



Journal of the  
INDIAN LAW INSTITUTE

REPRINT

# NOTES AND COMMENTS

## EXECUTIVE'S LAW MAKING : LESSON FROM EAST INDIA COMPANY

### I Speakers' admonitions

THE SPEAKER of the *Lok Sabha* cannot control the promulgation of ordinances by the executive. Yet, Speaker after Speaker in the last thirty-six years has been denouncing in very strong terms the promulgation of ordinances as a matter of routine. Their argument has been that the promulgation of an ordinance commits the House to a particular legislation in advance because once it is promulgated and acted upon, the House, when it meets after its promulgation, is confronted with a *fait accompli* and has no option but to put its seal of approval on the matter that has been legislated upon by the ordinance. Theoretically, the House can disapprove of an ordinance by its resolution after it has been laid on the table or reject the bill containing the provisions of that ordinance when it is brought before it for consideration. But in practice it has never happened because the ruling party has always a majority in the House and uses its Whip on such occasions. The letters written by G.V. Mavalankar, Speaker of the first *Lok Sabha*, to Jawaharlal Nehru, the first Prime Minister of the Republic of India, strongly disapproved the frequent promulgation of ordinances when no extreme urgency or emergency was involved to justify such promulgation. Further, there were also very critical observations made by him in the *Lok Sabha* from time to time on this issue, describing these promulgations as inherently undemocratic, unhealthy, not conducive to the development of the best parliamentary traditions, etc. They are being referred to and quoted again and again in both the Houses of Parliament and outside. Recently, the Speaker of the Kerala Legislative Assembly, V.M. Sudheeran, made a scathing attack on the Government of Kerala for abusing its ordinance-making power. On September 18 1985 he gave a sharp and elaborate ruling on the subject in the assembly in which, after pointing out the abnormal promulgation and re-promulgation of the same ordinances for several times, he observed that it was an extremely unhealthy tendency to convert the provision for the promulgation of ordinances to be used in exceptional and extreme circumstances into a permanent style of legislative business. This approach would, in effect, deprive the legislature's rights and opportunities to make legislation. On no account can it be afforded that the legislature be made a rubber stamp.<sup>1</sup>

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1. The phrase "rubber-stamp" was first used by Mavalankar in his letter dated 17 July 1954, to Jawaharlal Nehru, in which he had warned the Prime Minister about the grave consequences of the promulgation of ordinances if the practice was not limited by conventions to only extreme and very urgent cases.

Sudheeran concluded his above-mentioned about 1100-words ruling with the hope that the government would take these aspects into serious consideration. It has been reported that the Government of Kerala went blue with rage over this ruling which has dealt a body blow to it and has assumed the overtones of a confrontation between the Speaker and the executive with the result that a covert move is afoot to remove Sudheeran from the speakership.

## II Executive's defence

The executive so far, while admitting that normally it is not desirable to promulgate ordinances, has been defending its action on the plea of compelling circumstances. But now the cat is out of the bag. The Chief Minister of Kerala, K. Karunakaran, states :<sup>2</sup>

[W]e issue Ordinances not to usurp more powers but to do good to the people. The Assembly does not meet every month. It meets only twice or thrice in the year when we pass a few bills. How can we help promulgating Ordinances at other times? You cannot find fault with any one for this....

He is reported to have made these observations in a press interview at Delhi on September 30, 1985.

## III Legislature not a factory

It is true that the legislature does not meet every month. In fact, it cannot so meet. Even if it can do so, it is not necessary for it to meet every month. Nowhere in the world does a legislature meet every month because no government worth the name can say that it needs new laws every month to run the administration. A legislature is not a factory which must go on manufacturing laws continuously by working in shifts—the legislators making laws in the first shift when the legislature is in session and the executive making laws in the second when the legislature is in recess.

## IV Executive and legislative powers

As new laws are not required every month, even though the legislatures of other democratic countries do not meet every month, the power to make laws by the executive during the recess of the legislature is usually not found in the constitutions of those countries. The Constitution of India, however, empowers the executive to make temporary laws (ordinances) during the recess of the legislature. But an ordinance can be promulgated only when an urgent situation has arisen which cannot be dealt with by the existing law and requires immediate enactment of a new law that cannot be delayed till the legislature reassembles.

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2. *Malayala Manorama*, 1 October 1985 (Kottayam ed.).

This does not mean that the executive can make laws as a matter of routine. Such routine action doubly violates the constitutional scheme. On the one hand, the executive comes to exercise the functions of the legislature in a manner not contemplated in the Constitution. On the other, the legislature, which is the repository of the legislative power of the state under the provisions of the Constitution, is thereby prevented from exercising its legislative functions. It is unthinkable that one limb of the legislative organ should, as a routine, function in the capacity of the legislature, thereby destroying the democratic element of the organ. Secondly, extraordinary legislative power of the executive cannot be converted into an ordinary one so as to supplant the normal legislative process. Edward Gibbon, observes "The principles of a free constitution, are irrecoverably lost when the legislative power is nominated by the executive".<sup>3</sup> In the case of promulgation and re-promulgation of ordinances as a matter of routine the legislative power is not nominated by the executive but is exercised by it which is even worse.

#### V Sessions of the legislature

As regards the observation of the chief minister that the assembly meets only twice or thrice in a year when only a few bills are passed, it is submitted that there is no upper limit laid down in the Constitution for the number of times a legislature can meet or the duration of its different sessions. In fact, B.R. Ambedkar, Chairman of the Drafting Committee, had expressed his belief in the Constituent Assembly that owing to the exigencies of parliamentary business there will be more frequent sessions of the legislature than the minimum two prescribed in the Constitution.<sup>4</sup> So the Government of Kerala can certainly convene more frequent sessions of the legislature, of longer duration, if it has more legislative business to accomplish. Not to speak of convening more frequent sessions of the legislature, of longer duration, to make new laws, the Kerala Legislative Assembly which had re-assembled on 3 September 1985, solely for legislative business (the Speaker of the Assembly had even cancelled his programme to attend the Commonwealth Parliamentary Conference in Canada for this purpose) and mainly to convert the then existing ordinances into Acts, was prorogued on 26 September 1985, after it had converted only seven out of the 32 ordinances in force in the state at that time. Of these 32 ordinances, 13 had been promulgated after obtaining the prior approval of the President of India for their promulgation. It may be pointed out here that most of these 32 ordinances were not new ones. They had been re-promulgated earlier several times: one had been re-promulgated nine times; two, eight times; three, seven times; five, six times; two, five times; ten, four times; five, thrice; and two, twice.

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3. *The History of the Decline and Fall of the Roman Empire*, vol. 1, p. 197 (1862).

4. 8 C.A.D. 215 (1949).

Is it not a fact that the session of the assembly was got prorogued not because there was no time with the government but because the government wanted to extricate itself from the embarrassment in which it found itself after the exposure of scandal after scandal in the assembly in which it had enmeshed itself and which dominated the session and caused considerable discomfiture to it? Secondly, the government did not want the assembly to meet for more than 42 days at a stretch because all the ordinances which were not converted into Acts during the session would have lapsed.

As all the 25 ordinances which were not replaced by the Acts of the legislature during this session became liable to expire on 15 October 1985, in accordance with the provisions of the Constitution, they were re-promulgated again before the date of their expiry. Nine of these ordinances which required the prior approval of the President for their re-promulgation were re-promulgated on 12 October 1985, after obtaining that approval and 16 which did not require such approval were re-promulgated on 15 October 1985. In addition to these, four new ordinances also were promulgated after the prorogation of the assembly, two of which were promulgated with the prior approval of the President. Thus, there were 29 ordinances in force in Kerala by the end of October 1985.

### VI Undemocratic philosophy

To say that all this (the promulgation and re-promulgation of ordinances) is done for the good of the people is to insult their intelligence. It is a great blow to the concept of parliamentary democracy, the basic tenet of which is that the people shall be governed by laws made by the legislature, consisting of their elected representatives, in accordance with the provisions of the Constitution and not by laws made by the Council of Ministers in their chambers, by by-passing the legislature. It was by declaring themselves the protectors of the people, that Marius and Caesar had subverted the Constitution of their country. All modern military dictators, without exception, who overthrow the constitutional governments, suspend the constitutions of their countries and assume powers in their hands, proclaim to have done so in the interest of the people. So, in a vibrant democracy, such an argument as advanced by the Chief Minister of Kerala that the promulgation and re-promulgation is done for the public good have led to a major debate in the country because it promotes undemocratic philosophy. It is a very serious statement which should not be ignored or allowed to go unchallenged because by minimising the importance of the legislature as a pillar of democracy it cuts at the very root of parliamentary system. If the executive's ambition to enjoy unbridled legislative power is not nipped in the bud, it will soon degenerate into despotism.

## VII Directions of the Court of Directors of the East India Company regarding law-making in India

In the beginning of the British rule, the territories of India were divided into the Presidencies of Bengal, Bombay and Madras for administrative purposes. As regards the sources of legislation, the Governors-in-Councils of those Presidencies made laws, known as regulations, from 1793 to 1833, for the administration of territories in their respective jurisdictions. In 1833, the Charter Act of 1833<sup>5</sup> was passed which raised the Governor-General of Bengal to the position of the Governor-General of India,<sup>6</sup> withdrew the legislative powers of the Bombay and Madras governments<sup>7</sup> and vested the whole legislative authority, for all the British territories in India, in the Governor-General in Council.<sup>8</sup> There was, thus, established one central legislative authority in place of three councils which had existed before. To the body of the Governor-General's Council was added, for the first time, a fourth ordinary member for legislative purposes.<sup>9</sup> Section 47 of the Act enjoined upon the Court of Directors of the East India Company to make such rules as they deemed expedient for facilitating the Governor-General-in-Council in the discharge and exercise of all powers, functions and duties imposed on or vested in him by virtue of the Act. These rules were to prescribe the modes of making law by him also.

In their despatch<sup>10</sup> accompanying the above mentioned Charter Act, the Court of Directors wrote to the Governor-General of India in great detail about the operation of the new enactment and the manner in which the powers entrusted to the company by the Act could best be exercised for fulfilling the intentions of the British Parliament. After explaining the general intent and object of those portions of the Act which related to the constitution of his government, the Court of Directors proceeded to give the Governor-General such directions in connection with the different subjects as seemed to them more especially requisite.

With reference to section 47 of the Act, they wrote that the first point that occurred to them was the process by which he was to make laws. In this connection they wrote to him that making of laws "may take place in many ways and the means of effecting it are easy of contrivance" but the process by which the law is to be made "is a matter of nicety and to be settled with much thought and care". They further stated :

5. 3 and 4 William 4, c. 85.

6. *Id.*, s. 39.

7. *Id.*, s. 59.

8. *Id.*, s. 43.

9. *Id.*, s. 40.

10. No. 44, dated 10 December 1834 (Home Public Department Consultations, National Archives of India, New Delhi).

[O]n this head, however, it is not necessary nor expedient to set forth the particular steps or formalities by which you are to proceed. We shall, we think, best comply with the intention of the legislature by stating the principles which you should keep in sight in discharging the important duties in question, and which should be embodied in such rules as you may frame for the purpose.<sup>11</sup>

While enumerating the principles with regard to the use of the legislative powers conferred upon the Governor-General by that Act, the Court of Directors wrote to him that "*the first principle is that no law, except one of an occasional kind, or arising out of some pressing emergency, should be passed without having been submitted to mature deliberation and discussion.*"<sup>12</sup>

"Trite as this maxim may appear", they wrote further, "we are of the opinion that it should be distinctly and very carefully acted upon in framing your rules of procedure."<sup>13</sup> After pointing out that in their country "*the length and the publicity of the process by which a law passes from the shape of a project into that of a complete enactment, and the conflict of opinions through which the transit must be made, constitute a security against rash and thoughtless legislation*", they urged the Governor-General very strongly to provide by positive rules "*that every project or proposal of law shall travel through a defined succession of stages in Council before it is finally adopted; that at each stage it shall be amply discussed; and that the intervals of discussion shall be such as to allow to each member of the Council adequate opportunity of reflection and enquiry.*"<sup>14</sup>

Remarkable! More remarkable because these were the words not of the Speaker of the House of Commons responsible to the public opinion, but of a body committed to an association of individuals—a trading community—a small group of businessmen not responsible to Parliament, not elected by the people, but elected by persons who had no more interest in India than consisted in the simple possession of so much stock.

### VIII Conclusion

Which court will tell the Chief Minister of Kerala today, in 1986, what the Court of Directors of the East India Company had told their Governor-General of India 153 years back in 1833 that no law, except one of an occasional kind, or arising out of some pressing necessity should be passed without having been submitted to mature deliberation and discussion?

Anyway, three cheers for the Court of Directors of the East India Company.

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11. *Id.*, para 14.

12. *Id.*, para 15 (emphasis added).

13. *Id.*, para 16.

14. *Ibid.* (emphasis added).

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