B.R. Act Amendment Ordinance—Against Spirit of Cooperation and Federal Structure

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President of India promulgated Banking Regulation Amendment Ordinance 2020 on June 27, 2020. The ordinance is brought as replacement to the bill introduced by Finance Minister in Parliament on February 10, 2020. Presently, when Parliament session is suspended because of COVID-19, and no discussion on the bill could be held Government of India has decided to issue the ordinance. Reasons for the urgency are not clear. Official statement informs that the ordinance is for bringing Urban Cooperative Banks under RBI regulation. But, as discussed in the preceding part of article, UCBs are being regulated by RBI since the last 55 years.

As per constitutional provisions Cooperation is a state subject. Central Government can only pass laws concerning institutions functioning under Multi-State Act. If Central Government enacts any law affecting institutions functioning under State Cooperative Societies Act, it will be deemed as encroaching on State's rights. For this reason of encroachment into state's domain, the 97th Constitutional Amendment passed by both houses of Parliament during UPA period, was held as ultra-virus to Constitution, and hence void, by Gujarat High Court. While delivering the sensational verdict against Central Government the Court commented that the amendment was interference in state's rights and against the spirit of federal structure. In the light of this judgment, there is a need to ponder whether the ordinance, which, besides giving greater control over banking related activities of UCBs to RBI, also bestows areas which are within the powers of RCS, as per State Cooperative Societies Act. This gives rise to questions, such as, whether Central Government was right in promulgating the ordinance? Is it not against constitution? Most of the state governments, with the exception of Kerala and West Bengal, have not voiced their opposition to the ordinance, possibly for being politically correct.

One of the important aspects the ordinance seeks to modify is regarding capital of UCBs. As per the criteria prescribed now, all banks whether in private sector or public sector or cooperative urban banks, they are required to have a prescribed minimum capital for functioning and continue to grant loans. While the private sector banks depend on market to raise the required capital by issuing shares, debentures, preference shares and derivatives etc., for public sector banks required capital is contributed by shareholder members and reserves accumulated from their net profits. In the last 116 years of existence of urban cooperative banks, not a rupee has been contributed by either central or state governments or institutions like RBI or NABARD. UCBs also do not expect any such funding.

There is a difference in the formation and existence of cooperative institutions as compared to others. They are association of persons through voluntary membership, functioning democratically for extending help to one another in times of need. Profit earning is not the motive like in private sector institutions. Every year, out of surplus earned, 25% is transferred towards reserves and 10% towards Deficit Cover Fund. Only after making all allocations for NPAs and others, as per statutes and RBI directives, the balance is distributed as dividend to shareholders. Basic principle for cooperation is voluntary association. Whenever a member wants to cease being a member, he will be entitled to his share capital. The shareholder, however, is not eligible for any share over the reserves or other assets accumulated over the years. The accumulated wealth in the form of reserves and other tangible assets, does not belong to any one or a class of individuals. This wealth remains as the property of the cooperative institutions to be used by future generations of shareholders. This unique feature of cooperatives, differentiates them from other private sector commercial entities.

Private sector commercial banks or companies are entities established under Companies Act. A shareholder in a company is entitled to dividend declared by the company as also the value of shares in the share market on the date he sells the shares. The shareholder cannot sell the shares to the company.

Shares have to be necessarily sold in the market, where the value of the share may increase or decrease. The value or price of a share in the market, is not based on the company's performance only. It is based on several factors such as future prospects, government policies, as also unpredictable factors like demand for the share on that day.

The provisions of the Ordinance, seek to change this. Section 12 has been replaced, and as per the amendment, cooperative urban banks can raise capital from non-members also, subject to RBI guidelines. In such a scenario, cooperation is absent. One of the principles of cooperation being to help one another based on 'All for one and one for all' will not be there. Further, 'one person one vote' is another principle of cooperation. That is, irrespective of the quantum of share capital, a person will have only one vote. Board of Directors are elected by shareholders based on this concept. When this changes, a person who can invest more can get controlling interest in cooperative institutions. These are against cooperative principles as also against State Act provisions. The unilateral decision of Central Government, is against the spirit of constitutional provisions as also encroaching into state domain. Another important aspect is that whenever a weak cooperative urban bank decides to merge with another UCB, then the boards of these two banks as also the General Body of the banks discuss and take a decision.

As per the provisions of ordinance any decision for merger or reconstruction of an UCB would be at the sole discretion and decision of RBI. The Board of Directors or General Body of either the UCB that is being merged or reconstructed or the UCB which is merging another UCB will not have any say. This is also against the spirit of cooperation where the shareholder has a say and General Body is considered as supreme.

Voluntary association in cooperatives is an important attribute. The ordinance seeks to change this. The right of a member to withdraw or cease being a member and seek refund of share capital is being denied. That is, a person has to compulsorily continue as a member or sell his share in the market.

Another important change contemplated is constitution of Board of Management. So far UCBs are managed by Board of Directors elected by shareholders. Under the pretext that the elected Board of Directors do not have professional qualifications, which is affecting the functioning of UCB, constitution of Board of Management is mandated. RBI had issued instructions for constitution of BOM a few months ago. To give statutory backing to it, this has also been included in the ordinance. The composition and qualification of persons for BOM has been specified. The Board of Directors have to constitute BOM, which may become another power centre. A member of BOM can only be removed after obtaining RBI permission. BOM will comprise of 50% outsiders, which will cause avoidable delay in decisions such as loan sanctioning, investment etc.

Since the last two decades RBI has stopped issuing banking license to any new UCB or well-functioning cooperative society. R. Gandhi and Malegam Committees had recommended that the big urban cooperative banks should be converted as private sector banks and the medium sized ones should be converted as small finance banks. Although RBI was prepared to implement this recommendation and grant licenses to convert UCBs into private sector banks, none of the UCBs have agreed to the proposal. Now, the same recommendations of Malegam Committee and Expert Committee are being implemented through ordinance. The Committee recommendations were opposed by NAFCUB as also all state federations. Without making changes in State Cooperative Societies Acts, the Central Government is seeking to implement the changes surreptitiously through ordinance. The country is witness to sustained criticism that the regulatory and statutory institutions like CBI, Enforcement Directorate, Income Tax Department and Election Commission have been reduced to puppets acting at the behest of people in authority. This ordinance, together with other acts, in the last few quarters, are attempts to include RBI, the sole institution which is expected to guide the nation’s external and internal finances towards stability and progress, also in the above list. Irrespective of this, the unilateral action of promulgation of Ordinance by Central Government is against the spirit of cooperation and federal structure.

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