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Promulgation & Re-Promulgation of Ordinances in the Indian Constitution through the Eye of the needle

Ankita Singh[a] Aashna[b]

[a]OP Jindal Global University, Sonipat, India [b]OP Jindal Global University, Sonipat, India

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This paper traces the history of the ordinance's existent in India from the very onset of the colonial rule and exercising its promulgation in the contemporary world under the Indian Constitution. It emphasizes the aspect of re-promulgation as unconstitutional and void to the powers subjected in the hands of the legislature, with the overreach of powers by the executive branch of the government, breaching the principle of separation of powers through relevant case laws, with actions of the executive subjected to judicial review.

Keywords: *constitution, promulgation, judicial precedents, westminster model.*

INTRODUCTION

The doctrine of separation of powers, in principle and practice, embodied in the Indian constitution, caters to the maintenance of principles of fairness, equality, and justice under its preamble. The doctrine creates a demarcation in the three primary organs of the government namely the executive, legislature, and the judiciary, and their "powers, jurisdiction,

responsibilities and relationship with one another."[1] The very principle of ordinances overlaps with the law-making power of the legislature and an overreach of the powers of the President and the Governor for the introduction of laws, having the same probative value as that of an act of the Parliament. Ordinances in India are controversial, integrated as an article(s) under the Indian constitution, being subjected to judicial scrutiny under certain circumstances.

TRACING THE HISTORICAL PATH OF 'ORDINANCE RAJ'

The Indian Constitution, in 1950, was drafted drawing inspiration from parallel constitutions of countries around the globe and antecedent legislations existent in India such as the Government of India Act, 1935, creating a consequential development of the principle of 'Ordinance'. An Ordinance is "a law or rule made by a government or an authority"[2], having its roots embedded under colonial India as the 'Ordinance Raj', with ordinances being largely exercised by the colonizers. The 1935 Act, "authorized the Governor-General to enact three kinds of ordinances"[3] namely, Section 42 elaborating upon the 'substitutive legislature powers', with the "Governor-General conferred with the powers to promulgate ordinances"[4] in the absence of a federal legislature not being in session, following the advice of the Council of Ministers, limited to a period of 6 months. Conjointly, Section 43 provided for the promulgation of ordinances to discharge his functions under the aforementioned Act, with "neither the Cabinet nor the Federal Legislature having control over such ordinances, but essentially to be introduced and laid in both the Houses in Westminster."[5]

Section 44 vested "independent legislative authority"[6] providing non-interference and complete control over the legislative act(s) to the Governor-General, at any point of time, with due reasoning and justification to both the Chambers of the Legislature.

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[1] Karan Tyagi, 'The Doctrine of Separation of Powers and Its Relevance in Time of Coalition Politics' (2008) 69(3) The Indian Journal of Political Science

[2] *Cambridge Advanced Learner's Dictionary* (3rd edn, Cambridge University Press 2008)

[3] Shubhankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinances* (Cambridge University Press 2014)

[4] Government of India Act 1935, s 42

[5] Dam (n 3)

[6] Government of India Act 1935, s 44

This was a mandatory condition because of the permanent nature of the ordinances being imposed and exercised through the acts of the Governor, and to further prevent any arbitrariness, machinery, and lack of application of mind. Subsequently, during 1939-1950, about 394 ordinances were promulgated, with 99 of them coming into effect post-independence.

INCORPORATION OF THE BRITISH IDEA OF ORDINANCES INTO THE INDIAN CONSTITUTION

It was during the Quit India Movement (1942), wherein the "normal legislations had ceased to function, leading to the adoption of the method of ordinances to be used effectively."[7] Furthermore, this practice continued post-independence in 1947, under the India (Provisional Constitution) Order, 1947, with the powers conferred in the hands of the Governor-General.

Jawaharlal Nehru, contrary to his opinions regarding the application of ordinances during the British Raj, terming them as a, "means through which wishes of the autocratic executive could make laws and issue decrees and ordinances regardless of the public opinion"[8], brought them into force after becoming the first Prime Minister of Independent India, especially in 1948- The Securities Hyderabad Ordinance. However, it is essential to consider that contrary to the British Raj, the promulgation of the ordinances was only via provisional constitution and not frivolous in nature.

It was on 30th April 1947, when a Union Constitution Committee was set up, wherein B.N Rau collected the views of the members on the provisions of the constitution, furthermore formulating a memorandum that formed the basis of future discussions of the constituent assembly. This memorandum expanded on the likelihood of a provision for ordinances to be incorporated into the Indian Constitution, providing that ''if at any time, when the Union Parliament is not in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the

[7] Dam (n 3)
[8] *Ibid*

circumstances appear him to require."[9] While this was essentially a similar provision as that within the Government of India Act, 1935 a few diversions were suggested as in the matter of the effect and duration of such ordinances, thus ordinances so promulgated were to have the "same force and effect"[10] as acts of the parliament and were to remain in force for not more than six weeks from the reassembly of the parliament.

The need for a provision on ordinances was highly debated within the constituent assembly. Professor K.T Shah termed it as a 'negation of the rule of law', a few other members also contested the scope of ordinances. B. Pocker Sahib wished to incorporate a proviso to the Article that "such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law."[11] Additionally, H.V Kamath was also concerned about the duration of 6 weeks from the reassembly of the parliament, "contesting that a president taking undue advantage of that period may force upon dictatorship."[12]

However, these contentions were declined by B.N Rau, B.R Ambedkar, and P.S Deskmukh asserting that it was necessary to understand and acknowledge the fact that promulgation of law may be "necessary in the future when crucial situations arise"[13], with these ordinances having the same effect as that of an act of the parliament, which "the parliament would not be competent to enact under the constitution, making it void"[14] if they were against the public interest, public policy, or violative of the fundamental rights of the citizens. Additionally, unlike the Government of India Act, this provision did not provide "the executive with any independent power of legislation"[15] and was limited to only when the house(s) of parliament was not in session.

ARTICLE 123 AND 213 OF THE INDIAN CONSTITUTION

[9] BN Rau, *The Framing of India's Constitution* (Universal Law Publishing 2006)
[10] Constituent Assembly Debates, 'Constitution of India' (*Constitutionofindia.net*, 2021) <https://www.constitutionofindia.net/constitution_assembly_debates/volume/8/1949-05-23> accessed 25 August 2021
[11] *Ibid*
[12] *Ibid*
[13] *Ibid*
[14] *Ibid*
[15] *Ibid*

Article 123 and 213 of the Indian constitution encompasses the principle of ordinances and powers exercised in the hands of the executive branch of the government, exclusive to that of the legislature as a law-making power.

Under Article 123, the President of India, is authorized to pass ordinances, "during the recess of the Parliament."[16] This ordinance is a law, but of a temporary nature, and not acting as a parallel power to that of the legislature, but only in the absence of the houses of the parliament. Additionally, on reassembly of the parliament, it is mandatory, that such an ordinance, must be introduced in both the houses and on approval from the Parliament, only such ordinance becomes law. This provision ensures that any ordinance, that is beyond the subject matter of the powers of the parliament, or against the public policy and interest, arbitrary and mechanical in nature, breaching the fundamental rights of the citizens, constitutional amendments or any mala fide intention, shall to the extent of such an ordinance be void. Conjointly, the scope of assistance, advice, and consultation by the council of ministers, which is headed by the Prime Minister is "not discretionary in nature."[17]However, the use of the phrase "upon the satisfaction of the president" in terms of the conditions that arise, is beyond the scope of judicial scrutiny. These factors and means are reliable at the discretion of the President.

Under Article 213, the same powers are given to the "Governor in absence of the State Legislative Assembly and, or State Legislative Council."[18] The passing of ordinances by the Governor, is on the same matters as that of the State Legislature, with the aid of the council of ministers, headed by the Chief Minister. However, unlike Article 123, the Governor upon "certain subject matters, requires the assent of the President"[19], before issuing such an ordinance.

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[16] Constitution of India, art 123

[17] *It is not upon the decision or personal opinion of the President, that a bit of advice over issuing of an ordinance shall be conducted or not. Under Article 123, it is a mandatory provision to seek advice and consultation from the council of ministers, wherein such a meeting is headed by the Prime Minister over the subject matter under the jurisdiction of the Parliament*

[18] Constitution of India, art 213

[19] Constitution of India, art 213(1)

These ordinances can be withdrawn by the President under article 123, and the Governor under Article 213 over some time, before its expiration in the houses of the Parliament, or the State Legislature, respectively. The Legislature is authorized to either, approve, disapprove or none i.e. expire the ordinance introduced by the Governor or the President upon its discretion. The period for the aforementioned is about 6 weeks after which the subject matter on which the ordinance is issued, expires.

JUDICIAL INTERPRETATION OF ORDINANCES

In *T. Venkata Reddy Etc. v State of Andhra Pradesh,* the court was of the view that "it is impossible to accept that the ordinance can be invalidated on the ground of non-application of mind. The power to issue an ordinance is not an executive power but is the power of the executive to legislate."[20] Additionally, in *A.K. Roy v Union of India,* the court only analyzes the constitutionality of the ordinance and, therefore "evaluating the motive of the President behind such passing of the laws & the ordinance making power is not beyond scope of judicial review."[21] In *Shamsher Singh v State of Punjab*, "the satisfaction of the President or the Governor is not a personal satisfaction, but a satisfaction of a subject matter in a constitutional sense, it is essential to act upon the advice of the council of ministers in all matters."[22] Similar was the opinion held in, *M.P. Special Police Establishment v State of M.P.* wherein, "the aid and advice of the council of ministers was not a discretionary power of the Governor."[23] However, in *Bhuri Nath v State of Jammu & Kashmir*, it was observed that "the decision taken by the Governor would be upon his satisfaction and not on the aid and advice of the council of ministers, providing the "Act"[24] as distinct and different from those exercised formally."[25] In *R.K. Garg v Union of India,* the court held that "the President under Article 123 has a legislative power to promulgate an ordinance and this legislative power is co-extensive with the power of the Parliament to make laws. The very objective of conferring the ordinance making power is to

[20] *T Venkata Reddy Etc v State of Andhra Pradesh* 1985 AIR 724, 1985 SCR (3) 509
[21] *AK Roy v Union of India* 1982 AIR 710, 1982 SCR (2) 272
[22] *Shamsher Singh v State of Punjab* AIR 1974 SC 2192, (1974) 2 SCC 83
[23] *MP Special Police Establishment v State of MP* AIR 2005 SC 325, (2004) 8 SCC 788
[24] Jammu & Kashmir Shri Mata Vaishno Devi Shrine Act 1988
[25] *Bhuri Nath v State of Jammu & Kashmir* (1997) 2 SCC 745

enable the executive to deal with unforeseen or urgent matters, which is not ultra vires or unconstitutional in nature."[26] Therefore, ordinances, like the acts of the parliament, are not immune from judicial review.

REPROMULGATION OF ORDINANCES

Repromulgation is an act of re-enforcing and introducing the law or decree, previously introduced by a government or an authority. Under the Indian judicial system, "Repromulgation is a fraud on the constitution and a subversion of democratic legislative processes, especially when the government persistently avoids the placing of ordinances before the legislature."[27] While the President and the Governor are given the law-making powers under Article 123 and 213 of the constitution, respectively, during the absence of the legislative branch of the government, in *Dr. D.C Wadhwa and Ors. v State of Bihar and Ors.* "a series of ordinances were promulgated by the Governor of Bihar, from 1989 onwards. However, none of these ordinances were laid before the legislature, and no law was passed concerning this."[28] Conjointly, the moment one ordinance was ceased and expired, a new ordinance was issued by the Governor during the recess of the legislature.

Consequentially, a total of 256 ordinances were issued. About the writ petition issued by the respondents having a *locus standi*, the court believed that "repeated repromulgation of ordinances was unconstitutional, and the governor cannot assume legislative function above the strictly defined limits set out in the Constitution because otherwise, he would be usurping a function which does not belong to him."[29] This principle was established to be unconstitutional and ultra vires to the provisions of the constitution, therefore becoming void in nature. The same decision was upheld by the court in *Krishna Kumar Singh & Anr. v State of Bihar & Ors.*[30] wherein the primary objective opposing repromulgation is to impede the

[26] *RK Garg v Union of India* (1981) 4 SCC 675, 1981 1 SCR 947
[27] Samanwaya Rautray, 'Repromulgation of ordinances "fraud" on the Constitution: SC' (*Economic Times,* 3 January 2017) <https://economictimes.indiatimes.com/news/politics-and-nation/repromulgation-of-ordinances-fraud-on-the-constitution-sc/articleshow/56300394.cms?from=mdr> accessed 27 August 2021
[28] *Dr DC Wadhwa and Ors v State of Bihar and Ors* AIR 1987 SC 579, (1987) 1 SCC 378
[29] *Ibid*

[30] *Krishna Kumar Singh & Anr v State of Bihar & Ors* (2017) 3 SCC 1

Ordinance Raj in India and its arbitrariness, which existed during the colonial period, being against the fundamental principles of the Indian Constitution.

CRITICISMS OF REPROMULGATION

An analysis of the aforementioned cases shows how repromulgation is essentially unconstitutional in nature. *Dr. D.C Wadhwa and Ors. v State of Bihar and Ors* reflects the overreach of powers exercised by the Governor, with the reintroduction of a new ordinance after its expiration of 6 weeks, and issuing a fresh ordinance during the recess of the legislature, surpassing the legislative powers of the parliament. It emphasizes the misuse of the loopholes existent in the constitution, by the executive "due to the lack of an overt prohibition under Article 123 and 213, leading to the government taking an unfair advantage of a provision exclusively made to aid the formulation of temporary laws in cases of emergency." [31]

Even though "Article 123 is silent about repromulgation, wherein it doesn't provide for it, and equally doesn't disallow it"[32], the scope of judicial review, illustrates that repromulgation undermines the doctrine of separation of powers and the basic structure of the Indian constitution making the parliament irrelevant, and surpassing the legislative function of the parliament, and overlooking their advisory role."[33] Additionally, promulgation is fundamentally flawed as it contravenes the prescribed time limit of six weeks (from the reassembly of the houses of the parliament) and re-implements a previous ordinance rendering this practice erroneous, as the "tenure of an ordinance can only be increased if it is converted into an act after following the proper legislative procedure and respecting the role of the parliament."[34]

CONTEMPORARY APPLICATION OF ORDINANCES AND REPROMULGATION

[31] *Dr DC Wadhwa* (n 28)
[32] Dam (n 3)
[33] *Ibid*
[34] Dam (n 3)

The Modi Government has repromulgated, "the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014, for the second time."[35] Even though Article 123 of the constitution provides the President the power to issue ordinances, these ordinances are not permanent in nature, and are subject to the approval of the parliament, and lapse with the period. However, its repromulgation by the current government poses an objection to the constitutional validity of the aforementioned, regarding the DC Wadhwa case. Until 1986, the central government had never repromulgated ordinances. It was in 1992, "when the Narsimha Rao Cabinet resorted to it, and since then 196 ordinances were promulgated, out of which 53 were repromulgated."[36]

It is witnessed that ordinances, as emergency provisions are used for political agendas, special under the Narendra Modi government, passing "5 ordinances and 1 constitutional amendment order".[37] The passing of the constitutional amendment is violative of Articles 123 and 213 of the Indian constitution, making the aforementioned void and ultra vires. However, these powers are exercised with the overreach of the executive over the legislature, functioning arbitrarily for elections, being violative of the separation of powers.

CONCLUSION

The concept of ordinances introduced during the British Raj in India created a new ground for the establishment of power and authority. This law-making power is not parallel, but rather temporary and exclusive in nature. Despite the separation of powers existent in India, the executive branch overreaches its power, especially with the repromulgation of ordinances, subjecting it unconstitutionally. The judiciary, however, ensures its responsibility as a watchdog of the democracy, preventing the existence of arbitrariness, and ensuring fairness, with the provisions abiding by the principles of the constitution.

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[35] Shubhankar Dam, 'Repromulgation Game' (*The Hindu,* June 03 2015) <https://www.thehindu.com/opinion/columns/legal-eye-column-repromulgation/article7275518.ece> accessed 29 August 2021

[36] *Ibid*

[37] Maneesh Chhibber, 'Why Narendra Modi government is in such a rush to issue ordinances before elections' (*The Print,* 4 March 2019)<https://theprint.in/opinion/why-narendra-modi-govt-is-in-such-a-rush-to-issue-ordinances-before-elections/200956/> accessed 29 August 2021