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(BULL)YING THEIR WAY OUT OF THE JUDICIARY: A CRITICAL APPRAISAL OF THE PREVENTION OF CRUELTY TO ANIMALS (TAMIL NADU AMENDMENT) ORDINANCE, 2017

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ABSTRACT:

In 2014, the Supreme Court of India banned the practice of jallikattu primarily on the ground that it was in contravention to the Prevention of Cruelty to Animals Act, 1960. Three years later, the Tamil Nadu government promulgated an ordinance which amended those sections of the Act the Supreme Court had declared jallikattu fell afoul of, thus paving the way for it to be played again. The reasons cited in support of the ordinance was for the preservation of Tamil Nadu's tradition and for the survival of the bulls. I argue in this paper that the ordinance goes against the very essence of the doctrine of separation of powers, since the Court's exercise of judicial mind was effectively negated by the executive. In addition to this, I offer an alternate interpretation to Article 213 of the Indian Constitution, an interpretation which in my opinion can prevent any attempt at undermining the judiciary's independence. Lastly, I argue that there is a need for a system of checks to ensure that the executive does not step into the shoes of the legislature when not necessary, and offer what I feel is a possible solution to this conundrum.

INTRODUCTION

In the Explanatory Statement provided in the ordinance,¹ the Governor of Tamil Nadu acknowledged that the Supreme Court of India² had declared *jallikattu*³ to be *ultra vires* several provisions of the Prevention of Cruelty to Animals Act, 1960.⁴ The ordinance, which essentially ended the ban on *jallikattu*, was defended solely (and profusely) on the grounds that *jallikattu* played a significant role in preserving the 'tradition and culture' of the State in addition to its ensuring the 'survival' of the native breed of bulls.

Through the paper, I seek to convince the reader that the Governor in this case should not have been empowered by Article 213 of the Indian Constitution⁵ to promulgate an ordinance of this

¹ Tamil Nadu Ordinance No. 1 of 2017. Hereinafter referred to as "the ordinance" or the "*jallikattu* ordinance".

² *Animal Welfare Board of India v A Nagaraja* (2014) 7 SCC 547.

³ A Tamilian sport the aim of which is to grab a bag of coins tied to the horn of a bull.

⁴ Hereinafter referred to as the "PCA Act".

⁵ See n 48.

kind; one which in effect renders nugatory a Supreme Court judgment. The unstated theme that cuts across the paper is that the doctrine of separation of powers⁶ is pivotal to the harmonious working of a democracy and that the separation between the three organs in general and between the judiciary and the executive in particular is not to be tampered with at any cost—and certainly not through the backdoor.

The paper will comprise of 3 parts, the first of which traces the back-and-forth stands taken by the legislature and the judiciary on the issue of *jallikattu*, highlighting the reasoning given by the Supreme Court⁷ for the ban. The second part takes off from the first and looks at the plausible rationale behind the promulgation of the ordinance, which is followed by an examination of the role of Article 213 in the case at hand. This part contends that the words ‘circumstances exist’ in sub-clause (1) of the Article requires an alternative, restrictive interpretation in light of the recourse taken by Tamil Nadu in what I argue is a response to the 2014 judgment.⁸ This will then tie into my conclusion in part III that the ordinance does not sit well with the doctrine of separation of powers and that a mechanism should be put in place to ensure that such State ordinances should not be allowed to be promulgated, which I hope will satisfy the reader of the viability of my thesis.

I. THE LEGISLATURE, THE JUDICIARY, AND JALLIKATTU

Coming under the scanner in 2006 when the Madras High Court⁹ arguably went beyond the scope of the petition before it,¹⁰ *jallikattu* was banned only to return a year later when a division bench of the same High Court set aside the earlier order that called for its ban.¹¹ This confusion was only a precursor of things to come. In July 2007, the Supreme Court of India on appeal stayed the judgment of the division bench and then vacated the stay on January 15th 2008 (four days after it had expressed its refusal to vacate the stay). This was followed by the passing of the Tamil Nadu Regulation of Jallikattu Act in 2009,¹² which permitted the continuation of *jallikattu* ‘notwithstanding anything contained in any other law... or in any judgement’.¹³

⁶ In Bruce Ackerman’s view, the Indian Constitution embodies the principles of a ‘Constrained Parliamentarism’, with there being a separation of powers between the three organs of government, the result of which is that each organ keeps a check on the powers of the other without stepping on the other’s power.

⁷ *Nagaraja* (n2).

⁸ *ibid.*

⁹ *K. Muniyasamy Thevar v. Deputy Superintendent of Police* AIR 2006 Mad 255.

¹⁰ V Venkatesan, ‘Jallikattu & Ramar Setu: Understanding Supreme Court’s Confusion’ (*Law and Other Things*, 2008) <<https://lawandotherthings.com/2008/01/jallikattu-ramar-setu-understanding/>> accessed 23 March 2020.

¹¹ *K. Muniyasamy Thevar v. Deputy Superintendent of Police* (2007) 5 MLJ 135.

¹² Tamil Nadu Act 27 of 2009. Hereinafter referred to as the “TNRJ Act”.

¹³ Section 3(1) of the TNRJ Act.

Less than a year later, the matter again meandered its way through to the Supreme Court¹⁴ when the Animal Welfare Board of India¹⁵ sought an absolute ban on any activity relating to *jallikattu*. While the Court refused to grant an outright ban, it laid a number of restrictions on the sport, including a requirement that all bulls involved in it be registered with the AWBI. The Ministry of Environment and Forests¹⁶ then effectuated a de facto ban on *jallikattu* when in July 2011 it issued a notification¹⁷ that prohibited bulls from being trained as ‘performing animals’ as under Section 22 of the PCA Act.¹⁸ It was in 2014 that the pivotal judgment¹⁹ (around which this paper is centred) was delivered, and: a total ban was imposed on *jallikattu*, the TNRJ Act was held to be unconstitutional, and the validity of the MoEF notification was upheld.

In a complete reversal of the MoEF’s notification, the Central Government vide its own notification²⁰ dated 07.01.16 permitted bulls to be exhibited or trained as performing animals,²¹ thus in effect circumventing the Supreme Court’s ban. A challenge to the notification resulted in the Supreme Court issuing a stay on it, which was followed by the Central Government subsequently deciding to withdraw it on account of its practical effects on the 2014 judgment. It was after this (in 2017) that the ordinance which gave rise to this paper was promulgated, as the Tamil Nadu government, amidst a wave of massive protests in the State, made amendments to the PCA Act- thus removing the basis on which the judgment was passed in the first place.

To appreciate the enormity of the ordinance, it is essential to first understand the reasoning behind the 2014 judgment. The Court noted that the objective of the PCA Act was to “prevent the infliction of *unnecessary*²² pain or suffering of animals”,²³ the determination of which it said could be done by considering whether it could have reasonably been avoided or if the conduct causing the suffering was for a legitimate purpose.²⁴ On this, the Court observed that by holding *jallikattu* and similar events, the organizers were not *preventing* any such pain or

¹⁴ *Animal Welfare Board of India v. A. Nagaraja* (2010) 15 SCC 190.

¹⁵ Hereinafter referred to as “AWBI”.

¹⁶ Hereinafter referred to as “MoEF”.

¹⁷ Notification No.G.S.R.528 (E).

¹⁸ 22. **Restriction on exhibition and training of performing animals.** - No person shall exhibit or train-
 (i) any performing animal unless he is registered in accordance with the provisions of this Chapter;
 (ii) as a performing animal, any animal which the Central Government may, by notification in the Official Gazette, specify as an animal which shall not be exhibited or trained as a performing animal.

¹⁹ *Nagaraja* (n2).

²⁰ Notification No. G.S.R.13 (E).

²¹ Again, as under Section 22 of the PCA Act.

²² Emphasis mine.

²³ Preamble, PCA Act.

²⁴ *Nagaraja* (n2) 28.

suffering, but were in fact *inflicting* that which they were “*legally obliged to prevent*”,²⁵ since Section 3 of the PCA Act casts a duty upon those in charge of an animal to ensure its well-being. It then looked at Section 11 of the Act- a penalizing provision that deals with cruelty to animals- and held that *jallikattu* and its like *per se* violated sub-clauses (a) and (m)(ii) of sub-section (1),²⁶ thereby making the organizers of such events liable to punishment under the Section. In addition to declaring *jallikattu* as being perverse to Sections 3 and 11, the Court also held that it was inconsistent with Section 22 of the Act²⁷ read with Articles 51A (g) & (h) of the Constitution.²⁸ Importantly, the Court’s decision was based not just on a reading of the PCA Act, but also on the foundation of fundamental rights and India’s international obligations.

This leaves one with the last ground (the very one the State had used to rest its claim to conduct the sport) on which the Court delivered its judgment- culture and tradition. Completely disregarding the argument put forth by the State that events like *jallikattu* are “closely associated with village life”²⁹ and that they have been going on for the last 300 years “by way of custom and tradition”,³⁰ the Court emphatically opined that *jallikattu* has never been a part of Tamil Nadu’s tradition or culture, but rather, that it is the welfare and well-being of the bull that has been.³¹

If there was ever any cloud over the question of whether the Supreme Court *had* in fact banned *jallikattu* (for it did not say so in as many terms), none should have remained after it categorically stated- “... *bulls cannot be used as performing animals, either for the Jallikattu*

²⁵ *ibid.*

²⁶ 11. **Treating animals cruelly.** - (1) If any person-

(a) beats, kicks, over-rides, over-drives, over-loads, tortures or otherwise treats any animal so as to subject it to unnecessary pain or suffering or causes or, being the owner permits, any animal to be so treated;

.

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.

(m) solely with a view to providing entertainment—

(ii) incites any animal to fight or bait any other animal;

²⁷ n18.

²⁸ 51A. **It shall be the duty of every citizen of India-**

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform;

²⁹ *Nagaraja* (n2) 5.

³⁰ *ibid.*

³¹ *Nagaraja* (n2) 42.

events or Bullock-cart Races in the State of Tamil Nadu, Maharashtra or elsewhere in the country.”³²

II. WHY THE ORDINANCE? APPROACHING ARTICLE 213 DIFFERENTLY

Post *Nagaraja*,³³ a sport that was popular only among a few communities in Tamil Nadu³⁴ magically appropriated to itself a distinct Tamil identity that would, in the months to come, be the cornerstone behind the promulgation of the 2017 ordinance.³⁵ While two *Pongal* festivals passed by without a *jallikattu* event much to the chagrin of the subalterns, the January of 2017 witnessed unprecedented protests in the State, with the gathering at Alanganallur that demanded a lifting of the ban resulting in over 500 people being arrested, setting off a chain of rallies that culminated in one at Chennai’s Marina beach in which over 140 people were injured and a police station set on fire.³⁶ The matter got so out of hand that the then Chief Minister of Tamil Nadu wrote a letter to the Prime Minister of India asking the Government of India to promulgate an ordinance ‘removing the legal impediments enabling the conduct of Jallikattu during Pongal, 2017’.³⁷ Though the Centre was interestingly averse to promulgating an ordinance that would facilitate the conducting of *jallikattu* as the matter was sub judice, it did express that it would be supportive of the steps taken by the State Government.³⁸ With this, the wheels were in motion for the Governor of Tamil Nadu to use his powers under Article 213.³⁹

Since a State amendment to the PCA Act would have resulted in a conflict between a Central law and a State law, the *jallikattu* ordinance was brought after the Governor received ‘instructions’ from the President (as is required under Article 213)⁴⁰. That obstacle having been overcome, the Governor on the 21st of January, 2017 promulgated an ordinance ‘to amend the PCA Act so as to preserve the cultural heritage of the State of Tamil Nadu and to ensure the

³² *Nagaraja* (n2) 77.

³³ *Nagaraja* (n2).

³⁴ Kalaiyarasan A, ‘Politics of Jallikattu’ (2017) 52 Economic & Political Weekly.

³⁵ n.l.

³⁶ Kalaiyarasan (n34) 13.

³⁷ Letter from O. Panneerselvam to Narendra Modi (9 January 2017).

³⁸ Mini Srivatsava and Shivangi Yadav, ‘The Custom Of Jallikattu In Law And Practice In India: Need For A Jurisprudential Shift’, *Environmental Law and Policy* (Delta Book World 2017).

³⁹ ‘Power of Governor to promulgate Ordinances during recess of Legislature’.

⁴⁰ Shubhankar Dam, *Presidential Legislation In India: The Law And Practice Of Ordinances* (Cambridge University Press 2013).

*survival and wellbeing of the Native breed of bulls.*⁴¹ Splitting this statement of purpose into its components, one arrives at the conclusion that the ordinance was promulgated to:

- i) Amend the PCA Act so that the cultural heritage of Tamil Nadu could be preserved, and
- ii) To ensure that the native bulls would survive.

The first reason of culture and heritage (as already discussed)⁴² was considered at length by the Supreme Court⁴³ and rejected as untenable. Interestingly, the only other reason cited in support of the ordinance- the one relating to survival of the native breed- was not put forth before the Court in *Nagaraja*.⁴⁴ However, this too is easily dealt with if one looks at the empirical data provided by PETA India: in 2017 alone, after the ordinance was passed, the lives of 3 bulls were claimed.⁴⁵ PETA claims that the real figure is likely to be much higher since bull deaths often go unreported. Moreover, evidence provided by the AWBI showed how the bulls were tortured before they were let into the arena, with participants and organizers feeding them with alcohol, rubbing their genitals with chilli powder and constantly poking them with sharp objects, prompting the Court to observe that the treatment the bulls received during these events was “*cruel, barbaric, inhuman and savage*”.⁴⁶ Surely if the intention of the ordinance was to ensure the native bull’s safety and well-being, it should not have been promulgated so as to enable the conducting of a sport that is by its very nature cruel to it? In fact, if what the governor sought was the ‘continuance’⁴⁷ of the native breeds, surely the logical course of action for him would have been to place an outright ban on any activity that would put them in harm’s way? Of course, the response to these questions would go back to the discourse on culture and tradition, thus completing a circular argument. The only way out of this loop is for those taking a stand in favour of *jallikattu* to drop one of the two arguments, for they are inherently contradictory. Unfortunately, this still does not invalidate either of the counter-arguments put forward in opposition to the promulgation of the ordinance.

⁴¹ Preamble, *jallikattu* ordinance.

⁴² *Nagaraja* (n2) 42.

⁴³ *Nagaraja* (n2).

⁴⁴ *ibid*.

⁴⁵ PETA India, ‘Jallikattu Investigation 15 January- 3 February 2019’ (PETA India 2019) <https://www.petaindia.com/wp-content/uploads/2019/05/PETA_JALLIKATTU_INVESTIGATION_2019_13.05.2019.pdf> accessed 24 March 2020.

⁴⁶ *Nagaraja* (n2) 19.

⁴⁷ Explanatory Statement, *jallikattu* ordinance.

It is vital at this stage to turn to the text of clause (1) of Article 213-48 in particular, to the words ‘*circumstances*⁴⁹ exist’ and ‘render it *necessary*’⁵⁰. The Supreme Court has held that “the existence of circumstances is an objective fact”⁵¹ and that the necessity to promulgate an ordinance “is distinguished from a mere desirability”,⁵² with the words ‘immediate action’ in the Article conveying the sense that the promulgation of an ordinance was imperative because of an emergency situation. The ordinance-making power of a Governor had also been justified previously⁵³ on the ground that public interest should not suffer because of the unavailability of the legislature during the emergency. In the case of the *jallikattu* ordinance, if it were the fact that the promulgation of an ordinance was *imperative*, the Centre would have used the ordinance route long ago and the standing government would have earned significant brownie points in Tamil Nadu for making *jallikattu* possible.⁵⁴ Its reluctance to do so arguably stemmed from the fact that promulgating an ordinance when the matter was sub judice would have led to a confrontation with the judiciary, and with the government already having a strained relationship with it,⁵⁵ it would not have wanted to start on the wrong note with KS Khehar, J. who had taken over as the Chief Justice of India just weeks before the ordinance was eventually promulgated.⁵⁶

For the then Chief Minister of Tamil Nadu, however, ending the protests was a bigger priority⁵⁷ than maintaining a friendly relationship with the Supreme Court, more so because *jallikattu* was an integral part of the community to which he belonged. Viewed in this background, it would not be too far-fetched to conclude that the *jallikattu* ordinance was promulgated not because circumstances existed which rendered it *necessary* for its promulgation, but because circumstances existed which rendered it *desirable* to do so. It is also hard to argue, as the Court

48 213. Power of Governor to promulgate Ordinances during recess of Legislature

(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require:

Provided:

...

⁴⁹ Emphasis mine.

⁵⁰ Emphasis mine.

⁵¹ *Krishna Kumar Singh v. State of Bihar* (2017) 3 SCC 1 at Para 105.

⁵² *ibid.*

⁵³ *D.C. Wadhwa v. State of Bihar* (1987) 1 SCC 378 at Para 6.

⁵⁴ R.D. Vijayasekhar and Rayappa Sarah Mahimanjali, ‘Socio-Legal Perspective Of The Prevention Of Cruelty To Animals Act, 1960 With Special Reference To Jallikattu, Bullock Cart Races And Cockfights’ (2019) VIII IUP Law Review.

⁵⁵ The tussle with the previous Chief Justice of India TS Thakur over the matter of appointment of judges had created a furor.

⁵⁶ Vijayasekhar and Mahimanjali (n54).

⁵⁷ S. Vignesh, ‘Hugging The Bull: Becoming-Animal In Jallikattu’ (2018) 12 Deleuze and Guattari Studies.

in *Wadhwa*⁵⁸ did, that public interest would have suffered had the ordinance not been promulgated, for as stated previously,⁵⁹ *jallikattu* was popular only among a few communities in Tamil Nadu. Moreover, acting in public interest alone should not form the basis to promulgate an ordinance, as that would create a dangerous precedent.⁶⁰

To prevent ordinances of this kind, then, the words ‘circumstances exist’ in Article 213 should be interpreted in a manner that leaves no room for the executive to circumvent the judgment of a court (any court), especially if the ordinance is promulgated without providing justifications that have not already been provided in front of the Court. Additionally, whenever an ordinance is promulgated by a Governor, a statement *explaining* the circumstances which had necessitated such promulgation should be provided for in the ordinance itself. That is, unlike the *jallikattu* ordinance in which the Governor simply stated that circumstances existed which warranted the promulgation, to deter the Governor from promulgating ordinances at his or her whims and fancies, he or she should be liable to explain the aggravating circumstances that led to a particular ordinance being promulgated. This (along with the previous suggestion) would ensure that the judiciary as an institution would not be rendered useless and that the executive does not step on the toes of the legislature.

III. CONCLUSION

The ban imposed by the Court in *Nagaraja*⁶¹ had multiple angles to it and was not just centred around the fact that *jallikattu* violated the PCA Act. The Court relied heavily on international jurisprudence and constitutional principles. One of the arguments it made was that the international community was shifting from an anthropocentric to a nature’s-right centric approach, observing that animals too have “*honour and dignity which cannot be arbitrarily deprived of*”.⁶² The bench drew attention to the prevailing practice in Germany⁶³ where there is a Constitutional guarantee for animal welfare since 2002. Interestingly, the Court also gave an expansive reading to Article 21 and opined that it was this Article that safeguarded the environment and that as a vital part of the environment, cruelty to animals would affect the

⁵⁸ *Wadhwa* (n53).

⁵⁹ *Kalaiyaran* (n34).

⁶⁰ *Wadhwa* (n53) 145.

⁶¹ *Nagaraja* (n2).

⁶² *Nagaraja* (n2) 51.

⁶³ *Nagaraja* (n2) 49.

dignified life of a human.⁶⁴ The final nail in the coffin as far as the State was concerned was the Court's refusal to accept that *jallikattu* could be conducted with regulations. It countered that regulating cruelty would be akin to legitimizing it.⁶⁵

The doctrine of separation of powers implies that each pillar of democracy- the judiciary, the executive, and the legislature- act as separate entities and perform different functions. In Bruce Ackerman's conception of the 'constrained'⁶⁶ Indian Parliament, this aspect of performing different functions assumes all the more importance. Moreover, the quasi federal democratic structure of India means that the separation of powers is restricted not just to the horizontal axis (i.e, the separation between the judiciary, the executive, and the legislature)- but extends also to the vertical (between the Centre and the various States) and the internal (within each of the three pillars of a democracy) ones. As pointed out in the Introduction, the Explanatory Statement to the *jallikattu* ordinance is in a sense *confessing* that *Nagaraja*⁶⁷ had banned the sport, and yet proceeds, almost mockingly and on the garb of preserving the State's culture, to do the very thing that *Nagaraja*⁶⁸ had sought to prevent. Promulgating ordinances like the one analysed in this paper should never have been within the ambit of a Governor's power under Article 213, since it defeats the very fabric of the doctrine of separation of powers. It is crucial to point out here that this doctrine is not one that exists in thin air; much to the contrary, it has been declared to be a part of the basic structure of the Constitution.⁶⁹ This argument can be stretched to say that no law can be made that deviates from this doctrine.

However one views it, in a hypothetical world if prior to it being promulgated the ordinance was produced before the Supreme Court for it to decide on its validity, the ordinance would unlikely have stood the test of judicial scrutiny seeing as it provided no new justification for the sport that the Court had not already considered; moreover, the ordinance only amended the provisions of the PCA Act, still leaving behind the myriad reasons for which the Court had banned the sport. This hypothetical judgment should be the yardstick for determining whether or not a Governor should have the power to promulgate a particular ordinance.

⁶⁴ Jessamine Therese Mathew and Ira Chadha Sridhar, 'Granting Animals Rights Under The Constitution: A Misplaced Approach: An Analysis In Light Of Animal Welfare Board Of India V. A. Nagaraja' (2014) 7 NUJS Law Review.

⁶⁵ *Nagaraja* (n2) 58.

⁶⁶ Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review.

⁶⁷ *Nagaraja* (n2).

⁶⁸ *ibid.*

⁶⁹ *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 at Para 615.