The Annual Survey of State Laws in India

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MAHARASHTRA

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Introduction

Indian federalism is unique in its combination of unitary and federal features. Essential to its federalist structure is the inclusion of special provisions to address regional disparities. As against a coming together model of federalism, where the constituting states have agreed to join the federation and retain the right to withdraw from it, India is a holding together model.[2] In India, federalism was in existence even before the Constitution came into effect and the constituent assembly adopted a federal solution.[3]

The distribution of legislative and executive powers between the centre and states has been a vital component of federalism in India. It has also given the Indian supreme court a role to play in determining the scope of powers.[4] The skewed distribution of powers between the centre and the states has had many critiques.[5] Despite this criticism of the conferment of powers, there has been no systematic examination of the actual exercise of legislative power by the states. This survey examines the subjects on which the Maharashtra state government legislated and the instruments it used to exercise this power by moving away from a court-centric approach to a legislature-centric approach.

The year of study in this survey is 2020 – the year of the pandemic. The operation of federalism involved questions regarding the role, responsibilities, and powers of India's central and state governments. All states were not affected equally by the pandemic, and hence they did not respond to it in the same manner. From the early days of the pandemic itself, the need was for decentralized governance. In fact, several state governments had taken measures to deal with the pandemic even before the central government announced the national lockdown. After the national lockdown, it was apparent that state governments had a vital role in handling the situation. Innumerable notifications were issued under the Epidemic Diseases Act, 1897 and the Disaster Management Act, 2005 by the central and state governments. These constituted the dominant method of handling the pandemic.

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   The author thanks Akshara Rajratnam, BA LLB (Year II), RML National Law University, Lucknow for research assistance.
2. For a detailed discussion see, A. Stepan, J. Linz, *et. al.*, *Crafting State-Nations: India and Other Multinational Democracies* (Johns Hopkins University Press, Baltimore, MD, 2011).
3. *See*, H.M. Seervai, I, *Constitutional Law of India* 166 (Tripathi, Bombay, 3rd ed., 1983).
4. *State of West Bengal* v. *Union,* (1964) 1 SCR 371, which held that the supreme authority of the courts to interpret the Constitution and invalidate action violative of the Constitution was India's predominant federal feature.
5. M.P. Singh, "The Federal Scheme" in Sujit Choudhry, Madhav Khosla, *et. al.* (eds.) *The Oxford Handbook of the Indian Constitution* 451-465 (Oxford University Press, UK, 2016). *See* Vidhi Centre for Legal Policy, "Cleaning Constitutional Cobwebs: Reforming the Seventh Schedule," (2019), *available at*: https://vidhilegalpolicy.in/research/cleaning-constitutional-cobwebs-reforming-the-seventh-schedule/(last visited on Jan. 21, 2022).

The lack of national legislation on public health and the lack of a plan for public health was evident.[6] Though states can legislate on health, sanitation, and public order under the Indian Constitution, the central government formed an inter-ministerial central team under the Disaster Management Act, 2005. This move impinged on the federalism principle, as several states like Andhra Pradesh, Tamil Nadu, Goa, Uttar Pradesh, Madhya Pradesh, and Assam had Public Health Acts which they could invoke.

The role of local bodies such as panchayats, municipalities, and municipal councils in handling the pandemic is another facet of federalism. This review of laws, bills, ordinances, rules, and regulations in Maharashtra engages with the quotidian exercise of power during the pandemic.

In 2020,[7] Maharashtra proposed legislations in both the state and the concurrent lists. The survey looks at proposed and passed legislation, which includes draft bills proposing amendments to state and central laws. It also examines ordinances, regulations, and notifications issued during this period.

The most significant proposals from Maharashtra were amendments to the Indian Penal Code (IPC), 1860 and the Criminal Procedure Code (CrPC), 1973 on sexual assault. The executive proposed ordinances on an eclectic range of issues, including amendments to the Maharashtra Goods and Services Tax (GST) Act, 2017 regarding filing returns, and amendments to the Municipal Councils Act regarding elections to municipal councils and cooperatives. A critical issue was the postponement of elections to various local bodies.

Quantitative Profile

Thirty-six bills were proposed in 2020. These bills covered subjects from both the state and concurrent lists. The areas covered in the state list were agriculture, land, municipalities and panchayats, public service, taxation, and salaries and allowances of the members of the Maharashtra legislature. The areas in the concurrent list included amendments to criminal law (Shakti Bills), education, labour, public trust, and food safety. The state legislature passed three of the 36 bills proposed. The executive promulgated 21 ordinances and proposed 19 bills to replace them. Out of the 19, only seven bills were passed by the House, replacing the ordinances.

The executive used ordinances to amend several legislations, such as the Maharashtra Cooperative Societies Act, the Mumbai Municipal Corporation Act, 1888, the Maharashtra Municipal Corporations Act, 1949, the Maharashtra Municipal Councils, Industrial Townships and Nagar Panchayats Act, 1965, the Maharashtra Goods and Services Tax Act, 2017 and the Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963.

Qualitative Profile

The qualitative review has three parts: Part A looks at the legislations introduced to handle the pandemic; Part B studies the state's exercise of its ordinance-making power, and Part C covers state amendments to central legislation.

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6. Kiran Kumar Gowd, Donthagani Veerababu, *et al.,* "COVID-19 and the legislative response in India: The need for a comprehensive health care law" *Journal of Public Affairs*, e2669 (Mar. 21, 2021).
7. The material for the survey has been sourced from Manupatra, PRS, India Code, and a general internet search. The Maharashtra Legislature website (http://mls.org.in/index.aspx) had nine bills, including bills seeking public opinion, such as the Farm Bills, the Shakti Bill, and the Goods and Services Tax Amendment Bill.

Handling the Pandemic

The pandemic was an unprecedented disaster that threw huge challenges to governments across the world. In this context, it is important to examine how the Maharashtra government exercised its power to manage the pandemic. This review picks up two areas for closer examination: public health and labour.

Under entry 6 of list II, state governments can legislate on public health, sanitation, hospitals, and dispensaries. Under sections 2, 3, and 4 of the Epidemic Diseases Act, state governments have the power to take special measures and prescribe regulations when faced with an epidemic threat. Maharashtra was one of the states that bore the brunt of the pandemic. It responded by issuing a slew of regulations and advisories from various government functionaries.[8] The first such regulation issued on March 13, 2020, invoked general powers under the Epidemic Diseases Act, 1897. Subsequently, on March 14, 2020, the government issued the Maharashtra COVID-19 Regulations under sections 2, 3, and 4 of the Epidemic Diseases Act, 1897.[9] These regulations imposed obligations on hospitals, both private and government, to have separate screening corners for screening of suspected COVID-19, all hospitals must record travel history, history of contacts with suspected or confirmed cases of COVID-19 was to be recorded, in case of persons with any such history of travel to affected areas in the last 14 days was required to home quarantine and persons who did not home quarantine were quarantine in facilities set up by the government.

In the absence of a statute, these notifications became the primary method of dealing with public health during the pandemic. According to the Bombay Chamber of Commerce,[10] the Maharashtra government issued 34 notifications in the period between the first lockdown on March 14 and December 30, 2020. These included notifications from the commissioner of police, labour commissioner, Thane district office, and the government. Notification No. Corona-2020/C.R.97/Aarogya-5 issued, on August 31, 2020, by the Public Health Department amending and extending previous notifications invoked the enabling provisions of the IPC, Maharashtra Essential Services Maintenance (Amendment) Act, 2011, Maharashtra Nursing Homes (Amendment) Act, 2006, Bombay Public Trust Act, 1950 in addition to the earlier notifications, the Epidemic Diseases Act and the Disaster Management Act. This notification addressed access to medical facilities. It set out the extent of the problem regarding access to health care during the pandemic. It noted that Public Charitable Trusts which were running Charitable Hospitals have an obligation to set aside 10% of operational beds for indigent patients and had an obligation to earmark an additional 10% at concessional rates. However, patients who did not have insurance or whose insurance was exhausted were being charged exorbitant amounts. In light of these

8. For instance, 6 notifications were issued by the Public Health Department.
   Govt. of Maharashtra, Public Health Dept, Notification No. Corona 2020/C.R. 58/Arogya-05, dated March 14, 2020.
   Govt. of Maharashtra, Public Health Dept, Notification No. Corona2020/C.R.58/Health, dated March 14, 2020.
   Govt. of Maharashtra, Public Health Dept, Notification No. Corona2020/C.R.58/Health, dated April 30, 2020.
   Govt. of Maharashtra, Public Health Dept, Notification No. Corona 2020/C.R. 97/Arogya -05, dated May 21, 2020.
   Govt. of Maharashtra, Public Health Dept, Notification No. Corona 2020/C.R.97/Arogya-05, dated Aug. 31, 2020.
   Govt. of Maharashtra, Public Health Dept, Notification No. Corona-2020/C.R.97/ Arogya-05, dated Dec. 15, 2020.
9. The Maharashtra COVID-19 Regulations, 2020, Public Health Dept., Govt. of Maharashtra, dated March 14, 2020, *available at*: https://arogya.maharashtra.gov.in/pdf/30.pdf (last visited on April 15, 2022).
10. For an exhaustive list of the notifications issued in this period, see, Bombay Chamber of Commerce and Industry, "COVID-19 Archives", *available at*: http://www.bombaychamber.com/knowledgecenter?CovidArchives.html and http://bombaychamber.com/knowledgecenter?CovidArchive.html (last visited on April 15, 2022).

conditions several directions were issued including, directing charitable hospitals to discharge their obligations before charging patients for services; healthcare providers to make all efforts to increase bed capacity. It determined that, throughout Maharashtra excluding the Municipal Corporation of Greater Mumbai(MCGM) 80% of total operational bed capacity would be regulated by prescribed rates and within the MCGM 80% of isolation beds and 50% on non-isolation beds would be under the control of the Commissioner Mumbai, patients would receive treatment at applicable rates on first come first serve basis and COVID patients treated at any hospital would be charged according to rates prescribed.

Non-payment of wages to workers and the withdrawal of other labour protections available under labour laws was a significant impediment to welfare during the pandemic. Labour is a concurrent subject, and the central and state governments adopted different approaches towards the crisis. Soon after the declaration of the lockdown on March 20, 2020, the labour commissioner of Maharashtra issued an advisory to employers not to terminate the services of workers and not to reduce their wages; neither could employees be deemed to be on leave without pay. The advisory was also against the termination of the services of casual and contract workers. It suggested treating the absence of any employee during the lockdown as a period spent on duty.[11] However, there were no provisions that specified the consequences if the advisory was breached.

This advisory from the state government came before the central government responded to the question of livelihoods affected by the lockdown. At the central level, the Ministry of Home Affairs issued an order, on March 29, 2020, regarding workers' entitlements during the pandemic. Clause (iii) of the order directed all employers to pay workers their wages without deduction.[12] This order was challenged in the supreme court on the ground that it was arbitrary, illegal, irrational, unreasonable, and violative of articles 14 and 19. It was also contrary to the principles of equal pay for equal work and no work no pay. The petitioners, some of whom were medium and small-scale enterprise owners, claimed that the government could not impose financial obligations on the private sector. In an order dated June 12, 2020, the court preferred an amicable solution to a legal resolution between the parties. In para. 36, it held that:

> "It cannot be disputed that both industry and labourers need each other. No industry or establishment can survive without employees/labourers and vice versa. We are thus of the opinion that efforts should be made to sort out the differences and disputes between the workers and the employers regarding payment of wages of above 50 days and if any settlement or negotiation can be entered into between them without regard to the order dated 29.03.2020, the said steps may restore congenial work atmosphere."[13]

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11. Office of the Commissioner of Labour, CL/IR/COVID/2020/Desk-, dated March 20, 2020, *available at*: http://bombaychamber.com/admin/uploaded/NEWS%20Block/COVID%2019%20-%20NOT%20TO%20TERMINATE%20SERVICES%20OF%20EMPLOYEES%20OR%20REDUCE%20THEIR%20WAGES%20DURING%20THE%20SHUT%20DOWN.pdf (last visited on April 15, 2022).
12. Clause (iii) of the order: "All the employers, be it in the industry or in the shops and commercial establishments, shall make payment of wages of their workers, at their workplaces, on the due date, without any deduction, for the period their establishments are under closure during lockdown period."

    Ministry of Home Affairs, No. 4-3/2020-DM-I(A), dated March 29, 2020, *available at*: https://www.mha.gov.in/sites/default/files/MHA%20Order%20restricting%20movement%20of%20migrants%20and%20strict%20enforement%20of%20lockdown%20measures%20-%2029.03.2020_0.pdf (last visited on April 15, 2022).
13. *Ficus Pax Private Ltd. and Ors.* v. *Union of India and Ors.*, MANU/SC/0477/2020.

Before the supreme court finally heard the matter, there was high court ruling which evinced a more sensitive approach. The Aurangabad bench of the Bombay high court, in *Rashtriya Shramik Aghadi* v. *the State of Maharashtr*a, held that:

> "This Court cannot turn a Nelson's eye to an extraordinary situation on account of (the) Corona virus/COVID-19 pandemic. Able-bodied persons, who are willing and desirous to offer their services in deference to their deployment as contract labourers in the security and housekeeping sector of the trust, are unable to work since the temples and prima facie, places of worship in the entire nation have been closed for securing the containment of (the) COVID-19 pandemic. Even the principal employer is unable to allot the (sic) work to such employees in such (a) situation. I feel that the principle of "no work no wages" cannot be made applicable in such extraordinary circumstances. The court cannot be insensitive to the plight of such workers, which has unfortunately befallen them on account of the COVID-19 pandemic."[14]

The Maharashtra government's notification on March 30, 2020 followed the March 20 advisory that all workers who had to stay at home due to the lockdown would be deemed to be on duty and would receive full salary and allowances. Another notification issued by the Directorate of Industrial Safety and Health granted factories relaxations from sections 51, 52, 54, and 56 of the Factories Act from May 8 2020 to June 30, 2020. The exemption allowed factories to extend the workday to 12 hours and weekly working hours to 60. The increase in working hours was to be compensated by payment of overtime wages at twice the rate of wages.[15]

The high court of Maharashtra found their hands tied when parties sought relief during the pandemic since the supreme court was also seized of the matter. The high court initially had held that it was disinclined to interfere with the state government's orders directing full wages to be paid. However, it later ordered the state not to take coercive action against the employers based on the government's orders. Since it was represented before the court that the matter was pending in the supreme court, the former was persuaded to stall the matter rather than instruct the state government to enforce its orders.

Exercise of Ordinance-Making Power

Ordinances are a unique mechanism in the Indian Constitution, conferring on the executive, which has no law-making role or power ordinarily, the power to make laws. Articles 123 and 213 of the Constitution confer ordinance-making power on both the president and the governor respectively.

A relic of the colonial rule, serious reservations were expressed in the constituent assembly against incorporating such a power. Despite these reservations, it was incorporated based on 'necessity'. D.C. Wadhwa has painstakingly documented and exposed the executive's widespread (mis)use of this power.[16] In fact, he filed public interest litigation (PIL) in the supreme court, highlighting that

14. WP 4013 of 2020, dated May 12, 2020, *available at*: https ://www.livelaw.in/pdf_upload/pdf_upload-374784.pdf (last visited on April 15, 2022).
15. Days after this decision, the government of Uttar Pradesh took a cabinet decision to grant employers exemption from implementing many of the labour laws for three years. The Madhya Pradesh government made amendments to the Contract Labour Act, Factories Act, Industrial Disputes Act, and MP Industrial Relations Act, reducing protections under these laws.
16. D C Wadhwa, *Repromulgation of Ordinances: Fraud on the Constitution* (Gokhale Institute of Politics and Economics, 1983).

ordinances flouting the constitutional mechanism of legislative oversight were routinely used in law-making by the executive.[17]

The executive uses this power to promulgate an ordinance with a limited life and re-promulgates it as many times as it deems fit, thus bypassing the need for legislation. The executive does not specify the necessity for the ordinance even though the Constitution expressly requires that the power is to be exercised only if necessary. In practice, judicial review of ordinances does not extend to evaluating their necessity.[18] Commentators observing the powers of the Indian executive such as Subhankar Dam, point out that ordinances have been promulgated every year since 1950. These ordinances, which cover an eclectic range of subjects, rarely spell out the contingencies that make them necessary.[19]

Issuance of ordinances is not only a violation of the principle of separation of powers but also a direct infringement of the constitutional and legal rights of citizens. Since ordinances are not subject to discussion in the public domain before promulgation, they violate the people's right to participation. Further, since they create temporary rights, they can be withdrawn at any time by the executive with no liability attached. In *Krishna Kumar v. State of Bihar,* the state government took over private schools through ordinances and promulgated seven ordinances without passing a law or placing the ordinances before the legislature.[20] The status of teachers in these schools remained unclear for more than 20 years, as they were not considered government teachers and could not draw the salaries of government teachers, but the government had taken over the schools. Since ordinances are temporary, they were held not to create 'enduring rights'. While Subhankar Dam has documented the use of ordinance-making power by the centre, the use of ordinances by states has received less attention.

Many of these themes play out in the survey year in Maharashtra. Ordinances were promulgated both before and after the declaration of the lockdown.

On a quantitative level, Maharashtra passed fewer ordinances in 2020 than in previous years. Twenty-one ordinances were passed covering nine areas, including cooperatives, contingency fund, public universities, regional and town planning, professional tax, and village panchayats; as many as six ordinances on municipal corporations, municipal councils, nagar panchayats and industrial townships; two on Agricultural Produce Marketing Committees (APMC) and three on GST.

These areas cover items in both the state list and the concurrent list. Areas in the state list include cooperatives, municipal councils, village panchayats, contingency funds, and regional and town planning. Agriculture has always been an essential item in the state list. Similarly, education is in the concurrent list, and GST, once part of sales taxes under the state government, is now a matter where both the centre and the state share jurisdiction.

The state legislature replaced many of these ordinances with bills. This seems to be a result of the supreme court's decision in the *Krishna Kumar* v. *State of Bihar* case.[21] Justice Chandrachud held that it

17. *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378.
18. For a detailed discussion on the evaluation of ordinances, see Subhankar Dam, "Making Motives Count: Judicial Review of Ordinances in India", 33(2) *Statute Law Review* 81 (2012).
19. Subhankar Dam, "Constitutional Fiat: Presidential Legislation in India's Parliamentary Democracy" 24(1) *Columbia Journal of Asian Law* 1 (2010).
20. *Krishna Kumar v. State of Bihar*, (2017) 3 SCC 1.
21. *Ibid*.

was an unavoidable obligation on the executive to place the ordinances before the House. He held that the legality of the ordinances would be affected if they were not placed before the Assembly. The judge introduced a procedural check of placing the ordinances before the House rather than substantively evaluating the ordinances. This decision of the supreme court neither checked the validity of the ordinance utilising the criterion of necessity nor asked why the executive used the ordinance route instead of the legislative route.

Consequently, despite these seminal decisions of the supreme court, the larger question of when the executive may invoke the ordinance-making powers remains unanswered.[22] The use of these powers in such an egregious manner is unprecedented. While ordinance issuance in the past have been used as an interim measure, it has not been used to impinge upon central laws as these ordinances proposed. The fact remains that though courts have condemned the arbitrary and excessive use of the ordinance-making power, they have not distinguished it from ordinary legislative power.

Most of the bills proposed in Maharashtra were first enacted as ordinances and later converted into bills. This is a standard route adopted by governments at the state and central levels. The Farm Bills were also first promulgated as ordinances and later replaced with bills. While many bills took the ordinance route in Maharashtra, a few were introduced directly as bills. The Shakti Bills, which increased punishment for sexual offences against women and set up special courts for these offences, did not take the ordinance route. It may be recalled that the Criminal Law (Amendment) Bill, 2013 took the ordinance route before being passed by parliament.

In addition to the areas covered by ordinances, the proposed bills covered employment, food safety and standards, public trusts, criminal law, housing, education, legislative members' salaries, and land acquisition spread over the concurrent and state lists.

A successful challenge to the executive's ordinance-making power was in the context of agricultural markets. The government of Maharashtra first introduced two ordinances, Ordinance 2 and 3 of 2020, suggesting amendments to Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963. These were later introduced as bills the Maharashtra Agricultural Produce Marketing (Development and Regulation) (Amendment) Bill, 2020, on February 25, 2020 and the second Amendment Act 11/2020, introduced on March 14, 2020.

The need for promulgating these ordinances arose from a decision of the Bombay high court (Aurangabad bench) in 2019. In the *Sanjay Tukaram Autade* v. *State of Maharashtra* case,[23] the single judge of the high court struck down the appointments made to the market committee under section 13(1C) of the Maharashtra Agricultural Produce Marketing (Development and Regulation) Act, 1963. This section was introduced first as an ordinance in June 2015 and then re-promulgated twice before the Amendment Act was enacted in 2016. It provided for special invitees on every market committee, who would be experts in the field of agriculture, agricultural processing, agricultural market, law, economics, or commerce.

This section was challenged on the ground that it was introduced for political reasons, specifically to accommodate members of the ruling party. The petition alleged there were no guidelines or rules

22. In 2020, Uttar Pradesh and Gujarat promulgated ordinances to suspend all labour laws.
23. WP No. 12084 of 2015, dated July 19, 2019, *available at*: https://indiankanoon.org/doc/146927371/ (last visited on Jan. 20, 2022).

framed for such appointees; there was no nexus between the provision and the objectives of the Act; it was therefore violative of Article 14. The petition further contended that the section also violated Article 19(1)(c) and (g). The petitioner alleged that the state government, by the exercise of this power, could interfere in the affairs of the market committee, a duly elected body. Further, these committees had elected representatives of agriculturists, elected directors from village panchayats, and traders and there was no need for expert members.

The high court engaged with the issue at two levels: (i) were the amendments necessary and (ii) how was the power exercised? The first question involved a high standard of judicial engagement as it asked for a review on due process. The state contended that this was a matter of government policy and beyond the scope of judicial review. The high court agreed with this contention by quoting the precedent of the supreme court that "legislative malice is beyond the jurisdiction of the law courts". The petitioner had not questioned the legislative competence of the state. Since the legislature had the competence to enact, the amendment was deemed necessary. The court investigated the substantive aspects of the amendment to find that the expert members did not vote and hence could not interfere with the committee's functioning. The apex court had earlier held that the fact that non-experts were or may be appointed was not a good ground to hold the provision unconstitutional.

The second level of review was regarding the exercise of power. The court called upon the counsel for the state to place on record the procedure and considerations while appointing certain persons as experts. The court found that the persons whose names were recommended were committed workers of the ruling political party and did not possess any educational qualifications which would justify their being considered as experts. In addition, these candidates had lost the elections to the managing committee of the APMC. The court struck down the appointments as it found the discretion exercised by the government was arbitrary.

Following this decision, the Maharashtra government introduced Ordinance 2 of 2020 on January 31, 2020 deleting section 13(1C). The ordinance was placed on the floor of the House as a bill. In the second amendment ordinance, the government amended section 13 again to provide representation to women, other backward classes, and de-notified and nomadic tribes. There was no provision allowing for the nomination of experts. The state legislature passed the bill as Maharashtra Agricultural Produce Marketing (Development and Regulation) (Amendment) Act 11 of 2020.

The above sequence of events shows that there is no specific procedure or purpose for the use of the ordinance-making power. Thus, a statute could be amended through an ordinance to allow for nomination of experts to duly elected bodies. The power could again be deployed to delete provisions in a statute or to re-introduce a provision. In effect, it is indistinguishable from ordinary legislative power.

The broad use of the power can be seen in the context of Maharashtra Co-operative Societies (Amendment) Ordinance 12 of 2020, which sought to postpone elections to nearly 35,000 cooperative societies. The constitutional question that the petitioner raised was whether the state government could exercise its ordinance-making power to act contrary to the statute. This was a matter on which the supreme court had ruled as early as 1955 that executive power is undefined in India.[24] It is the power that remains after legislative and judicial functions have been taken away. It was held that executive power was to execute laws and included all inherent, implicit, and ancillary powers. Its exercise was

24. *Ram Jawayya Kapoor* v. *State of Punjab*, AIR 1955 SC 549.

not dependent on the existence of a statute as article 73/162 clearly indicates that the executive power extends to all matters on which the legislature is competent. The court refused to hold that the exercise of power by the executive is dependent on the existence of a law.

The petitioner claimed that the 35,000 cooperative societies were governed by the Maharashtra Co-operative Societies Act, 1960. The elections to these committees were due by the end of January 2020 but were postponed by orders of the state government. These orders were challenged and were struck down by the high court as arbitrary and also violative of article 243 of the Constitution and the Cooperative Societies Act. The state legislature passed a bill to enable the postponement of elections on the ground of natural calamity. Once the Disease Management Act was invoked in Maharashtra, the government again postponed the elections. It issued an ordinance providing for the extension of the term of the existing members. The ordinance was later passed as an Amendment Act. The petitioner claimed that there was a provision in the Act that allowed for the appointment of an administrator if elections could not be held; hence promulgation of the ordinance continuing the term of the earlier members was ultra vires and violative of articles 14, 19(1)(c), 243-ZJ, and 243ZK of the Constitution.

The high court did not address the substantive grounds raised by the petitioner and dismissed the petition on the ground of lack of *locus standii*.[25] The court did not delve into the question of whether an ordinance could suggest a different way of dealing with an exigency than what was provided in the statute. In this case, the conduct of elections, ordinarily considered a mandate of the statute which the executive could only implement, was first postponed by an order of the state government, then by an ordinance, and later by an amendment bill. The law-making powers of the executive and the legislature were seen as indistinguishable.

While the Bombay high court dismissed the petition, a similar petition in the Calcutta high court prompted the court to examine the issue of appropriate use of executive power.[26] Justice Sanjib Banerjee examined the propriety of executive action, which the state claimed was necessary due to the COVID-19 situation. The Calcutta high court was examining the postponement of elections in municipal corporations. Citing the unusual circumstances of the pandemic, the executive had passed a notification postponing elections and continuing the term of the previous office bearers, which the petitioner claimed was a backdoor entry without the mandate of the people. The claim by the petitioner was that in light of the pandemic, health and hygiene were critical issues, and municipal corporations were important agencies assigned with the responsibility to tackle the pandemic. The petitioner essentially claimed that the executive had no authority to suspend elections, and the same could only be done by the legislature. The state responded by stating that the niceties of separation of powers could not be adhered to when public interest and the lives of citizens were at stake. The state claimed that even if its power could not be sourced from the statute's wording, it could claim a residuary constitutional power to act in the public interest. Justice Banerjee, in pronouncing on the matter, held that the executive did not need to use its ordinance-making power. It could deal with the situation by just issuing a notification, and such an act was within constitutional propriety.

State amendments to Central Legislation

One of the prominent features of Indian federalism is the sharing of powers to legislate. Apart from the exclusive right to make laws on the state list, states share the power with the centre to legislate on

25. *Arun Yashwant Kulkarni* v. *The State of Maharashtra*, MANU/MH/0405/2021.
26. *Sharad Kumar Singh and Ors.* v. *The State of West Bengal and Ors*., MANU/WB/0634/.

matters listed in the concurrent list. Article 254(2) is often cited as the high point of federalism in India as it allows for a law made by the legislature of a state with respect to matters in the concurrent list to prevail in that state, even if it is in conflict with the central law, with a proviso that it must receive presidential assent. This allows for legislations like the Maharashtra Control of Organised Crime Act (MCOCA), 1999 to operate along with other central legislations like the Unlawful Activities Prevention Act (UAPA), 1967. The MCOCA contains several provisions which override the provisions of the Indian Evidence Act, 1872 with reference to confessions to a police officer. The doctrine of repugnancy, which would ordinarily have the central law prevail if there is a conflict between central and state laws, has been read down to apply only in cases where it is impossible for both laws to operate. In all other cases, if both laws can operate, they will be allowed to operate. The preference for the doctrine of pith and substance, which allows an incidental entrenchment without affecting the vires of the legislation, has been considered the hallmark of federalism. Using the doctrine of pith and substance, provisions of the MCOCA which encroached upon items in the central list were held to be valid.[27]

In exercise of such powers to amend or add to central laws, Maharashtra proposed contentious amendments to the following central legislations: Indian Penal Code (IPC), 1860, Code of Criminal Procedure (CrPC), 1973 and the Protection of Children from Sexual Offences Act (POCSO), 2012. Two bills were introduced in the state legislature on December 14, 2020—the SHAKTI Criminal Law (Maharashtra Amendment) Bill, 2020 and the Maharashtra Exclusive Special Courts (for certain offences against women and children under SHAKTI Law) Bill, 2020. The SHAKTI bills were opened for suggestions and were referred to a joint select committee. The state amendments were proposed to increase protection for women and children from sexual offences by prescribing harsher punishments and ensuring speedy investigation and trial.

The amendments to IPC proposed by the SHAKTI amendments were to increase penalties for failure to register a first information report (FIR), failure to furnish information or provide assistance in the investigation of offences against women. This goes against the recommendations of the Verma Committee, which took into account that basic safety measures on crimes against women were not enforced with any amount of efficacy and those were more important than prescribing draconian punishments. The committee observed that the non-registration of FIRs in cases of sexual assault was observed by the ministry of home affairs in its memorandum in as early as 2009[28] but no effective measures were in place. The Verma committee noted that the executive was fully aware of the minimum steps that needed to be taken to ensure the safety of women. The committee also took note of the need for reforms: to hold the police accountable; to consider the inordinate delay in investigation as a serious misconduct; to ensure the right to register an FIR at the nearest police station/online was protected; and other measures.

However, in place of measures that enhance accountability on a holistic basis, the proposed amendments merely increase penalties and impose harsh punishment. There are increased penalties for failure to share data with the investigating officer by social media platforms, and internet or mobile telephone data providers. The amendments propose that life imprisonment may be enhanced to imprisonment for the remainder of natural life or death. The central law currently provides for ten years or life imprisonment, which does not necessarily mean the remainder of natural life and does

27. *Zameer Ahmed* v. *State of Maharashtra*, (2010) 5 SCC 246.
28. JS Verma, Leila Seth, *et al*, "Report of the Committee on Amendments to Criminal Law" (2013) *available at*: https://archive.nyu.edu/handle/2451/33614 (last visited on April 18, 2022).

not include the death penalty. The Verma committee had clearly indicated that the death penalty for rape was a regressive step. The central law was amended in 2018 to increase the penalty from 7 years to 10 years. The SHAKTI amendments also propose to add a new provision, section 354 E, to provide for punishment in cases of intimidation of a woman by any mode of communication in addition to insulting her modesty. The most contentious amendment is the introduction of section 182A, which imposes penal liability for filing false complaints. The section provides for simple imprisonment of up to one year with or without a fine in case of filing a false complaint or providing false information to a public servant in cases of acid attacks, outraging the modesty of a woman, sexual harassment of women, human trafficking of women, and rape.

The SHAKTI bills amendments to the CrPC include an additional section 37A, which makes it mandatory to share information available on social media platforms and with internet or mobile telephone data providers, including an intermediary or a custodian, in relation to crimes against women and children. Section 37 CrPC states that the public is duty bound to assist a magistrate or police officer in the discharge of their duties. Amendments are also proposed to section 100, which allows the police to call upon independent and respectable inhabitants to witness the search and seizure. The state amendment proposes to include public servants or social workers recognised by the Women and Child Development Department of the Maharashtra government in place of independent witnesses. The most contentious proposals are to complete the investigation within 15 days and to complete the trial within 30 days. The provision on anticipatory bail is made inapplicable to sexual offences against women. The amendments also propose to deny the special powers of the high court and the court of session to grant bail under section 439 CrPC.

The SHAKTI bill amendments to POCSO continue the harsh punishments as envisaged in the IPC. These include the death penalty in exemplary cases. Similar provisions regarding enhanced penalties for failure to share data have been made.

The second bill, the Special Courts Bill, establishes one or more exclusive special courts in each district. These courts can try cases filed under offences other than the specified offences if an accused is charged with them. Special public prosecutors for such trials, special police teams with at least one-woman police officer, and women personnel are sought to be constituted. Institutions providing medical and psychiatric support, legal and financial aid are proposed to be set up. Section 10 provides for a Women and Children Offenders Registry, which would contain full details of persons convicted of specified offences. The registry is proposed to be linked to the National Registry of Sexual Offenders.

The bills have come under heavy criticism from several quarters, including feminist groups.[29] In a memorandum to the Maharashtra government, they expressed shock that such a draconian law was being proposed in the name of curbing widespread violence against women and girls. The memorandum pointed to various studies questioning the death penalty's efficacy in curbing crimes. It also pointed out that such provisions make it dangerous for women as the sentence for rape and murder are the same. It also highlighted studies that showed that in cases of POCSO, more than half the offences were committed by persons known to the child, and the death penalty only made the reporting of such crime more difficult, along with increasing the trauma of the child. The memorandum affirmed that the certainty of investigation, trial, and punishment should be the guiding principle rather than

29. Civil society memorandum to the Maharashtra government on the Shakti Bill, *available at*: https://www.newsclick.in/sites/default/files/2020-12/Memorandum-to-Maharashtra-Government-About-Shakti-Bill.pdf (last visited on Jan. 19, 2022).

the severity of punishment. The bill was referred to a joint select committee. Several police officers expressed reservations on the provisions of the bill. They cited hundreds of cases where trials could not be completed for two to three years. They also said that the provisions to hurry up the investigation might lead to botched-up investigations.[30]

Conclusion

The review of the exercise of legislative power in Maharashtra in 2020 showed that executive powers were excessively relied on during the pandemic. The Westminster Model of parliamentary democracy that India adopted rests on the executive's actions being scrutinised by several state institutions, including by the legislature.[31] This study revealed that the principle was only 'absently present' in Maharashtra as well as in the other states. The executive dominated the legislature by first exercising legislative power through ordinances and then by converting them into bills.

The state legislature passed more ordinances into bills than original bills. There was little distinction between executive law-making and legislative law-making. The executive handled the pandemic using laws not geared to deal with its specific context. Instead of deliberating on how to handle the pandemic, the executive came up with piecemeal and discordant responses to even critical issues like protection of labour and public health. The high court made limited attempts to hold the executive accountable to constitutional principles of non-arbitrariness and separation of powers, but largely deferred to executive discretion. The only area in which the legislature played a major role in 2020 was the introduction of the SHAKTI amendments to criminal laws. Instead of using the ordinance route, these bills were introduced in the legislative assembly, proposing amendments to central legislation.

Since criminal law is in the concurrent list, the state may propose amendments that are repugnant to the central law and the state laws shall prevail on receiving assent as under Article 254(2). This bill brings to fore the restraint that presidential approval can impose on hastily formulated bills

30. Mohamed Thaver, "Draft Shakti Bill debated by review committee, several reservations raised", *The Indian Express*, Nov. 5, 2021, *available at*: https://indianexpress.com/article/cities/mumbai/draft-shakti-bill-debated-by-review-committee-several-reservations-raised-7607735/ (last visited on Jan. 19, 2022).
31. Guillermo O'Donnell, "Horizontal Accountability in New Democracies" in Marc F. Plattner, Andreas Schedler, *et. al.* (eds.), *The Self-Restraining State: Power and Accountability in New Democracies* 29 (Lynne Rienner Publishers, 1999).