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Navigating Constitutional Frontiers: Analysing Ordinance Making Powers in India

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ABSTRACT

The authority to promulgate ordinances is entrusted to the President and the State Governor, respectively, under Article 123 and Article 213 of the Indian Constitution. This authority is only meant to be used as an interim remedy in cases of extreme urgency while the legislature of state or union isn't in session. When the legislature reconvenes, ordinances lapse after six weeks. Ordinances have become more and more useful as a parallel legislative technique as the efficiency of the Parliament is decreasing. Ordinances were the primary means of government in the state of Bihar for a little over fifteen years. However, the legislature is granted the authority to enact laws by the constitution, and this authority is compromised by the frequent enactment of ordinances. Ordinances have been historically seen to be exempt from judicial review, with an exception of instances in which they infringed fundamental rights. This stance persisted from Indian law prior to independence, till Independence, when in 2017 the frequent promulgation of ordinances was deemed to be the constitutional subversion. Ordinances are no longer declared void upon re-promulgation, excepting exceptional situations. Hence, this article explores & demonstrates the constitutional need for Ordinance making power, evaluates the efficacy of the decision of the court in closing historical gaps, explores the role of state intervention in undermining the constitutional authority & scope of judicial review.

Keywords: *Ordinances, State Intervention, Constitution of India, Promulgation, Promulgation.*

I. INTRODUCTION

The Indian Constitution established India as a representative democracy in which citizens have the right to elect leaders every five years to represent them in legislatures, be it at the national or state levels. Legislative authorities have the exclusive authority to enact laws for the proper governing of the nation. The Constitution carefully outlines the scope of legislative power vested by both the Union and State Legislatures, grouping them based on territorial jurisdiction and subject matter. As a consequence, the legislature is our country's primary institution for making laws, tasked with enacting legislations in conformity with the ideals embodied in the

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Constitution and the will of the Indian people.

While the Indian Constitution tacitly rather than officially expressing the notion of separation of powers, it does grant legislative competence to the Executive. This authority is entrusted to the President under Article 123 and to state governors under Article 213. These provisions authorise the President and Governors to create laws through ordinances. Such provisions have been incorporated into the Constitution to meet emergencies that arise when the legislature is not in session.²

(A) Need for Ordinance Making Power in India

The inclusion of ordinances in the Indian Constitution dates back to the Government of India Act of 1935, which granted the Governor General the ability to promulgate ordinances. Sections 42 and 43 of the Indian Constitution stated the Governor General's ordinance-making authority, stating that it may only be employed "if circumstances exist which render it necessary for him to take immediate action."³

During the Constituent Assembly's discussions, there were several extensive debates and disagreements about the power to make ordinances. Some members expressed their worries that the President's power may violate the constitutional standards and represents an unusual move.⁴ Others contended that it should be limited to emergency situations. Hence, the powers which we have today are made after considering these debates, which encompasses several limitations which would be discussed subsequently.

II. ORDINANCE MAKING POWERS IN INDIA

The distribution of responsibility and power among the three parts of government is a fundamental principle in Indian constitutional. While the national and state legislatures are tasked with creating laws, the national and state executives are in charge of implementing them. The judiciary, comprising the Supreme Court, High Courts, and lower courts, interprets these laws. However, ultimate separation of powers is unattainable, as this would inevitably lead to disagreements.

The power to enact ordinances provided to the President under Article 123 and to Governors under Article 213 is an evident example of this overlap. The Indian Constitution's Chapter IV, Part VI, Article 213 titled "Legislative Power of The Governor," explicitly states that the

² Joyita (2024) Ordinance making powers of the executive in India, PRS Legislative Research. Available at: <https://prsindia.org/theprsblog/ordinance-making-powers-of-the-executive-in-india> (Accessed: 31 March 2024).

³ Sections 42 and 43 of the Government of India Act, 1935.

⁴ Bag, A. (2019) Ordinance making power of the president of India: A critical outlook, iPleaders. Available at: <https://blog.ipleaders.in/ordinance-making-power-critical-outlook/> (Accessed: 31 May 2024).

Governor may enact ordinances while Parliament is on recess. Although the legislature usually has lawmaking authority under the constitution, the executive branch is also authorised to enact ordinances in emergency situations.

Further, Article 213 provides state executives the same authority for enacting ordinances as Article 123, which deals with the union executive. This authority is subject to certain limitations too. Ordinances can only be issued when the governor decides that, in light of the current situation, immediate action is required while the legislature is not in session. Firstly, the legislative calendar determines when ordinances are promulgated. Ordinances cannot be issued by the governor or president when the legislature is in session since the legislature has the exclusive authority to enact laws during such specific circumstances. In short, while the legislature retains primary lawmaking authority, the executive is empowered to issue ordinances under exceptional circumstances when legislative action is impractical.

The second need involves the President and Governor's private satisfaction with the current situation. Only when the president and governor is persuaded that immediate action is required due to the state of affairs can an ordinance be enacted. In this case, the President's delight highlights the necessity of the situation and goes beyond mere desirability. The word "necessity," in conjunction with the requirement for "immediate action," emphasises how important it is to pass an ordinance in certain situations. Both, President and Governor has the absolute authority to issue ordinances under Article 123 & 213⁵; however, this authority is dependent on the urgency of the circumstance. But this extraordinary authority cannot take the place of the State Legislature's legislative authority. Since the constitutional requirement reserves the right to enact laws for legitimately elected legislatures, the governor's role in ordinance-making isn't equivalent to a parallel legislative authority.

Furthermore, there are situations in which the Governor cannot enact ordinances without the President's approval such as⁶:

- When a bill or amendment contains provisions that the President must approve before it can be introduced into the legislature, as in the case of Article 304(b)⁷ of the Constitution, which gives the State Legislature authority to impose reasonable restrictions on trade, commerce, and intercourse within the state for the public interest, the President's approval is required before the bill or amendment can be

⁵ The Constitution of India, 1950.

⁶ Proviso to Art. 213 (1), The Constitution of India.

⁷ The Constitution of India, 1950.

introduced in the State Legislature.

- When a proposed law includes provisions that the Governor believes require the President's consideration, as specified in Article 200⁸ of the Constitution, the Governor is required to reserve a bill for the President's consideration if they believe it could undermine the High Court's authority or compromise the bill's intended constitutional role if it were made law.
- When a state legislature passes a law requiring the President's approval in order for it to be valid, as mentioned in Article 254⁹, and a state law that is related to a topic listed in the Concurrent List¹⁰ conflicts with a law passed by the Parliament on the same topic, the state law will only take effect if the President has given it his approval.

Further, under Article 213(2)¹¹, where the ordinance is passed by executive shall have the same effect and force as in the case of an act enacted by the legislature. But, as soon as legislature comes into session again, the ordinance is supposedly to be laid down before the legislature or otherwise the ordinance can be held inoperative. Not just this, but there are three situations where an ordinance can cease to operate¹²:

- If the ordinance is not presented to the legislature, it will expire after 6 weeks from the reassembly date. Also, If the Houses of a State's Legislative Council reconvene on different dates, the 6-week period commences on the later date¹³.
- If the governor withdraws the ordinance priorly;¹⁴ or
- If the resolution disapproving it have already been passed by legislative assembly and agreed by the legislative council.¹⁵

III. STATE INTERVENTIONS & POLITICAL ABUSE

The drafters of the Constitution foresaw the possibility of abuse in granting legislative authority to the executive branch. H. V. Kamath and Pandit Kunzru expressed concern about the need to put a clear upper bound on the period for which ordinances could remain in effect without parliamentary scrutiny. Despite P. S. Deshmukh dismissing concerns about the President's

⁸ Ibid.

⁹ Ibid.

¹⁰ List III, Schedule VII, The Constitution of India, 1950.

¹¹ The Constitution of India, 1950.

¹² Art. 213 (2), The Constitution of India, 1950.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

abuse of power during the Constituent Assembly debates, no clear recognition was made of the possibility of such authority being abused by the ruling party.¹⁶

The potential for abuse of this authority appears in a variety of ways. For example, ordinances can be issued in situations where there is no true urgency, in order to avoid the normal legislative procedure or for ulterior motives. Second, a prevalent sort of misuse is the recurrent promulgation of ordinances. This approach has resulted in what is known as "Ordinance Raj," in which the executive branch, when unable to make legislation through the authorised legislative procedures, acts as the legislature by issuing ordinances on a regular basis. As a consequence, ordinances remain in effect for long periods of time, allowing the legislature to discuss and implement appropriate legislation on the subject.¹⁷ Such actions undermine the goals of the founding fathers of our constitution, who wanted to construct a system in which legislative authority is exercised by the authorised entity, namely the legislature, in line with established procedures.¹⁸

The landmark judgements *DC Wadhwa v. State of Bihar*¹⁹ and *Krishna Kumar Singh v. State of Bihar*²⁰ provide instances of the aforementioned misuse. In the case of *Krishna Kumar Singh*, the State issued a series of legislation with the aim of acquiring control over 429 Sanskrit schools. During this procedure, all teachers and other workers from these schools were transferred to the state government. The initial ordinance, put out in 1989, was followed by five more ordinances. Notably, none of these ordinances, including the first, received legislative investigation imposed by constitutional regulations. Furthermore, the government failed to enact a statute incorporating the terms of these ordinances, and the final ordinance lapsed on April 30, 1992.²¹

In light of this case, the ordinances' constitutionality is put into doubt because they aren't in line with constitutional provisions. The effects of implementing these ordinances demand rigorous judicial scrutiny for their retention. Furthermore, there is debate about whether converting schools from private to public institutions requires 'urgent action,' and whether such transformative measures, with long-term consequences, should be pursued through the mechanism of ordinances. The issuance of ordinances in such instances may be considered as

¹⁶ 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>

¹⁷ Sukrit Garg, A Critical Overview of Ordinance Making Power, 5 INT'L J.L. MGMT. & HUMAN. 882 (2022).

¹⁸ Chandrasekaran Mridul Bhardwaj, An Analysis of the Power to Issue Ordinance in India, *Statute Law Review*, Volume 42, Issue 3, October 2021, Pages 305–312.

¹⁹ 1987 1 SCC 378.

²⁰ 2017 3 SCC 1.

²¹ *Ibid.*, see pg.07.

an example of exploiting constitutional silence, in which gaps in legislation are exploited to achieve policy objectives without respect for parliamentary scrutiny and discussion.²²

IV. JUDICIAL PRONOUNCEMENTS

In *R.C. Cooper v. Union of India*²³, the legitimacy of the Twenty-fifth Amendment Act of 1971 was challenged, which restricted individual property rights and allowed the government to acquire property for public use at a price specified by Parliament. As referred to the Bank Nationalisation case, the Supreme Court considered the validity of the Banking Companies Ordinance, 1969, which sought to nationalise 14 commercial banks. It determined that the President's decision could potentially be challenged on the grounds of unnecessary 'immediate action.'

Further, In the case of *A.K. Roy v. Union of India*²⁴, the Supreme Court examined the National Security Ordinance, 1980, which authorised preventive detention in certain circumstances. The Court held that the President's ability to issue ordinances is subject to judicial review. However, further investigation into the issue was halted since the ordinance was replaced by an Act. The Court emphasized the importance of judicial review only on substantive grounds, not on minor objections.

Similarly, In *S.K. Sugar Ltd. v. State of Bihar*²⁵, the Court affirmed that the Governor's ordinance is not legitimate because it is based purely on subjective satisfaction.

Similarly, In *State of Orissa v. Bhupendra Kumar Bose*²⁶, the court ruled that an ordinance's rights and obligations take force when it is promulgated and can only be repealed by a valid legislative body. However, if the ordinance's enactment indicates an abuse of power or a violation of the constitution, the state should withdraw it immediately. Ordinances can be challenged on an array of grounds, including whether they constitute colorable legislation, violate fundamental rights, contradict substantive constitutional provisions.

In *DC Wadhwa v. State of Bihar*²⁷, the court addressed Bihar's vast promulgation and re-promulgation of ordinances, totaling 256 from 1967 to 1981. Chief Justice P.N. Bhagwati emphasised the emergency nature of ordinance power and cautioned against its exploitation for political purposes. Meanwhile, *Krishna Kumar Singh v. State of Bihar*²⁸ scrutinized the

²² Ibid., see pg. 07.

²³ 1970 AIR 564.

²⁴ 1982 AIR 710.

²⁵ AIR 1974 SC 1533.

²⁶ 1962 AIR 945.

²⁷ 1987 AIR 579.

²⁸ 2017 3 SCC 1.

President's ordinance authority, striking multiple ordinances due to a lack of explanation and justification for their enactment. Despite court intervention in response to excessive ordinance-making, questions persist about the scope of judicial review of president or governor-enacted ordinances.

V. CONCLUSION

In conclusion, the analysis of India's ordinance-making powers reveals the fragile equilibrium between executive authority and constitutional safeguards. While the Constitution enables the President and Governors to promulgate ordinances in exceptional circumstances, this authority must be used prudently to avoid constitutional violation and political abuse. Judicial scrutiny, as established by significant judicial pronouncements such as *DC Wadhwa v. State of Bihar* and *Krishna Kumar Singh v. State of Bihar*, is critical to protecting constitutional integrity and ensuring accountability in governance. However, concerns endure regarding the extent of judicial review of ordinances and the standards for their correct implementation.
