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Article 123: A Constitutional Quandary or a Detrimental Dilemma?

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ABSTRACT

India has a parliamentary system. In the Indian Constitution, however, there is a clause that allows the President to periodically make laws without engaging the Parliament. Such presidential legislation are called ordinances, not Acts; the President promulgates them. And once a certain period of time has passed without such formal legislative permission, they cease to exist. However, aggressive political behaviour and generous court interpretations have rendered these restraints obsolete after several years of constitutional practise. What was exceptional and temporary is now 'normal' and 'permanent'. The aim of this research paper is to delve into origin, relevance and validity of Article 123 of the Indian Constitution, as well as "Article 213 of the Indian Constitution". In addition, abuse of provision over the years, from the first government under Jawaharlal Nehru in 1952 to the present NDA government under Narendra Modi, is examined in greater detail. The rising abuse of the provision during the Covid era is also examined, as is what Apex Court had to say regarding re-promulgation of orders in the landmark D.C. Wadhwa Case. Finally, once the undemocratic nature of ordinances has been demonstrated, a number of alternatives to the ideal situation in which ordinances are fully removed from the constitution are presented.

Keywords: *Ordinance, Ordinance Raj, Parliament, Governor, Democracy, President.*

I. INTRODUCTION

The Constitution of India is based on parliamentary and democratic traditions, and its two-tiered legislative structure is built around the notion of people's representation as a means of keeping the executive branch accountable and facilitating close oversight of the legislative process. Based on these principles, the Indian Parliament is divided into "**Council of State** (or Rajya Sabha) and the **House of People** (or Lok Sabha"). The President has the authority to call a meeting of either House of Parliament at any time and location he sees proper. They typically have three sessions each year, each spaced out by four months. This "**extraordinary power**" legislation by decree was "for the first time" placed on the Governor-General, the highest

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administrator of the government of India, by that landmark British statute, the **Indian Councils Act, 1861**, on **August 1, 1861**.

The Indian constitution is a treasure trove of legislations and includes a lengthy list of laws and regulations through which the largest democracy in the world functions. Some parts of the constitution, are very intriguing and are often the reason for debate. One such law is that contained in ambit of "**Article 123 of the Indian Constitution"** where President is given the authority to make laws by promulgating ordinances.

- Neither House of Parliament is in session.
- "Immediate action" is necessary, for the sake of the people.
- Passage through both chambers of Congress in the first six weeks when Congress is back in session.

Similarly, the state corollary of this law is encapsulated by "**Article 213 of the Indian Constitution"** that allows the Governor of the state to propagate an ordinance if he feels that there are situations that deem it necessary for a law to be passed urgently.

(A) Relevance in the Current Scenario

The excellent phrase ***"contra legem facit qui id facit quod lex prohibet; in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit"***[3]

meaning "**one who contravenes the intention of a statute without disobeying its actual words, commits a fraud on it**."[4] are crucial when thinking about the executive's ability to make Ordinances as envisioned by the Constitution. The administration of each type and figure has resorted to extreme usage of the ordinance, which is solitary reserved for the developing condition when the parliament is not in meeting.

(B) Statement of problem and objectives of research

The persistent employment of Ordinances is an affront to democracy because it sidesteps the Parliamentary System. Since limited government is a central tenet of the Constitution, this runs counter to its principles.

The validity of both these laws have been debated since time immemorial. The British used this

[3] Open Jurist, Contra legem facit qui id facit quod lex prohibet, in fraudem vero qui salvis verbis legis sententiam eius circumvit, https://openjurist.org/law-dictionary/contra-legem-facit-qui-id-facit-quod-lex-prohibet-in-fraudem-veroqui-salvis-verbis-legis-sententiam-ejus-circumv (last visited Jul. 14, 2023).

[4] Y. P. Singh, Law, Morality and Indian Politics, The Statesman (New Delhi), Jan. 11, 2017, https://www.thestatesman.com/features/law-morality-and-indian-politics-1484168547.html (last visited Jul. 14, 2023).

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law to do as they please and it was formally introduced multiples times including in "**Government of India Act, 1935"**[5] which allowed the viceroy at the time to do as he pleased to quell protests and suppress the growing independence fervour at the time. The same law was then picked up by Dr. B.R. Ambedkar who was the chairman of the Constituent Assembly[6]. Multiple leaders and members of the Constituent Assembly had also opposed this law but Dr. B. R. Ambedkar, albeit, aware of the dangers was sure that it would be used responsibly and if done so, would cause minimal harm to the democracy.

The objectives of this research are mentioned below:

1. To delve into the origin, relevance, and validity of Article 123 of the Indian Constitution.
2. To read Article 123 from a judicial perspective.
3. To examine the abuse of Article 123 misapplication throughout a spectrum of governments.
4. To view the rise in use of Ordinances during the Covid times.

II. HISTORY, RELEVANCE AND VALIDITY

- **Reminiscing the Past: Narratives from History**

The **1935 Government of India Act** granted the then-Governor-General of India the authority to make an order when the Central assembly was not in meeting. The colonial powers used this unprecedented ability to quell the Indian independence movement and other forms of civil unrest. Some examples of its misuse include the **implementation of martial law** for extended periods of time, restrictions on journalistic activities, and **constraints on freedom of association**. Further, the Governor-General of colonial India misapplied it by promulgating Ordinances like "**Bengal Criminal Law (Amendment) Ordinance (1924)** and the **Lahore Conspiracy Case Ordinance (1930")** to try freedom fighters and revolutionaries in special tribunals.

As a result, Pandit Nehru, who subsequently became the first Prime Minister of India , harshly attacked the issue of Ordinances as "***enforced submission***" in his Presidential Address, referring to the "***humiliation of Ordinance***."

Nehru's objections to the issuance of Ordinances, which he viewed as undemocratic and demeaning, became a need almost overnight once he became Prime Minister. By the time he

[5] Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8, c. 2.
[6] Constituent Assembly Debates, Vol. VIII, 214 (1947), available at https://www.constitutionofindia.net/constitution_assembly_debates (last visited July 15, 2023).

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passed away in May 1964, Prime Minister Nehru's government had enacted 102 Ordinances in independent India.

First speaker of Parliament **G.V. Mavalankar** wrote to PM Nehru in 1950 that the widespread use of Ordinances gives the *"impression that governance is carried on by Ordinances"* and is thus *"inherently undemocratic."*

- **Relevance and Constitutionality of Article 123**

There is always room for debate over ***whether or not the provision for ordinances ultra vires the democratic spirit envisioned by the constitution makers***, given that the constitution provides for a democratic way to pass laws in the nation, whereby the assent of a majority or even a special majority is needed in certain cases. Thus, there are, as with any argument, two valid perspectives. Those in favour of the provision often point to the fact that in the event of an emergency and the immediate passage of a law is necessary, ordinances are a useful tool. Many people who are opposed to Article 123 point to the numerous times where there is adequate proof that Article 123 was utilised by the administration in power to enact a bill that wouldn't necessarily obtain consent in the parliament or for other political goals before elections.

It is strongly contended that, it is imperative to understand the exact words of the law makers. Ordinances can only be approved when "**both houses of parliament are not in session"**. Afterwards, the article discusses when it is "**necessary**" for the president to release an executive instruction. The purpose of the law was to provide the president the power to introduce emergency legislation in cases when the status quo was so dire that only immediate action could prevent crises. Therefore, it is clear from the Constitution's wording alone that Article 123 is only intended to be a **temporary remedy.**

The query of the **validity** of an decree passed under article 123 and article 213 (governor's power to pass an ordinance in the state) was brought up in the famous "***D.C. Wadhwa v State of Bihar"***[7] case where the Bihar State Administration passed an ordinance to take control of 629 Sanskrit schools in the state. After the expiry of the ordinance, the government would when pass another ordinance to re-promulgate the previous ordinance. When finally, the legislature was unable to pass the legislation to make the order a permanent law, a teacher who had just lost his job due to these events, took the government to court. The Supreme Court was ruthless in its judgement and said that ***the irrational use of the ordinance making power is a***

[7] D.C. Wadhwa vs State of Bihar, AIR 1987 SC 579

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"subversion of democratic process". Relying on the landmark ***S.R. Bommai*** [8]case, Justice Bhagwati stated that much in the same way as the proclamation of emergencies is subject to judicial review, the same standard is held for ordinances as well. Further, the Supreme Court reprimanded the Bihar State Government and strictly struck down the re-promulgation of decrees deprived of them being presented to legislature. The court also answered the question about the validity of the rights that the ordinance had created. The Judges opined that the rights created would not be valid after the expiry of the ordinance unless it was in public interest. The same was then reiterated in the "***Krishna Kumar Singh v State of Bihar"***[9] in which the Supreme Court upheld the Wadhwa decision and stated that freed re-promulgation of decrees is unauthorized.

III. JUDICIAL PERSPECTIVES AND SUBSEQUENT PRACTICES

Ordinance lapses or stops to function at the end of six weeks from the refabrication of the legislature or before the end of that period, if legislature disapproves of it.

However, the potential for its misuse persists because the government is free to issue new ones again if the old ones expire.

Moreover, the Courts might not have a good vantage position to grasp policy thickets, so they wouldn't be able to take that advantage away from a government, which might make things even worse. To lessen the likelihood of such occurrences, the Supreme Court of India (SCI) cautioned against overusing the Ordinance in "***D.C. Wadhwa v State of Bihar"***. It held that "the power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be perverted to serve political ends".

In ***Rustom Cavasjee Cooper v. Union of India***[10], the SCI had the option to censure the re-promulgation of Ordinances, but chose not to. It concluded that "the legislative authority of promulgating Ordinance between sessions is vested in the President in instances of urgency and emergency." The President alone decides if he will issue the Ordinance.

The aforesaid majority judgement makes it clear that it abstained from commenting on mala fide or arbitrary use of the Ordinance. In contrast, the minority opinion said that "the President's use of authority can be challenged" by **showing ill reliance or mala fide and immoral purpose**. Again, the question arose as to whether an Ordinance may be invalidated on the basis

[8] S.R. Bommai vs Union Of India, 1994 AIR 1918, 1994 SCC (3) 1
[9] Krishna Kumar Singh v State of Bihar, AIR 1998 SC 2288, JT 1998 (4) SC 58, (1998)
[10] Rustom Cavasjee Cooper v. Union Of India (1970 AIR 564, 1970 SCR (3) 530)

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of **bad faith**. In "***T. Venkata Reddy v. State of Andhra Pradesh"***[11], the Supreme Court of India ruled that "the appropriateness, expediency, and necessity of a legislative Act are to be determined by the legislative power and not by the judiciary." However, in the new ruling of "***Krishna Kumar Singh v. State of Bihar"***[12] , the SCI have expanded scope of judicial review of Ordinances, although on narrower grounds. After this ruling, the Courts are now able to investigate any ambiguous motivations behind the issuance of Ordinances.

IV. ABUSE OF THE PROVISIONS OF ARTICLE 123 THROUGH A SPECTRUM OF GOVERNMENTS

Although it is evident that a culture of ordinances has existed since the Indian Constitution took effect, different administrations have had **varying histories of abusing this privilege**. In the past, it was common for presidents to criticise specific ordinances, but this has changed over time. A report by an esteemed newspaper included the following statistics.

In the initial 30 years of our governmental egalitarianism, for each ten bills presented in House of Representatives, **one order was delivered**. In the subsequent thirty years, there were **two orders** for every single ten Bills. In the 16th Lok Sabha (2014-2019), there were **3.5 ordinances for every 10 bills**. In the present Lok Sabha, there have been **3.3 ordinances for every ten bills.** Look at it another way. When the BJP-led National Democratic Association was in control from 1998 to 2004, the administration issued **9.6 ordinances each year**. Between 2004 and 2009 ("United Progressive Alliance-I"), **7.2 ordinances per year were published**, but UPA-II released just five per year. Amid "2014 and 2019", during the initial period of the Narendra Modi administration, the amount of annual **ordinances increased to ten**. On the eve of the 2019 general election, about ten ordinances were issued.

In terms of the deterioration of democratic ideals as a result of circumventing democratic procedures, it is reasonable to state that the previous decade or so have been the worst. Not only has **the present administration made a mockery of the exception rule normally applied to the ordinance provision in the centre, but it has also done so in party-controlled states.**

V. RISE IN THE USE OF PROVISION OF ARTICLE 123 DURING COVID TIMES

Regrettably, some of these regulations are passed in **opposition to the public interest** in order to protect the nation's economic standing from public scrutiny. Under the guise of the Covid 19 scenario, for instance, the state governments of Gujarat and Uttar Pradesh have suspended the

[11] T. Venkata Reddy Etc. Etc vs State Of Andhra Pradesh 1985 AIR 724, 1985 SCR (3) 509
[12] Krishna Kumar Singh v State of Bihar, AIR 1998 SC 2288, JT 1998 (4) SC 58, (1998)

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vital Labor Laws that stipulate Minimum Wages and limit work hours. Without any input or debate with labour unions or civil rights groups, these rules have been suspended, allowing the wealthy to abuse workers who are already struggling to find job and provide for their families. This is one of several such laws pushed through by the executive branch. The "**Recovery of Damages to Public and Private Property Ordinance" was approved in 2019 by the BJP administration**, allowing the government to recover property damage from protesters. This legislation is frighteningly reminiscent of British colonial practises.

On other times, the present administration has utilised the ordinance clause to preserve face after a scandal or simply to demonstrate its might to the opposition and public. The "**Banking Regulation (Amendment) Ordinance"**, which was passed immediately after the "**Punjab and Maharashtra cooperative bank scandal"**, is a prime illustration of this. Despite the fact that this action demonstrated the government's readiness to fix the system's flaws, no permanent legislation was introduced when the ordinance expired. In addition to flexing its muscles during the passage of the agricultural law ordinance, the administration ensured that it did so before passing the measure in the legislature. Allowing "**corporate farming and liberalising agricultural trade regimes"** as well as output program to advantage large stores does not necessarily help the poor farmers, as the value of state-run markets is eliminated and corporate companies can now pay whatever they want and bully the farmers, who are known to be in a difficult financial situation in our country. The federal government has also compelled the state governments to approve laws amending their "**Agriculture Produce Marketing Committee Acts, demonstrating its absolute authority"**. This would diminish the influence of state market committees and may lead to the formation of agricultural cartels comprised of large food companies and merchants. "Uttar Pradesh, Madhya Pradesh, Gujarat, and Karnataka" have swiftly issued ordinances in accordance with the mandate.

VI. RECOMMENDATIONS

It is more than clear that not only have ordinances been misused, but they are inherently **against the spirit of democracy** thus the question arises, what can be done about the provision so that at least the misuse of the provision is reduced if not completely eradicated and removed from the constitution. It is important to note that there are only 3 countries in the world that still have ordinances as a part of their constitution. Interestingly all 3 countries – **Pakistan, India and Bangladesh** have derived the idea from the "**Government of India Act, 1935"**, thus the colonial shadow of this law is clear. Like every other parliamentary democracy in the world, the provision for ordinances should be removed but since that is practically impossible

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considering the backing that the law gets from the government in power, **we can look at other solutions that can reduce the misuse of the law as well.**

- Firstly, the time period before which an ordinance needs to be reduced could be **reduced from 6 weeks to a couple of weeks**, after which the legislature must be summoned, or the law passed by the ordinance becomes obsolete.
- Next, the provision for ordinances should be used as they were intended to be used by the constitution makers, i.e., only as an **absolute emergency and provisions** must be included to the effect that necessity of action to promulgate an ordinance must be proved by the executive later.
- If such a situation is not proved by the executive, then there **should be some measures to reprimand the same.**
- Another provision that seems reasonable and could be added is one that allows the President to **only promulgate an ordinance only when the emergency has been declared in the state or nation.**

VII. CONCLUSION

Article 123 and its state counterpart, Article 213, of Indian Constitution grant the President and the Governors of the states the authority to enact laws through the use of executive fiat if they determine that new legislation is necessary. From the days of the Constituent Assembly until the year 2021, this provision has been the topic of heated discussion. Some contend that it is undemocratic because executive can use it to pass laws that not only bypass the democratic process but also work against the public interest. As the world's greatest democracy, it is alarming that article 123 is increasingly being used by each administration, despite the fact that the Supreme Court has spoken out against the abuse of this authority. While it would be preferable if this clause were eliminated entirely, it would not be too difficult to do so given the support it receives from all of the currently ruling governments. Instead, we may investigate a variety of options that would limit the scope of ordinances and the circumstances under which they can be enacted, so reducing their influence and reducing their authority.

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