FRAUD ON THE CONSTITUTION AS A LIMITATION TO GOVERNMENTAL ACTIONS

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INTRODUCTION

In India, the fountainhead power, Constitution has assigned its sovereign power among the three pillars; the Legislature – to make and change law, the executive – to implement the law and the judiciary – to uphold the law. But the Indian Constitution does not provide the watertight separation of powers as envisaged under American or Australian Constitution[1]. Overlapping of functions is prevalent here. The judiciary and the executive can also make laws in India. The Supreme Court and the High Courts can make new laws through their judgements and Article 141 of the Constitution also states that "Law declared by Supreme Court to be binding on all courts"[2]. Likewise, the Constitution as per Article 123 and 213 empowers the President and the State Governors respectively to legislate through promulgation of ordinances under exceptional circumstances requiring immediate actions when the legislative bodies are not in session. They execute these functions on the advices given by the council of ministers. However, the Indian Constitution had made an effort to shield the powers of each organ against encroachment which makes it requisite to place the ordinance before the legislative bodies during session and restricts the life of the ordinance by only six weeks from the reassemble of the session or its disapproval from the legislative bodies or its withdrawal by the President or by the Governor whichever earlier.

But when the executive usurps power by circumventing the legislature through re-promulgation of ordinance it would be a fraud on the Constitution. The question, thus, definitely arises why the government through the executives does so and how it limits the governmental actions? In this context, the researcher in the present project tries to explore answers to these questions while examining following hypotheses:

1 Bani Mahajan, Doctrine of Separation of Powers, Lawctopus, December 7, 2014, available at https://www.lawctopus.com/academike/doctrine-of-separation-of-powers/ Retrieved on September 20, 2017.
2 The Constitution of India, Article 141.

1. If there is re-promulgation of Ordinance then it is a fraud on the Constitution.
2. If there are exceptional circumstances then re-promulgation of Ordinance is done.
3. If there is a weak or coalition government then re-promulgation of Ordinance is done to overcome limitation to governmental actions.

REPROMULGATION OF ORDINANCE IS A FRAUD ON THE CONSTITUTION

As mentioned earlier that when the President or the Governor is satisfied that the present situation is exceptional and there is an urgent need for promulgation of immediate law, the ordinance is passed. Keeping this in view the six-week life period from the date of calling in of the session has been fixed by the Constitution. But in so many cases it has been observed that the ordinances were not indispensable but passed bypassing the legislative body. The matter is more serious when the executive adopts the method of repeated promulgation of the ordinance without laying it before the voice of the legislature as it amounts to direct usurpation of law making capacity of the legislatures by the executives. The executive taking recourse to an emergency power (when legislative body is not in business) cannot assume the law-making function of the legislature. In D C Wadhwa v State of Bihar (1986) case[3] the Bihar Sugarcane (Regulation of Supply and Purchase) ordinance was kept alive for long fourteen years through re-promulgation again and again. The Supreme Court ruled that it is unconstitutional to re-promulgate ordinances except under extraordinary situation. It was also held that what is not allowed directly cannot be done indirectly. "If there is a constitutional provision inhibiting the constitutional authority from doing an Act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision".[4] In the recent Krishna Kumar v State of Bihar (2017) case[5] the ordinance was re-promulgated for several times from 1989 to 1992 for having control over the management of Sanskrit schools. A seven-judge Constitution bench, having majority of 6:1, held that re-promulgation is not permissible by the Constitution as it is a failure of the constitutional system which has provided a limited capacity to make ordinances by the President and the Governors. Justice Dr Chandrachud, who penned the majority verdict on behalf of four other Justices, said

3 Dr. D.C. Wadhwa & Ors vs State of Bihar & Ors on 20 December, (1986), 1987 AIR 579, 1987 SCR (1) 798.
4 *Ibid.*
5 Krishna Kumar Singh V. State of Bihar 2017 (1) Supreme 620.

that "Re-promulgation of ordinances is a fraud on the Constitution and a sub-version of democratic legislative processes".[6]

However, a fraud on the Constitution does not always suggest that there was a *mala fide* intention. An activity of the executive which is evidently outside the purview of the constitutional authority entrusted to him is quashed as *ultra vires.* Even if the transgression by the executive is "covert or latent, the said action is struck down as being a fraud on the relevant constitutional power".[7] In this context, the courts generally judge the element of the material and not the form. Therefore, the action of the executive is meticulously examined to ascertain whether constitutional power is transgressed and if so the challenged action is expunged as a fraud on the Constitution.

REPROMULGATION OF ORDINANCE IS DONE IN EXCEPTIONAL CIRCUMSTANCES

Though Wadhwa decision[8] was against the general government practice it has also appeared as a relief to the government. It clearly stated that government may re-promulgate the ordinance when it is unable "to introduce and push through" to transform a bill into an ordinance due to too many legislative issues and limited session period. This paved the way to march forward with the governmental decisions through the repeated proclamation of ordinances. It is evident in the case of Gyanendra Kumar v Union of India (1997)[9] where it was held that the government's action to re-promulgate 10 ordinances was very well within the purview and limit of the exception mentioned by the Supreme Court in the Wadhwa case.[10] In Balasaheb v State of Maharashtra (2004) case[11] it was ruled that re-promulgation of ordinances "do not suffer from any illegality or infirmity" due to short session period.

6 *Ibid.*
7 M R Balaji v State of Mysore (1962), 1963 AIR 649, 1962 SCR Supl. (1) 439.
8 *See supra* note 3.
9 Gyanendra Kumar v Union of India (1996), AIR 1997 Delhi 58.
10 *See supra* note 3.
11 Balasaheb v State of Maharashtra (2004), available at https://indiankanoon.org/doc/259841/ Retrieved on September 22, 2017.

REPROMULGATION OF ORDINANCE IS DONE BY THE WEAK OR COALITION GOVERNMENT TO OVERCOME LIMITATION TO GOVERNMENTAL ACTIONS

In the majority non-coalition government period of 1952 to 1991, no re-promulgation of ordinances was observed in the Centre. However, the central government started the re-promulgation practice since 1993 when the minority Narasimha Rao government adopted the route of re-promulgation to keep a batch of seven ordinances alive. Thereafter almost every government in the center excepting the thirteen-day Vajpayee government has embraced the practice of re-promulgation. After Rao, the minority coalition governments led by Deve Gowda, I K Gujral, A B Vajpayee all resorted to re-promulgation system.[12] Even though a majority government, the present sixteenth Lok Sabha period has observed so many re-promulgations of ordinances because of its shortage of members in the Rajya Sabha (a weak government in this sense). The bills like insurance bill, land acquisition bill, the mines bill, the coal bill, the citizenship amendment bill etc., all faced the problem of parliamentary deadlock. In order to overcome this hurdle and to send a message to the investors, the political oppositions and the people that the government is committed to the reforms leading to the economic development and growth of the country. The constraints blocking governmental actions were thus defeated.

DISCUSSION

From the above test of hypotheses through review of court cases and governmental actions it is revealed that though there were no wonderful logic behind promulgation of ordinances but time and again it was introduced to overcome institutional inertia, declining standard of the legislative efficiency, growth of coalition government, and above all reluctance and ineptness of the political players to build up working majorities and promotion of consensus. India's legislative practice is more a compromised one. Oppositions in many cases either oppose for the sake of opposing without giving weightage to necessity or beneficial effects of the bills or do not perform adequate homework to provide fruitful suggestions. It is also the responsibility of the legislature to become proactive to keep control on executive overriding. They can move for disapproving an ordinance if it is undemocratic. The President or the Governors of the

12 S Dam, *Re-promulgation game*, The Hindu, January 3, 2015, available at www.thehindu.com/opinion/columns/legal-eye...repromulgation/article7275518.ece Retrieved on September 22, 2017.

States as the case may be should be more vigilant to make themselves satisfied as per Articles 123 and 213. But the usual action falls short of such practices. Therefore, government takes the shortcut routes of re-promulgation of ordinances and adopts the risk of welcoming judicial intervention which frequently limits governmental actions.

CONCLUSION

The foregoing discussion clearly guides me to conclude that repeated promulgation of ordinances leading to fraud on the Constitution definitely hinders the government activities but in many cases, the situation demands re-proclamation of ordinances. In order to overcome such situation and to ensure fair practices, the legislatures should be more vigil, the government should be more tactful, dutiful and committed. Furthermore, President and Governors of the States should be more responsible and most importantly measures should be taken to make need for the ordinance irreverent like the sessions should be continued throughout the year, scrapping of Article 74(2) of the Constitution, and regular logical judicial intervention.