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A Critical Overview of Ordinance Making Power

SUKRIT GARG[1]

ABSTRACT

The Constitution of India empowers the executive to legislate in circumstances requiring immediate attention. This is done by granting the power to issue ordinances to the President of India and to the Governors of States. However, ordinances have often been used to subvert the legislative process. This paper seeks to take a critical overview of the nature, scope and extent of this exceptional power as devised by the Constitution, and to locate the loopholes that need to be addressed so that its misuse may be tackled. Further, it tries to answer what constitutes the misuse of this power, how governments at the Union and State level have contravened the limits of this power, and the role played by the judiciary to curb the transgressions against this power.

I. INTRODUCTION

The Constitution establishes India as a representative democracy.[2] Every five years people elect their leaders to represent them in the legislative body, whether at the Union or in the States.[3] It is the exclusive power of the legislative bodies to come up with laws for the proper regulation of the affairs of the country.[4] The Constitution extensively deals with the scope of the legislative power of the Union and the State Legislature, wherein the division is made in respect of both the territory and the topic of legislation.[5] Thus, the legislature is the primary law-making body in our country, which legislates at the behest of the citizens of India, while functioning within the Constitutional scheme.

Despite reflecting the doctrine of separation of powers within its design, though without exclusively mentioning it,[6] the Constitution empowers the Executive to perform the task of legislation by way of granting legislative powers to the President under Article 123, and to

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[1] Author is an Assistant Professor at Institute of Law, Nirma University, India.
[2] *See* Constitution of India, 1950, Art. 81(1)(a), and Art. 170(1).
[3] *See* Constitution of India, Art. 83(2), and Art. 172(1).
[4] Constitution of India, Art. 245.
[5] Mahendra Pal Singh, V. N. Shukla's Constitution of India 774 (Eastern Book Company, Lucknow, 13th edn., 2017). Also, see Constitution of India, 1950, Art. 245 and Art. 246.
[6] P. M. Bakshi, "Comparative Law: Separation of Powers in India" 42(6) ABAJ 553 – 595 (1956) http://www.jstor.org/stable/25719656 .

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Governors of the States under Article 213. By virtue of these two Articles, the President and the Governor can issue laws through Ordinances. Such power had been granted by the Constitution so as to tackle any emergency-like situation at times when the legislature was not in session.

However, several instances have been witnessed where the ruling party misused the power so as to avoid the legislature in situations where it knew that the legislation would not have been passed by the legislative procedure. Against the backdrop of the Constitutional provisions on the ordinance-making power, this paper examines the nature, scope and extent of this power. Further, it tries to answer what constitutes the misuse of this power, how governments at the Union and State level have contravened the limits of this power, and the role played by the judiciary to curb the transgressions against this power.

II. Need for ordinance-making power

The power to pass ordinances is a relic of foreign rule. Sections 42 and 43 of the Government of India Act, 1935 empowered the Governor-General of British India to promulgate ordinances during recess of the Federal Legislature and at any time with respect to certain subjects respectively. Similar powers were also given to the Governors of the provinces.[7] The ordinances were known tools of oppression in the hands of the British Raj.[8]

It is necessary to point out that in comparison to the Government of India Act, 1935, the Constitution does not grant the power to the President and the Governor to pass ordinances at any time without the law being placed before the legislature subsequently. Thus, the provisions of only Sections 42 and 88 of the Act of 1935 are reflected in our Constitution.[9]

The question then arises as to why a power with a marred history was included in our Constitution. The purpose was to provide machinery for legislation when immediate action is required during the recess of Parliament.[10] *Dr. B. R. Ambedkar* explained the need of granting the President and Governors the ordinance-making powers in the following words:

"... it seems to me that the only solution is to confer upon the President the power to promulgate the law which will enable the executive to deal with that particular situation because it cannot

[7] *See* Government of India Act, 1935, Ss. 88 and 89.

[8] *See* for eg., statements of H. V. Kamath in Constituent Assembly Debates, Vol. VIII (8.89.92), available at http://cadindia.clpr.org.in/constitution_assembly_debates/volume/8/1949-05-23 .

[9] Sections 43 and 89 of the Government of India Act, 1935 granted the power to the President and the Governors of Provinces, respectively, to pass ordinances at any time without having to place it before the legislative body. However, the ordinances issued under these sections were meant to expire at the end of a maximum period of six months, and were capable of being re-promulgated for further periods of 6 months.

[10] Mahendra Pal Singh, *supra* note 5, at 503.

resort to the ordinary process of law because, again ex hypothesi, the legislature is not in session."[11]

III. Nature and scope of ordinance-making power: constitutional provisions

Legislative Powers of the President: Article 123 of the Constitution empowers the President to promulgate ordinances. In order to issue an ordinance, three elements need to be satisfied: there shall be a recess of Parliament, the President must be satisfied with the requirement to take urgent action, and the matter requiring urgent action shall be such over which the Parliament has the power to legislate. Another condition ought to be fulfilled post-issuance of the ordinance: it shall be placed before both the Houses for Parliamentary scrutiny.

1. **Recess of Parliament:** The President may issue an ordinance at any time except when both Houses of the Parliament are in session. Thus, the power to issue an ordinance cannot be used when the normal legislative process is available. If one House or both the Houses of Parliament is not in session, no legislative work can take place. In such situations, the President may issue an ordinance. This requirement ensures that ordinance making power does not transform into a parallel law-making power with that of the legislative body.

2. **Requirement of President's satisfaction:** Further, the simple non-existence of the normal legislative procedure is not sufficient for the issuance of an ordinance. It may be issued only if the President is satisfied that such circumstances exist which make it necessary for him to take 'immediate action'. In view of the Constituent Assembly debates[12] and clause (1) of Article 74, the President cannot issue such an ordinance except on the advice of the Council of Ministers.

3. **Jurisdiction of the power:** The legislative power of the President is parallel to the legislative powers of the Parliament alone.[13] The ordinance so issued shall have the same force and effect as an Act of Parliament. Thus, he can issue ordinances only on the matters over which the parliament has legislative powers, and the ordinances so issued shall be made subject to the same limitations as are laws made by the Parliament.[14]

4. **Parliamentary Scrutiny:** The power is not unrestrained and an ordinance has to be

[11] *Id.,* at 506.
[12] *See* for eg., statements of H. V. Kamath and B. R. Ambedkar in Constituent Assembly Debates, Vol. VIII (8.89.90; 8.89.149), available at http://cadindia.clpr.org.in/constitution_assembly_debates/volume/8/1949-05-23.
[13] Constitution of India, 1950, Art. 123(3).
[14] *See* Constitution of India, 1950, Art 367(2) according to which an Act or law made by Parliament also includes an ordinance made by the President.

brought under parliamentary scrutiny as soon as possible. Once the Parliament reconvenes, the ordinance ought to be placed before both the Houses of Parliament for scrutiny. The Supreme Court declared parliamentary scrutiny to be a mandatory requirement in the judgment of Krishna Kumar Singh v. the State of Bihar, (2017) 3 SCC 1. Non-compliance with this requirement would, therefore, snatch all legal validity from the ordinance – both past and future.

An ordinance once passed shall not remain in for an indefinite period. The Constitution provides for three ways through which the ordinances may cease to have an effect. The first way is through withdrawal of the ordinance by the President. Also, an ordinance shall mechanically expire at the end of six weeks from the date of reassembly of the Parliament. It may be brought to an end even earlier if a resolution disapproving it is passed by both the Houses of Parliament. It is worth noting that the Parliament has no power to convert an ordinance into law by a resolution approving the ordinance. If the contents and rules of an ordinance are to be transformed into legislation, then the proper legislative procedure starting with a Bill and ending with the President's assent shall be resorted to. Thus, the maximum duration for which an ordinance may last is seven and a half months as, under Art 85(1), six months cannot intervene between two sessions of Parliament.

A look at the provision under clause (2) of Article 123 that provides for the mechanical expiry of the ordinance brings to light an interesting fact. We note that an ordinance shall mechanically expire at the end of six weeks from the date of reassembly of both Houses of Parliament. Further, a perusal of clause (1) of Article 85 shows that no more than six months shall pass between two sessions of the Houses of Parliament. Thus, a combined reading of clause (2) of Article 123 with clause (1) of Article 85 shows that the maximum duration for which an ordinance may last is six months and six weeks. This elongated duration for which an ordinance, legislation made by the executive, can stay in force worried some members of the Constituent Assembly. An amendment was proposed by *H V Kamath* in the Constituent Assembly which aimed at prescribing a maximum period of four weeks within which the ordinance shall be placed before both Houses of the Parliament.[15] *Pandit Kunzru* also proposed an amendment to limit the maximum period for which an ordinance can be in effect to thirty days.[16] Both the proposals were rejected.

[15] *See* statement of H. V. Kamath in Constituent Assembly Debates, Vol. VIII (8.89.86), available at http://cadindia.clpr.org.in/constitution_assembly_debates/volume/8/1949-05-23 .

[16] *See* statement of Hriday Nath Kunzru in Constituent Assembly Debates, Vol. VIII (8.89.95), available at http://cadindia.clpr.org.in/constitution_assembly_debates/volume/8/1949-05-23 .

Legislative Powers of the Governor: Article 213 grants Governors the power to issue ordinances for their states. The power granted to them is of a nature similar to that of the power granted to the President under Art 123, though the mutatis mutandis changes ought to be made carefully. The ordinance may be issued only during the recess of the legislative body in circumstances where the Governor finds it necessary to take immediate action. The power is coextensive with the legislative power of the State Legislature, enjoys the same status as that of Acts passed by the State Legislature and is subject to the same limitations.

However, Art 213 imposes some additional limitations on the power of the Governor to issue ordinances. These limitations mostly share with certain centralising tendencies of our federal constitution. In some enumerated circumstances, the Governor cannot issue an ordinance without instructions of the President. The circumstances may be listed as follows:

1) where a Bill containing the same provision would have required the previous sanction of the President for its introduction in the State Legislature[17], or

2) where the Governor would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President[18], or

3) where an Act of the State Legislature containing the same provisions would have been invalid unless having been reserved for the consideration of the President it had received his assent.[19] The proviso to clause (3) of Art 213 applies the principle of Art 254(2)[20] to ordinances made by the Governor with the difference that a repugnant ordinance could be saved if it has been made in pursuance of instructions from the President.

IV. MISUSE OF ORDINANCE-MAKING POWER

The framers of the Constitution predicted the vulnerability to misuse of granting legislative powers to the executive. References have already been made in this paper to *H. V. Kamath's* and *Pandit Kunzru's* demands for providing an explicit upper limit to the period up to which ordinances can work without Parliamentary scrutiny. Though all fear of misuse of the power by the President was rejected by *P. S. Deshmukh* in his statement in the Constituent Assembly debate[21], no such fear relating to its misuse by the ruling party was expressed.

[17] *See* for e.g. Constitution of India, 1950, proviso to Art 304.
[18] Constitution of India, 1950, Art 200.
[19] *See* for e.g., Constitution of India, 1950, Art 254(2).
[20] Art 254(2) enacts that where a State law, after it has been passed by the legislature, is reserved for the consideration of the President and the President gives his assent thereto, that law, in spite of its repugnancy to a previously passed law of Parliament or an existing law, shall be valid and operative in the State.
[21] *See* statement of P. S. Deshmukh in Constituent Assembly Debates, Vol. VIII (8.89.131), available at http://cadindia.clpr.org.in/constitution_assembly_debates/volume/8/1949-05-23 .

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The abuse of ordinance-making power may be attributed to the defaults in the Articles granting the power and also to the subsequent interpretation of the provisions by the Courts. The provisions leave a number of important issues unanswered which extends the scope for their misuse. Some of these questions are: “Whether ordinances can be re-promulgated?”, “Whether the effects of an ordinance die with the death of the ordinance?”. *Shubhankar Dam* presents the issue in the following words: “Their (Ordinance’s) freestanding nature untethered from legislative restraints and time limits privilege executive edict over primary legislation in troubling ways.”[22]These questions have been dealt with in the next part of the paper.

The power may be misused either by issuing ordinances in situations that are not so emergent just so as to circumvent the normal legislative procedure or for some other oblique motives. Another method by which the power has been misused is by re-promulgating an ordinance a number of times. What this leads to is a situation that has often been termed as “Ordinance Raj” wherein the executive, finding itself incapable of passing a law through the prescribed legislative procedure, usurps the function of the legislature by means of issuing ordinances. This results in a continuation of the ordinance for a long period of time, within which any law for the subject matter could easily be made by the proper body – the legislature. This is also against the intention of the makers of the Constitution.[23]

An objectionable practice of not placing the ordinances for legislative scrutiny was reported in this regard. In this practice, the ordinances were re-issued verbatim after the prorogation of the legislative body. This was aided by the fact that the Assembly too would be prorogued within a period of six weeks so as to avoid mechanical expiry of the ordinance under clause (2) of Article 123. The State government would operate on the idea that the laws could be made through the executive by getting ordinances promulgated after the end of each succeeding session of the Parliament. This amounted to legislation by an executive fiat compromising the power of the legislature to perform its constitutionally allotted task.[24]

An example of the aforementioned practice is found in the judgments of DC Wadhwa v. the State of Bihar, (1987) 1 SCC 378 and Krishna Kumar Singh v. the State of Bihar, (2017) 3 SCC 1. In Krishna Kumar’s case, a series of ordinances were issued through which the State sought to take over 429 Sanskrit schools. In this process, the services of all the teachers and

[22] Shubhankar Dam, “Constitutional Fiat: Presidential Legislation in India’s Parliamentary Democracy” 24 Colum. J. Asian L. 1, 62 (2010).

[23] “Ordinance making is by itself an unusual, extraordinary and undesirable power; it should be qualified by a maximum period being qualified for its life.” – K. T. Shah in Constituent Assembly Debates, Vol. VIII (8.89.113), available at http://cadindia.clpr.org.in/constitution_assembly_debates/volume/8/1949-05-23 .

[24] M. P. Jain, Indian Constitutional Law 392 (Lexis Nexis Butterworths, Wadhwa, 6th edition, 2013).

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other employees of the schools were transferred to the State government. The first ordinance, which was issued in 1989, was followed by a succession of five ordinances. None of these ordinances, not even the first one, were placed for legislative scrutiny. The government failed to enact a statute containing the terms of the ordinances, and the last of them was allowed to lapse on April 30, 1992. In such a case, due to the non-observance of the constitutional provisions, the validity of the ordinance is hurt, and the effects that the ordinances have had require close judicial assessment for their retention. Further, it is questionable whether the conversion of schools from private into public institutions is an action that requires 'immediate action', and whether such transformations deserving lasting consequences ought to be attempted through the tool of ordinances. The promulgation of ordinances could also be framed as a case of misuse of constitutional silence.

V. RESPONSE OF JUDICIARY

This part deals with answers to the following questions as given by the judiciary: "Whether ordinance-making power is subject to judicial review? If so, then to what extent?", "What happens to the rights, privileges and obligations created by an ordinance when it is allowed to lapse without being replaced by an Act of Legislature?", and "Whether ordinances can be re-promulgated?".

1. **Judicial Review of Ordinances**: In **A. K. Roy v. Union of India**[25], the Supreme Court discussed the scope for judicial review of ordinances. This was done specifically in the light of the then-recent omission of clause (4) from Articles 123 and 213 by the Constitution (Forty-Fourth Amendment) Act, 1978. The fourth clause, an addition made by the Constitution (Thirty-Eighth Amendment) Act, 1975, had the effect of barring any judicial review of the satisfaction of the President and the Governor. The omission of this clause was taken by the court to be an indication that judicial review is not totally excluded in regard to the question relating to the President's satisfaction. The Court, however, pointed out that a prima facie case must be made out by the person challenging the satisfaction to show that there could not have existed any circumstances necessitating the issuance of the ordinances. Later, in **T. V. Reddy v. State of A. P.**[26], the Supreme Court held that since ordinance-making power is a legislative power, its exercise cannot be questioned on grounds of motives or non-application of mind or on grounds of propriety, expediency or necessity. However, Prof. *M.P. Jain* regards the approach of placing ordinances on a similar footing as legislation to be erroneous in the light

[25] (1982) 1 SCC 271.
[26] (1985) 3 SCC 198.

of the differences that appear between the two of them. The very fact that an ordinance lapses mechanically after a while, and needs to be replaced by an Act of legislature shows that it is merely a temporary expedient – an inferior kind of law.[27] In **Krishna Kumar Singh v. the State of Bihar**[28], the Supreme Court widened the scope of judicial review of ordinances. The satisfaction of Court can check whether the President or Governor had any relevant material to arrive at the satisfaction that an ordinance was necessary and to examine whether there was any oblique motive. However, the Court will not determine the sufficiency or adequacy of the material.

2. **Effect of Ordinances**: In the **State of Orissa v. Bhupendra Kumar Bose**[29], the Supreme Court, in the factual context of the case, held that the rights created by the ordinance in question must be held to endure and last even after the expiry of the ordinance. In **T. V. Reddy's case**[30]**,** the Supreme Court observed that when an ordinance is replaced by an Act, it does not mean that the ordinance is to be regarded void ab inito. The provision means that the ordinance shall remain effective till it ceases to operate. Thus, posts abolished by an ordinance do not revive after the lapse of that ordinance. Hence, in the light of the two judgments, the Courts would hold that the effect of the ordinance has not come to an end, keeping in mind the factual context and other factors, even after the ordinance may have ceased to exist. However, the "*theory of enduring rights*" as laid down by the two preceding judgments was held to be flawed in **Krishna Kumar's case**[31]as it was based on an erroneous comparison of Ordinance with temporary enactment. The Court observed: "*The question as to whether rights, privileges, obligations and liabilities would survive an Ordinance which has ceased to operate must be determined as a matter of construction. The appropriate test to be applied is the test of public interest and constitutional necessity. This would include the issue as to whether the consequences have taken place under the Ordinance which has assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief.*"

3. **Re-promulgation of Ordinances**: In **D. C. Wadhwa v. the State of Bihar**[32], a writ petition was filed in the Supreme Court as a matter of public interest litigation which challenged the practice of re-promulgating up to 256 ordinances in Bihar for up to 14 years without ever placing them before the State Legislature. The Court held that the exceptional power under Art

[27] M.P. Jain, *supra* note 25, at 392. For further reading on difference between an Ordinance and an Act, see Shubhankar Dam, *supra* note 22.
[28] (2017) 3 SCC 1.
[29] (1962) Supp (2) SCR 380.
[30] *Supra* note 27.
[31] *Supra* note 29.
[32] (1987) 1 SCC 378.

213 cannot be used as a substitute for the lawmaking power of the State Legislature. It criticized the practice saying that the "*power to promulgate ordinances cannot be allowed to be perverted to serve political ends*." Even after speaking much against the practice of re-promulgation of ordinances, the court recognised two situations when the practice may be resorted to: "*Of course, there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the ordinance, because the Legislature may have too much legislative business in a particular session, or the time at the disposal of the Legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the ordinance*." The exceptions have been subjected to much criticism and rightly so. *Noorani* thought that the exceptions were "*wholly gratuitous and robbed the judgment of merit and value*."[33] *Shubhankar Dam* argues that both the exceptions violate the fundamental requirement that an "emergent situation" (i.e., unexpected exigent circumstances) is a prerequisite for re-promulgation. He states: "*If the legislature declines to handle ordinance related matters because of the volume of work or brevity of time, that itself may be a reason to doubt the existence of emergent conditions*." Similarly, in **Krishna Kumar's case,**[34] the position has been upheld that the re-promulgation of ordinances is a fraud on the constitution.

VI. CONCLUSION: THE ROAD AHEAD

The grant of law-making power to the executive through ordinances is for emergent situations alone which need immediate action. It is not meant to be utilised to make the executive a law-making body parallel to the legislature. Hence, neither the ordinances nor their effects are intended to last for lengthy periods of time. However, the executive has abused the loopholes in the constitutional provisions for surpassing the legislature. It has been a general tendency that circumstances requiring the ordinance are not properly explained even within the ordinance. Many of such ordinances are found to have been passed on matters that can not be classified as emergent in any sense.[35] Even worse scenarios of misuse have been noticed in Bihar where the executive meticulously prorogued the Legislature within a time of six weeks, and never placed many ordinances before the Legislature for its consideration. The practice continued even after the binding decision passed in DC Wadhwa's case.[36]

Though the Supreme Court has tried to expunge the ordinance-making practice of its anomalies

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[33] A. G. Noorani, "Supreme Court and Ordinances" 22 ECON. & POL. WKLY. 357, 357-58 (1987).
[34] *Supra* note 29.
[35] *See* Shubhankar Dam, supra note 22.
[36] *Supra* note 29.

and to free the provisions from their ambiguity, much still remains to be done. Two pitfalls can still be recognised. Firstly, though re-promulgation has been held to be an unconstitutional practice, the status of the exceptions culled out in the DC Wadhwa judgment has not been commented upon in Krishna Kumar's case.[37] The exceptions are not well-reasoned, and as *Shubhankar Dam* pointed out, they violate the fundamental principle that an "emergent situation" is necessary for promulgation.[38] Secondly, no time limit has been set within which the ordinance shall be placed before the appropriate legislature.

Thus, it is essential that by way of an amendment to the Constitution, an appropriate time limit is prescribed within which the executive is bound to take the ordinance to the Legislature for its scrutiny. The time limit of four weeks from the date of promulgation, as proposed by *H. V. Kamath* in the Constituent Assembly debates, seems to be an appropriate period. If the situation is emergent enough to require an ordinance to deal with it, it is enough to excuse to summon an emergent session of the Houses to deal with the matter. In the words of *H. V. Kamath*: "*Parliament can be summoned, I am sure, as it is done in many other countries, even within two weeks. You can summon an emergent session and four weeks is a liberal period of time within which to summon both Houses of Parliament*."[39]

Additionally, the Wadhwa exceptions must be removed, and the executive must be required to provide ample reason before issuing an ordinance. If the proposed changes are made, then the true intent of the provisions – dealing with emergent situations that need immediate action – would be fulfilled. The alterations would decrease the scope of manipulation of the Constitutional provisions by the executive. The power has been given to the executive against all democratic norms to deal with extraordinary circumstances. Thus, it must be ensured that sufficient restrictions and checks are formulated to prevent any subversion of rule of law by abuse of power.

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[37] *Id.*
[38] Shubhankar Dam, *supra* note 22.
[39] *Supra* note 8.