



## LEGISLATIVE POWER OF THE EXECUTIVE: AN OVERVIEW

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### Abstract

*This paper aims to provide a thematic analysis of jurisprudence regarding Ordinances in India. Whereas the power to promulgate Ordinance is an extraordinary legislative power of the executive, it needs to be ensured that the same is placed before the Legislative which through its democratic process may approve or disapprove of the same. The executive cannot create rights in favour of the citizens which the Legislative itself could not. The author first highlights the procedural aspect i.e. the relationship between the Legislature and Ordinance making power of the Executive and whether the Ordinance needs to be mandatorily be laid before the Parliament. Further the author seeks to trace the development of case law regarding the justiciability of the same and the extent to which the court can look into whether the immediate conditions for the promulgation of such Ordinance existed. Lastly, the effects of lapsing of Ordinance as well as validity of re-promulgation of Ordinance are analysed in terms of the democratic set up of the Country.*

Keywords: Ordinance, President, Governor, Legislature, Parliament.

### Introduction

The President and Governors have the extraordinary legislative power under Article 123 and 213 of the Constitution of India respectively, to pass an Ordinance. Such a power can be exercised on the satisfaction of 3 conditions, namely, both the houses of Parliament/ State Legislature are not in session, The President/ Governor is satisfied that there exists a situation which requires immediate action, the ordinance would be laid before the Parliament/ Legislature once the session commences.<sup>1</sup> The satisfaction of the President/Governor in the present case is not the personal satisfaction but must be taken based on the advice of the Council of Ministers. A report has revealed that atleast 34% of the ordinances were promulgated 15 days before the session was to commence and a similar percentage for 15 days after the session was to end.<sup>2</sup> Many Ordinances are not even introduced as bills in the Parliament. The largest number of Ordinances upto the year 2008 have been promulgated in the area of Finance i.e. 129 followed by Home Affairs (102). The latest Supreme Court judgment in the case of Krishna Kumar Singh vs. State of Bihar<sup>3</sup> can be considered a breakthrough in the area of Ordinance promulgation power of the Executive as it seems to give an answer to most of the questions regarding the same.

<sup>1</sup> Constitution of India. Art. 123 and 213.

<sup>2</sup> Amartya Bag, Ordinance making power of the President of India: A critical outlook, (July 27, 2018, 10:00 PM), <https://blog.ipleaders.in/ordinance-making-power-critical-outlook/>.

<sup>3</sup>(2017) 3 SCC 1.



### Analysis

This section represents a thematic analysis of the various aspects related to Ordinances through the development of Case laws as well as the problems which still remain to be addressed.

#### A. Legislature and Ordinance

The court in the case of R.K. Garg and Ors. vs. Union of India and Ors held that “this power to promulgate an Ordinance conferred on the President is co-extensive with the power of Parliament to make laws and the President cannot issue an Ordinance which Parliament cannot enact into a law.” Since the Legislature has the primary responsibility to pass legislation, there is a possibility of control and limitation by disapproval of the Ordinance by this organ of the State.<sup>4</sup> The case concerned The Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981 which was succeeded by an Act and allowed the same to be valid with retrospective effect. The objective behind the Act was to curb black money and proper economic planning, it allowed for persons in possession of black money to invest it in the Special Bonds and provided immunities to them. The petitioners argued that since the Ordinance was in nature of a Money Bill it could only be passed by the Lok Sabha and hence the Ordinance was invalid. The court held that when a provision of retrospectivity is there in an Act, actions taken under Ordinance are judged in reference to the Act and wherever the Parliament has the power to amend a tax law, the President too has similar powers.

<sup>4</sup> R.K. Garg and Ors. vs. Union of India and Ors., (1981) 4 SCC 675.

Therefore, the Executive has the power to pass Ordinances in case of Tax matters. Article 21 assumes that the procedure which has been established is permanent but an Ordinance doesn't fulfill this requirement as there is no way to ensure that the due process has been followed. Therefore, its effect cannot be permanent and should not automatically have the same effect as a legislative Act until it has been approved when the Parliament/ Legislature is in session.

#### B. Laying before the Parliament

Cases of Pre-Independence Ordinances, those which have not been repealed by the Parliament later, it continues to operate and the fact that it was not laid before the Parliament doesn't invalidate it. For Example, the Criminal Law Amendment Ordinance, 1944 continues to operate by virtue of The India Burma Emergency Act.<sup>5</sup> As far as Post Independence Ordinances are concerned, Justice Madan Lokur, held that Article 213(2) doesn't lay down that Ordinance must be necessarily laid down before the Legislature and is simply directory. If we look into the Article it merely talks about a resolution disapproving the Ordinance unlike Article 352 which has a positive obligation to approve in order for the Proclamation to continue. The only result of not placing an Ordinance is that it will cease to operate after 6 weeks of commencement of the session. The Ordinance can either have same effect of law or no effect at all. Justice Lokur laid too much burden on the Legislature saying that Legislature is not helpless as it can question

<sup>5</sup> M.M. Sales and Exports (India) vs. The State of Uttar Pradesh, AIR 1974 All 263



it on its own initiative as it is available in the Official Gazette and printed copy by Secretary. <sup>6</sup> On the other hand, Justice Chandrachud held that though an Ordinance has the same force as an act of Legislature, it must be mandatorily ensured that there is laying before the Legislature and ceases to operate after 6 weeks of reassembly or disapproval or being withdrawn by the promulgating authority but this deeming provision is applicable only when both the conditions of necessity of immediate action as well as laying before Parliament are satisfied. The rationale behind making it mandatory is to judge the necessity of it, to give it approval or otherwise and whether an Act to make it enduring should be passed. In case it is not done it is an abuse of constitutional and legislative power vested with the Executive. Since the constitution makers have used “cease to operate” and “void” both in Article 213 and 123, they cannot connote the same meaning. Void is in case it was not within the competence to enact the same. Unlike other provisions of the constitution, no saving of rights and liabilities clause is there in these two provisions. The judge has held that all the Ordinances in question were a fraud on the constitution as they were never laid in front of the legislative with no enduring rights to employees. Moreover, the use of the phrase “shall be laid” implies a mandatory requirement for an Ordinance to be placed in front of Legislature. But since even the first ordinance is in the chain of the Ordinances which are not in accordance with the constitutional scheme, it cannot be held to be valid. The present position is that the

non-laying down of an Ordinance is an effacement of the constitutional obligation. Only when an Ordinance is laid, the constitutional fiction that it has same effect as an Act will come into place.<sup>7</sup>

### C. Justiciability of Ordinances

One of the first cases where the adequacy of condition for promulgation of ordinance was held to be justiciable was where the Banking Ordinance, 1969 was struck down, thereby invalidating a similar provision in the succeeding Act too. The President/ Governor’s power to promulgate Ordinance has been constitutionally limited and can be passed only on two conditions being satisfied i.e. existence of circumstances and necessity to take immediate action. The decision is not always final and can be struck down. Though the court agreed it cannot sit down in policy argument.<sup>8</sup> Though the dissenting opinion of Justice Ray suggested that by virtue of Article 74(1), this power is exercised based on the advice of the ministers which cannot be questioned in the court. Moreover, that under Article 361(1) the president is not answerable to the court and no objective test for satisfaction cannot be implied. The grounds to question the same are limited to mala fide and bad faith.<sup>9</sup>

The position was later was altered by the Supreme Court in the SKG case where it said that in passing an ordinance the governor is the sole judge of existence of emergent situations and his satisfaction is not justiciable. In this case the ordinances were continually promulgated to validate all

<sup>6</sup>Krishna Kumar Singh and Ors. vs. State of Bihar and Ors., (2017) 3 SCC 1.

<sup>7</sup> Id.

<sup>8</sup>R.C. Cooper v. Union of India, AIR 1970 SC 564.

<sup>9</sup> Id.



the changes or actions to be brought in the Bihar Sugar Factories Control Act, 1963.<sup>10</sup> But the situation was reverted back where in a case the Supreme Court agreed that satisfaction was not a purely political question, for example, the case concerned the National Security ordinance subsumed into an Act. The necessity of power to issue Ordinance is for the peace and good government. It agreed to the fact that legislative procedure is very long and time taking.<sup>11</sup> Though after only three years court held in Venkata Reddy<sup>12</sup>, where it was held that the satisfaction was political and could not be questioned.

We need to take into consideration the Bommai case where it was held that fact of satisfaction can be enquired into by the court. The present position after the Krishna Kumar case is that power should be exercised when there existed an actual necessity where no delay due to non-commencement of session of Legislature/Parliament could be allowed, this is because a state of constitutional vacuum cannot be allowed to exist. The supremacy of Parliament need to be emphasised as it is elected body of the citizens are responsible to them and it is their prerogative, hence after the starting of a session, power should be transferred to Legislature to sit on to decide upon the Ordinance. The primary difference being that Ordinance does not allow for open debates which is required for a law affecting people which happens in case of Legislature/Parliament made laws. The decision in Bommai and deletion of the

provision that judicial review is barred in case of ordinances introduced by the 38<sup>th</sup> Amendment, it becomes clear that the satisfaction of the President/ Governor is not immune from judicial review and it can be seen whether there existed relevant material.<sup>13</sup> This was also recognised by the Allahabad High Court in an early case of 1956 that the court can enquire into the fact of satisfaction of the governor in promulgating the Ordinance though not the reasons. It may be argued that there existed no necessity as there was already communication between the two levels of government regarding the same. But even though the situation can be handled by making the amended act apply retrospectively but there would be other practical difficulties to be suffered by the assesses in that case..<sup>14</sup>.

#### **D. Existence of conditions for immediate action**

Based on the pattern of judgements in regard of existence of conditions, the Court has consistently presumed circumstances leading to an immediate action by the President to have existed based on Separation of Powers doctrine i.e. deference to the executive. There has been a high degree of burden placed on the petitioners to prove the non-existence of any immediate circumstances which required the President to pass Ordinances. In case the petitioner is unable to prove the same, the condition is presumed to have been present. This makes it hard for the Petitioners because the Statement of Object and Reasons in the Ordinances may mention the reasons for

<sup>10</sup>M/S. SKG Sugar Ltd vs State Of Bihar And Ors, (1974) 3 CTR (SC) 223.

<sup>11</sup> A.K. Roy v. Union of India, AIR 1982 SC 710.

<sup>12</sup>T. Venkata Reddy and Ors. vs. State of Andhra Pradesh, 1985 SCR (3) 509.

<sup>13</sup>Supra note 4.

<sup>14</sup>Vishwanath Agarwal vs. State of Uttar Pradesh, Lucknow, AIR 1956 All 557.



such promulgation which is generally taken to be immediate by the court. For example, the case concerned the Lotteries (Regulation) Ordinance, 1997 where the state government was given the power to regulate the conduct and organisation of lotteries. The court rejected the argument of the petitioners on the basis that they were unable to present any acceptable foundation based on which they could claim that no circumstances existed which necessitated the President to pass the Ordinance immediately.<sup>15</sup> But there was no burden on the Government to prove that the circumstances existed. Should we shift the burden to prove that there exists a prima facie case to pass the ordinance without waiting for the legislative session to commence on the Government instead of putting the sole responsibility on the Petitioners who may not have any tangible or legally acceptable documents to substantiate their argument.

Through the Ordinance the President sought to levy special duty on the import of liquor into Delhi state by amending the Punjab Excise (Delhi Amendment) Ordinance, 1979. The petitioners contended that this was a colourable device to make law on a subject which was not within the competence of the Parliament more so because the liquor was not manufactured in Delhi. But it was held that the objective behind the passing of the Ordinance was to impose special duty on goods which could not have been included in the Act as it sought to ensure public health. It therefore

held that the measure was valid.<sup>16</sup> Another aspect to be looked into here is whether in cases of Tax laws the burden is higher because it directly affects the financial stakes of the people and this should only come from the Legislature and not the executive, moreover in this case it was imposing a new kind of duty not present in the original act.

### E. Malice in case of Ordinances

With regard to malice and other grounds, the Supreme Court in a case where the state government decided that in order to increase employment of youth they reduced the superannuation age from 58 to 55 except for last grade employees. The court held that ordinance would be valid if the basis of such ordinance is ordinarily acceptable, in public interest and not against competence or that which affects fundamental rights but cannot be invalid on the ground that there was no application of mind. It also held that the Legislature as a body cannot be subject to allegations that it was for extraneous purpose.<sup>17</sup> It was contended by the appellant that malice in promulgation of an ordinance is where Ordinance is an abuse of the legislative power and process amounting to a fraudulent use thereof and thus the malice. It held that the separation of powers doctrine was the guiding principle of our constitution. But says that judiciary cannot be so deferent to the Legislature so as to not recognise manifestly unauthorised power.<sup>18</sup> But it is interesting to note that this case did

<sup>15</sup>Gujarat Lottery Sellers Association vs. State of Gujarat and Ors., (1998) 1 GLR 10.

<sup>16</sup>Sat Pal & Co. v. Lt. Governor of Delhi, AIR 1979 SC 1550.

<sup>17</sup>K. Nagaraj v, State of AP, AIR 1985 SC 551.

<sup>18</sup>Gurudevdatla VKSS Maryadit v. State of Maharashtra, AIR 2001 SC 1980.



not discuss the Bommai case where it said that mala fide could be enquired into as well as the fact of satisfaction.

### F. Effects on lapse of Ordinance

Now the question remains whether the rights created on the lapse of the Ordinance survive or they are reverted back to the status quo before the Ordinance was promulgated. Long before the Krishna Kumar case which is the most recent and authoritative precedent on the issue, the Guwahati High Court in 1998 had held that Section 6 of the General Clauses Act may not be applicable in case of Ordinances because what it deals with are temporary statutes which can be validated using a savings clause. In this case the petitioners were declared Scheduled Tribe and Hill Tribe by passing of four ordinances. Since no act has been passed by the Parliament for continuation of such a status, the Ordinance has lapsed, and until an Act is passed it cannot be said that the right conferred continue to operate.<sup>19</sup> Even the Delhi High Court held that where the position of a party was changed under an ordinance and the ordinance failed to be revived because it was not put up in the assembly, the status before the ordinance continues to exist.<sup>20</sup>

While the State of Orissa v Bhupendra Kumar Bose<sup>21</sup>, said that enduring rights were created while the Ordinance was in operation, this was extended subsequently in a case which concerned the Andhra Pradesh Abolition of Post of Part-time Village

Officers Ordinance, 1984. The Ordinance had failed to be converted into an Act by state Legislature, on the other hand continued with similar ordinances being passed four times. The question was whether on lapsing of such ordinance, the posts which were abolished will be revived. The court reasoned that Article 213 does not provide that once an Ordinance has been disapproved, it shall be void ab initio but only that it will cease to operate from such date. This was widened in the case of Venkata Reddy which held that the same could not have revived or reverted back to the situation before the ordinance was promulgated in case of closed transactions i.e. irreversible rights. Therefore, the posts were not revived.<sup>22</sup>

This has been overruled by the court in Krishna Kumar Singh<sup>23</sup> where it was held that the dicta in [Bhupendra Kumar Bose and Venkata Reddy was based on misconceived ideas and therefore needs to be overruled. The court didn't look into the distinction between a temporary statute enacted by Legislature and Ordinance by the Executive.](#) Contrary to what was said in Venkata, an ordinance cannot create an irreversible right on its own as it cannot be deemed to have been contemplated because it will be like introducing the Section 90 of 1935 Act back. Thus Justice Lokur held that if the situation is reversible, then the status quo ante should be revived on expiry of the Ordinance. But holds that since the first three of the 8 ordinances passed were never challenged, the benefit accrued to employees through these Ordinances are to be retained. Justice Chandrachud additionally said that

<sup>19</sup> Smt. Maitreyee Mahanta vs. State of Assam and Ors., (1998) 3 GLR 215.

<sup>20</sup> Mahaswetta Saikia vs. University of Delhi and Anr., 195 (2012) DLT 98.

<sup>21</sup> AIR 1962 SC 945.

<sup>22</sup> *Supra* note 3.

<sup>23</sup> *Supra* note 4.



rather than using the enduring right or irreversible right test, the public interest and necessity test should be used. As held in *Bommai*, in case a proclamation is disapproved, the proclamation cannot continue any longer and the status quo ante would revive. If this does not happen then the Legislature is deprived of its supremacy in law making. It will be required to see whether the consequence of the Ordinance is such that it is irreversible and if so the court can give the required relief but not as a blanket relief to all. Since the power given to the Governor/ President is limited, the completed events need not be declared permanent or validated always unless they have a permanent effect.<sup>24</sup>

### G. Re-promulgation of Ordinance

Re-promulgation was a major pattern seen in Legislatures where the Ordinance was passed again without presenting it before the Legislature. The same is problematic as it does not allow for discussions in the Legislature/ Parliament where the elected representatives in a democratic set up deliberate upon the issue. Ordinances were being re-promulgated by the Governor without them being replaced by the Acts of Legislature. The pattern was such that after the session of Legislature were prorogued the Ordinances which had ceased to operate would be re-promulgated with the same provisions. The court termed this as an “Ordinance Raj” and a fraud on the constitution. Though it was held that the satisfaction of the Governor could not be questioned.<sup>25</sup> This position has been slightly

altered by the decision of Supreme Court in 2017 in *Krishna Kumar Singh* which stated that the satisfaction could be questioned, especially after the decision in *Bommai* which stated that the same is not beyond judicial review.

The *Wadhwa* case had mentioned an exception to no re-promulgation of Ordinance i.e. situations where the Legislature could not have debated upon the issue due to a lot of work in that session but was stretched in another case where it was held that since the case allows for re-promulgation of Ordinance in certain circumstances, in this case in order to ensure continuance of proceedings under the earlier Ordinance, an Ordinance can repeal an earlier Ordinance.<sup>26</sup> This is problematic because in case the Ordinance was to be declared unconstitutional or not passed by the Parliament/ Legislature, the same was not an option anymore as the proceedings would still continue and affect the rights of the people affected by the same.

### Conclusion

Thus, we can see that the 2017 decision of the Supreme Court can be considered a breakthrough where it has reduced the possibility of misuse of the power of the legislative power by the executive. An Ordinance doesn't acquire force and effect an Act of Parliament automatically and cannot create enduring rights in all situations as it does not go through the process of public and Parliamentary debate which is essential for the democratic

<sup>24</sup> Id.

<sup>25</sup> *Dr D.C. Wadhwa and Ors. vs. State of Bihar and Ors.*, (1987) 1 SCC 378.

<sup>26</sup> *Joseph Chacko vs. State of Kerala & Ors.*, 1998 (1) KJ 390.



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working of the country. It needs to be ensured that the Parliament has the final say in enacting the laws governing the country as they have the primary responsibility of the same and this legislative power of the Executive is exercised in only immediate circumstances. The laying before the Parliament/ Legislature is mandatory otherwise it may be considered overreach. The three organs of the government i.e. Executive, Legislative and Judiciary are a part of horizontal power sharing structure and should act as a check and balance for each other.

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