordinance is a tool to be used when extensive deliberations cannot be made on a particular point of contention, the government failed to explain the need of setting up these bodies by this '*parallel legislative*' way.[11] NHRC was hailed as a national milestone since it was in coherence with International obligations adopted later that year.[12] One can clearly infer the intent behind passing the hasty ordinance was merely to further the ruling party's political agenda. A practice which young India has seen since inception.

Dam highlights the irony of how ordinances are accepted in every political domain, regardless of the ruling party in power.[13] The United Front- a coalition government, two prime ministers, i.e. *Mr. H.D. Deve Gowda* and *Mr. Inder K. Gujral* which claimed to be the non-BJP and non-Congress space in India, gave India 46 ordinances.[14] These were issued in the matter of roughly two years (June, 1996 to March, 1998).[15] India's first Prime Minister, *Mr. Jawaharlal Nehru*

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[6] SHUBHANKAR DAM, PRESIDENTIAL LEGISLATION IN INDIA (2014).
[7] §123, The Constitution of India, 1950.
[8] §213, The Constitution of India.
[9] *NHRC*, SAC accreditation available here, http://nhrc.nic.in/about-us/sca-accreditation.
[10] *SEBI,* available here https://www.sebi.gov.in/index.html.
[11] Anon, 'Human Rights Body to be Set Up', Time of India, 30 September, 1993.
[12] The Paris Principles, Adopted by the General Assembly resolution 48/134 of 20/12/1993,United Nations Human Rights, available at, https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx, last seen 25/07/19.
[13] DAM, *Supra* note 6.
[14] Id. at Pg. 7.
[15] Id.

of the Congress cleared some 70 ordinances from 1952 to 1964, leaving his daughter, *Mrs. Indira Gandhi* to clear about 77 later during 1971-77.[16] The current NDA government, led by *Mr. Narendra Modi*, is not much behind their UPA regime counter-parts.[17] This highlights that no matter what ideology is in power, governments will find a legislative loophole to escape scrutiny.

JUDICIAL REVIEW: PLUG THE LOOPHOLE?

Over and above this, the *Supreme Court of India* has had a lax attitude towards interpreting the COI for matters related to ordinances. To satisfy the demands of *Article 123,* COI; one, neither of the houses is in session, two, the President is satisfied with some legislative emergency and three, that immediate action is necessary.[18] In the parliamentary form of government which India follows, the President has meager ceremonial powers. He is merely a signing authority on blank papers given to him by the council of ministers. This means that each ordinance is the brainchild of the ruling party. Therefore, if one suggests *judicial review* of ordinances as a method to plug this loophole, they will fail on multiple grounds. If one argues that most ordinances are made with a *malafide intention*, a way of political parties to further their agenda, the court will have to declare unconstitutionality on grounds of '*irrelevant parliamentary motives*'. Now, it has already been clarified in *State of AP v. McDowell & Co.*,[19] that the two grounds to invalidate any legislation by the courts are; lack of legislative competence or violation of *Fundamental Rights*.[20] This does not include analysing the motive behind each legislation.[21] Legal luminaries like *Lord Atkinson* have held a similar view of the parliament being competent enough to mend their own mistakes, it does not need judicial intervention.[22] An adaptation of the English law, the Indian judiciary follows the same pattern.

[16] B Muralidhar Reddy, *Modi govt. passes 22nd ordinance, still short of the UPA numb*er, The Hindu, available at https://www.thehindu.com/news/national/Modi-govt.-passes-22nd-Ordinance-still-short-of-UPA-number/article14596574.ece, last accessed 31/08/19.

[17] *NDA takes the ordinance route, narendra modi regime outstrips upas pace but lags behind Nehru and Indira*, Firstpost, available at https://www.firstpost.com/india/nda-takes-the-ordinance-route-narendra-modi-regime-outstrips-upas-pace-but-lags-behind-nehru-indira-5223831.html, last accessed 31/08/19.

[18] §123, *Supra* note 6.

[19] AIR 1996 SC 1627.

[20] Id., Pg. 45.

[21] *Deo v. State of Orissa* [1954] 1 SCR 1 [9].

[22] *Hollinshead v. Hazleton* [1916] 1 A.C. 428.

However, contrast to the Indian and English position on the subject, the American jurisprudence supports assessing constitutionality of legislations on the basis of motive of the legislature.[23] They consider the sequence of events which lead up to the proposed legislation giving the judiciary a clear idea as to what the administrative history is with regards to the point in contention.[24] Although, legislative motive is an acceptable basis to invalidate legislation, this system of judicial review is also not free of encumbrances.[25] There is no guarantee that a statute can be successfully challenged on grounds of impermissible motives.[26] India could consider switching to the American style of judicial review, which would bring assessing constitutionality of ordinances on the basis of legislative intent. One, it would have to specifically be to review ordinances, otherwise inadvertently leading to many technical glitches and destruction of the larger distribution of power between legislature and judiciary. This hampers the symphony between the legislature and judiciary, risking an imbalance of separation of powers, ultimately leading to collapse of the democracy. The major irony here is; promulgating controversial ordinances as the preferred legislative route, will indefinitely lead to the break down of democracy. To avoid such a situation, shifting to the American jurisprudence to judicially scrutinize motives behind ordinances will ultimately aid the working of a democracy.

CRITIQUE OF THE TRIPLE TALAQ ORDINANCE

Speaking of criticizing controversial ordinances, the *Muslim Women (Protection of Rights on Marriage) Ordinance, 2018* (‘**Triple Talaq Ordinance**’)[27] was hastily passed post the Supreme Court ruling in the *Shayara Bano* case.[28] The government’s knee jerk reaction was completely uncalled for; there being no real statistics to say there was rampant increase in the number of ‘*talaq*’ cases.[29] Due to the scurry and scuttle, the ordinance promulgated was filled with fallacies.

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[23] *Village of Arlington Heights v Metropolitan Housing Development Corporation* 429 U.S. 252 (1977).
[24] Id.
[25] Shubhankar Dam, Making Motives Count: Judicial Review of Ordinances in India (June 11, 2011). Statute Law Review, Vol. 33, No. 2, 2012. Available at SSRN: https://ssrn.com/abstract=1862531.
[26] Id.
[27] *Muslim Women (Protection of Rights on Marriage) Ordinance, 2018.*
[28] *Shayara Bano v. Union of India & Ors*. (2017) 9 SCC 1.
[29] Ejaz Makbool and Akriti Chaubey, *Triple Talaq ordinance 2018, a classic case of haste makes waste*, available at https://barandbench.com/triple-talaq-ordinance-2018-a-classic-case-of-haste-makes-waste/, last accessed on 31/08/19.

Keeping aside the socio-economic compromises this legislation makes, when they completely ignore the taboos which follow in the Indian Muslim society, specifically. This legislation solicited criminalising a personal law, one of divorce. The legislature intent behind this was to cause deterrence against this barbaric law, but they missed taking in consideration significant points. Firstly, this practice is usually abundant in the economically weaker section of the Muslim population wherein women are not given the independence to proceed against their own husbands, or ex-husbands in this case. This legislation takes away the possibility of any re-conciliation possible in the first place. Secondly, the prescribed punishment of 3 years imprisonment[30] is far more excessive than much graver crimes like *Rioting* (2 Years imprisonment),[31] causing *Death by Negligence* (2 Years imprisonment),[32] to name a few. It is also arbitrary in nature.

At first instance, one would say that since there was no parliamentary deliberation on the matter, the matter is bound to go south. In the *triple talaq* matter, we witness the *Triple Talaq Bill*[33] being passed in the parliament in due time also being infected with the same fallacies. Can one really shift the blame on legislative scrutiny, or be bold enough to blame legislative incompetence? The government pushed to convert the ordinance through the parliament at the commencement of the session; only to have it passed with minor changes. Despite a huge media hue and cry, eminent scholars opining on canards in the ordinance, the parliament turned a blind eye. They ignored the fact that the women and their families can rampantly misuse this provision. I strongly agree that *triple talaq* is an antiquated, barbaric practice which had to be torn down, but the focus should also boil down to the ground level situation prevalent.

This puts Indian democracy in a peril. How does one put checks and balances on spoilt legislative interests? It is important to mention here that there are unpretentious situations where the ordinance route has to be taken. Take the demonetization of 2016, where the central government refused to honour old 500 rupees and 1000 rupees notes.[34] This step was crucial, to remove the excessive corruption and black money which had plagued the society. Not

[30] §4, The Muslim Women (Protection of Rights on Marriage) Bill, 2019 (Triple Talaq Bill).
[31] §147, The Indian Penal Code, 1860.
[32] §304-A, The Indian Penal Code, 1860.
[33] The Muslim Women (Protection of Rights on Marriage) Bill, 2019 (*Triple Talaq Bill*).
[34] S. O. 3407 (E), Gazette of India, Ministry of Finance, November 8, 2016, http://finmin.nic.in/172521.pdf.

getting into the debate as to what was the intermediate outcome of this ordinance but just to highlight that this step couldn't have been taken without the ordinance route.

To conclude, it is humbly submitted that India needs a stronger framework in place to review ordinances. This could be done by using the American *judicial review* system of checking legislative intent along with adequate authority. Further, we are living in a dynamic society which forces the law to update itself. A revolution has come in the thinking of our legislature, making it crucial to gap the bridge between social and legal norms.