

1. Explain the ordinance making powers of the President. Don't ordinances impinge upon the principles of a parliamentary democracy? Critically comment.

Introduction:

Ordinances are temporary laws, which can be issued by the President when Parliament is not in session. **Article 123** of the Indian Constitution grants the President of India the power to promulgate ordinances when either of the two Houses of the Parliament are not in session.

Body:

Ordinance making powers of the president:

Ordinances may relate to any subject that the parliament has the power to make laws and would be having same limitations. Thus, the following limitations exist:

- When legislature is not in session: The President can only promulgate an ordinance when either of the House of Parliament is not in session.
- Immediate action is needed: The President though has the power of promulgating the ordinances but the same cannot be done unless he is satisfied that there are circumstances that require him to take immediate action. E.g., The Criminal law amendment bill, 2013 was promulgated by an ordinance due to the exigent nature of the situation.
- Parliamentary approval: After the ordinance has been passed, it is required to be approved by the parliament within six weeks of reassembling. The same will cease to operate if disapproved by either House.
- Ordinances cannot be promulgated to make any provision which the parliament would not under this constitution be competent to enact and also cannot be promulgated to amend the constitution.

Ordinances not impinging upon parliamentary democracy:

- The idea intended by the Constituent Assembly when the provision for ordinances was included in the Constitution was that this power is necessary when immediate action was needed. Also it meant that the powers are extraordinary so they are not to be employed in normal times.
- Governments also take the ordinance route to address matters of public concern as was the case with the Criminal Law (Amendment) Ordinance, 2013, which was issued in response to the protests surrounding the Delhi gang rape incident.
- Ordinances are issued by the President based on the advice of the Union Cabinet and not based on discretion.

Ordinances impinge upon the principles of parliamentary democracy:

- Many times ordinances are issued by the government for lack of consensus in parliament or reluctance to face the legislature. In **Krishna Kumar Singh vs. State of Bihar** SC held that the failure to place an ordinance before the legislature constitutes abuse of power and a fraud on the constitution.
- Ordinances are used by governments to pass legislation which is currently pending in parliament, as was the case with the Food Security Ordinance.
- Unnecessary or prolonged re-promulgation of Ordinances raises questions about the legislative authority of the parliament as the highest law making body. For ex: The Securities Laws (Amendment) Ordinance, 2014 was re-promulgated for the third time during the term of the 15th Lok Sabha.
- It gives arbitrary power in the hands of the executive. The law is announced without any debate and discussion and hence lacks the refinement that normal legislation possesses.
- Even if the ordinance lapses or is repealed by the Legislative Assembly, the ordinance would not be void ab initio. Any legal effect caused by the ordinance in that period would continue to exist. Thus, even if the democratic institutions are to approve or disapprove of the acts later, the fact is that the undemocratic laws can affect the nature of the Indian State quite drastically.

Conclusion:

The constitution has provided for separation of power where enacting laws is the function of the legislature. The executive must show self-restraint and use ordinance making power only as per the spirit of the constitution and not to evade legislative scrutiny and debates.

2. What are family courts? How do they function? Are they an effective alternate dispute resolution forum? Examine.**Introduction**

The Family Courts Act, 1984 provides for establishment of Family Courts by the State Governments in consultation with the High Courts with a view to promote conciliation and secure speedy settlement of disputes relating to marriage and family affairs

Body**Main features:**

- To take the cases dealing with family matters away from the intimidating atmosphere of regular courts and ensure that a congenial environment is set up to deal with matters such as marriage, divorce, alimony, child custody etc.
- To tackle the problem of pendency by improving the efficiency of the system, where courts are equipped with counselors and psychologists to ensure that while there may be core legal issues to be dealt with; there is also a human and psychological dimension to be dealt with in these matters.
- It is mandatory for the State Government to set up a Family Court for every area in the State comprising a city or a town whose population exceeds one million.

Functioning:

- **Own rules**- The Family Courts are free to evolve their own rules of procedure, which over ride the rules of procedure contemplated under the Code of Civil Procedure.
- **Conciliation**- Special emphasis is put on settling the disputes by mediation and conciliation, when the matter is solved by an agreement between both the parties, it reduces the chances of any further conflict.
- **Away from legal system**- The cases are kept away from the trappings of a formal legal system, which can be a very traumatic experience for the families and lead to personal and financial losses that can have a devastating effect on human relations as well.
- **No legal representation**- A party is not entitled to be represented by a lawyer without the express permission of the Court.
- **Appointment of experts**- Conciliators are professionals who are appointed by the Court.
- **Method**- The proceedings before the Family Court are first referred to conciliation and only when the conciliation proceedings fail to resolve the issue successfully, the matter taken up for trial by the Court.
- **Appeal**- Once a final order is passed, the aggrieved party has an option of filing an appeal before the High Court.

Effective alternate dispute resolution forum:

- Reduce workload on the courts and ensure speedy disposal of cases
- Provides confidentiality for family matters.
- Reverberations of a family dispute are felt in society. Their effective resolution by mediation or conciliation may provide lasting solutions for overall good.
- The Mediation Cell of the Punjab and Haryana High Court, which attempts to patch up matrimonial disputes is a successful example.

Issues:

- **Continuity**- No fixed tenure for counselors. For example, in the family courts at Tamil Nadu, the counselors are changed every three months. Thus, when cases stretch for a period of time which is longer than this, the aggrieved

person has to adjust with new counselors and their story has to be retold several times.

- **Less power-** It doesn't explicitly empower Courts to grant injunctions to prevent domestic violence.
- **Not perceived well-** Since the Family Court has restrictive jurisdiction and does not have the power to decide issues of contempt, people do not seem to take the court as seriously as they would a magistrate or a city civil court.
- **Lack of uniformity-** Different High Courts have laid down different rules of the procedure, which is one of the reasons behind the fact that family disputes are still being heard by civil courts.
- **No legal representation-** Parties are not entitled as of right to be represented by a legal practitioner. The fact that the proceedings are conciliatory does not relieve them of the complicated legal issues which may be involved in the family dispute.

Conclusion

Family courts have enabled to take out the burden from courts and preserve the sanctity of family as a unit. Need is to empower these further and develop the necessary infrastructure.

3. Has the judiciary been adventuring into the executive domain of late? What can be its implications? Analyze with the help of suitable examples.

Introduction:

The constitution of India has provided for separation of powers between institutions of the state- executive, legislature and judiciary to ensure checks and balances which are essential in a democracy. But off late the judiciary has been criticized by executive, legislature and civil societies alike about interference in executive domains.

Implications:

Judiciary has been adventuring into executive domains off late and following are its implications:

Positive implications:

- a. Safeguards the rights and liberty of citizens and ensures welfare of the same.
 - River Ganga pollution curtailment and mitigation: The SC took a tough stand on the delay in taking steps to prevent pollution from industries and failure in an effective vision implementation of cleaning of River Ganga. This resulted in creating a time line and a target based action with 118 selected towns on bank or River Ganga to achieve total sanitation including waste water

treatment and solid waste management. Effective limits were implemented on industrial clusters to ensure abatement of pollution.

b. Protection of Fundamental Human rights guaranteed under article 21 of the constitution:

- Plight of under trial prisoners and Prison reforms: Concerned that almost 67% prisoners in overcrowded jails across India are under trials, the SC sought early conclusion and reformative steps stating that prisoners also have human rights. NALSA was asked to coordinate with state authorities and Home Ministry to establish under-trial Review Committee comprising of District Judge, District Magistrate and Superintendent of Police in all districts.
- Delhi pollution prevention and abatement: Judiciary was instrumental in pushing the government to develop and adopt various policies and programmes for combating air pollution. It also banned sale of older Diesel cars and also cars above 2000cc for certain period.

c. For protection of Law and order and safety of women:

- Ban on cooling stickers on cars: The Supreme Court has ordered a complete ban on use of tinted plastic films irrespective of the degree of visibility on windscreens and other glass panels of vehicles throughout the country. Vehicles with tinted glasses helped criminals escape after committing heinous crimes such as sexual assault against women, robberies, kidnapping etc.

d. Uniformity in policy creation on certain spheres. Also provides impetus for accountable and responsible administration.

- Likewise, the SC has intervened in many issues to serve the larger interest of society across the country. like cases of fighting diseases like Dengue, issues of policies of Health, drinking water, etc. stopping of polluting industries of Agra, beautification of Taj Mahal, etc.

Negative implementation:

a. Ignorance of technical and actual compatibility of implementation and decision taken.

- Judiciary mandate on speedy implementation of interlinking of river projects: There are certain procedures for taking up projects like feasibility reports, EIA, etc. which are violated due to the expedition. Technical feasibility and expertise were overlooked as a result of this intervention.

b. Irreversible judgments by Judiciary unless reviewed often leads to an ineffective progress in undesired projects.

- The SC, ruling on a PIL about road safety, banned the sale of liquor within 500m of any NH and SH: Data compiled by NCRB showed that in road accidents in 2014, over speeding and reckless driving accounted of nearly 90% of it, while drunk driving accounted to 2.5%, hence rendering it as an unfeasible decision.
- c. Arbitrary decisions made by judiciary affects growth and development of economy:
- Ban on Liquor on NH resulted in collateral damage for government, tourism and livelihood as there was massive loss of revenue because almost one half to two third of retail outlets, bars, etc. are located within 500 meters of NH and SH. Employment and livelihoods are bound to be a casualty as a multiplier effect.
- d. Leads to indolence, apathy and inertia on part of executive which is not a healthy trend in democracy.

Conclusion:

There have been numerous instances where the SC has justified its interference and enhanced the growth of judicial review. However, in the interest of democratic governance, all the 3 organs of the state should discharge their obligations freely and independently, entrusted with intervention only where required in the larger interest of the citizens of India.

4. Discuss the constitutional provisions that delve upon interstate river water disputes. Why have river water disputes been lingering for such long periods? Can there be a remedy? Suggest.

Introduction:

The Inter-State River Water Disputes are one of the most contiguous issues in the Indian federalism today. In extreme cases, it hampers the relationship between the different states and ultimate sufferers are the common citizen in general and farmers in particular.

Body:

Constitutional provisions for River Water Dispute:

- Water is in the State List. It is Entry 17 of the list and hence, states can legislate with respect to rivers.
- Entry 56 of the Union List, however, gives the Central government the power to regulate and develop inter-state rivers and river valleys.

- Article 262 also states that the Parliament may provide for the adjudication of any dispute or complaint with respect to the use, distribution or control of the waters of, or in, any inter-State river or river valley.

As per Article 262, the Parliament has enacted the following:

- River Board Act, 1956
- Inter-State Water Dispute Act, 1956: Under this act, the government may form a tribunal

Reasons for lingering of water disputes:

- Extraordinary delays in constituting the tribunal: A lengthy and time-consuming process, where states are asked for mutual negotiations first and then the establishment of Water Disputes tribunal if negotiations fail.
Ex: Godavari water dispute, Cauvery Water Dispute
- Due to delay in constituting the tribunal, state governments continued to invest resources in the construction and modification of dams, thus strengthening their claims
- Delay in Reports and Decisions given by the Tribunal. For instance, Mahadayi Water Disputes Tribunal.
- Lack of availability of the data also causes a delay due to the survey and collection of data each time the dispute arises.
- Sub-judice Matters: Either States approach Supreme Court under Article 136 (Special Leave Petition) or private persons approach Supreme Court under Article 32 linking issue with the violation of Article 21 (Right to Life).
Ex: Krishna Water Disputes Tribunal, Cauvery Water Disputes Tribunal.
- Appointment of the Members of the Tribunal. The composition of the tribunal is not multidisciplinary and it consists of persons only from the judiciary.
Ex: Vansadhara Water Disputes Tribunal.
- Delays in execution and implementation.
- Issues arising out of state reorganization also cause a delay as re-calculation of water distribution is required.
Ex: The state of Telangana and Godavari water.
- Differences arose over compensation and rehabilitation due to the construction of canal and power projects also causes the delay.
- Delays in the settlement and execution of the resolutions have been problems with the tribunal method of dispute resolution.
- There has been politicization of the dispute based on regional feeling and for vote bank politics.
Ex: Dispute between Tamilians and Kannadigas for Cauvery river water.

Way forward/ remedies:

- Enactment of pending Inter-State River Water Disputes (Amendment) Bill, 2017.

- Disputes Resolution Committee (DRC) should be set up for resolving any inter-state water dispute amicably and in a time bound manner.
- The decision of the bench of the tribunal should be final and binding and should have the same force as that of an order of the Supreme Court.
- A single permanent tribunal should be set up.
- Maintenance of data bank and information: A transparent data collection system at the national level for each river basin and a single agency to maintain data bank and information system should be established.
- The issues can be resolved by discussing the dispute in Inter-State Council.

Conclusion:

Inter-state river water disputes hinder the cooperative federalism of India and provide parochial mindset making regional issues superior to national issues. We should realize that our nation is a family in which all states are its members. So disputes must be resolved by dialogue and talks and the political opportunism must be avoided.

5. What are the forums available to address various trade related disputes? Is the regulatory environment robust enough to ensure that such disputes don't arise? Critically analyze.

Introduction

The dispute arises when a member/government believes another member/government is violating an agreement related to trade and commerce. Due to increased Cross border trade, investment, e-commerce there is a sheer necessary for dispute resolution mechanism.

Body

Various forums to address trade related disputes:

- World trade organization (WTO): The main objective is to help producers of goods and services, exporters and importers conduct their business.
- United Nations commission on international trade law (UNCITRAL): To promote modernization and harmonization of international trade law.
- United Nations conference on trade and development (UNCTAD): It is dealing with trade, investment, and developmental issues. It formulates policies related to all aspects of trade, aid, transport, finance and technology.
- International chamber of commerce (ICC): ICC has three main activities; rule setting, dispute resolution, and policy advocacy.

- International center for settlement of investment disputes (ICSID): International arbitration institution established for legal dispute resolution and conciliation between the international investors.
- Permanent court of arbitration (PCA): This has jurisdiction of disputes based on PCA founding documents or based on bilateral and multilateral treaties.
- Regional organizations: such as G20, ASEAN, BIMSTEC, OPEC, APEC, OECD, NAFTA have protocols related to resolving trade disputes.
- Commercial courts in India: Commercial Courts Act provides for constitution of commercial courts, commercial division and commercial appellate division in high courts for adjudicating commercial/trade related disputes.
- Alternate Disputes Mechanism: ADR has been given preference to solve commercial and trade related disputes in India over the years and has also been given legislative backing. Example: Under section 442 of the Companies Act, 2013 etc.

The regulatory environment is not robust enough to ensure the disputes do not arise:

- If a country fails to respond to forums' plaintiff, then country can take measure to offset any harm, such as blocking imports through tariff and non-tariff barriers.
- All countries debate on their vested interests to guard their resources and welfare of their own people.
- Chance of non-consensus of multilateral agreements by member countries, this lead to prolonging of the issue.
- Lack of technical expertise to resolve the disputes especially in India's case leading to biased/unsatisfactory outcomes.
- Legal routes: The order made by these dispute forums can be challenged in judicial courts in member countries which damages the credibility of these forums in the longer run. Ex: Antrix corporation and Devas media case.
- Non-Binding: Majority of these forums' verdicts are non-binding and also these do not have any authority to implement their decisions there by eroding their significance.
- Conflicting provisions: International /regional trade agreements and member countries trade regulations/laws have conflicting provisions there by creating various complications/disputes.
- Uniformity: There is a lack of uniformity among various forums and no uniform acts to guide them. It is based on arbitration and party with better arbitrator wins.

The regulatory environment is robust to deal with trade related disputes:

- Can establish credibility and transparency in the market.
- Increased growth and development of the countries with mutual cooperation and trust.

- The framework goes on the principle of equitable, fast, effective and mutually acceptable decisions.
- For instance, World trade organization has membership of 164 countries, i.e. all leading countries involved in international trade. So any disputes with regards to trade can be resolved through the arbitration process under Article 25 DSU. Likewise, majority of regional and international trade forums have their own dispute resolution mechanism to deal with such cases.

Note: The question does not specify any particular regional or nation specific forums and it is open ended. So include few India related issues and forums along with global ones.

Conclusion

There are no framework that-one size fits all. Alternative dispute resolution such as arbitration, mediation, conciliation, negotiation and collaborative law can offer a means of settling disputes without resorting to commercial litigation, aiming to resolve disputes in a way that is less expensive, faster and more predictable than the adversarial litigation process.

