



Jus Corpus Law Journal

Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

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Re-Promulgation of Ordinances: Violation of the Spirit of the Constitution?

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Received 19 May 2022; Accepted 07 June 2022; Published 11 June 2022

During the 1950s, central ordinances were distributed at a pace of 7.1 each year by and large. In any case, during the 1990s, the rate arrived at a high of 19.6 each year. In the recent several years, there has also been a significant increase in the number of ordinances promulgated (16 in 2019, 15 in 2020). Initially, the ordinance was intended to be a temporary measure. Nevertheless, in past few years, the widespread use of ordinances has weakened the legislature's function and the notion of separation of powers. When Parliament (or the State Legislature) is not in session, the Constitution allows the federal and state governments to pass legislation. Article 123 of the Indian Constitution empowers the government to issue ordinances provided certain requirements are met. Article 213 has similar obligations for state governments. Repromulgation of ordinances raises a variety of issues, including usurpation of legislative power, undermining the doctrine of separation of powers, and ignorance of Supreme Court decisions. The Supreme Court concluded in the DC Wadhwa Case of 1987 that the executive's legislative authority to publish ordinances should only be utilised in extraordinary situations and not as a replacement for the legislature's law-making authority. In the case of Krishna Kumar Singh v State of Bihar, the Supreme Court decided that re-promulgation of ordinances is an infringement of the Constitution and a disruption of majority rule authoritative strategies. The Indian Constitution establishes a separation of powers between the legislature, executive, and judiciary, with the legislature's role being to enact laws. The executive branch must exercise restraint and should only issue ordinances in unanticipated or urgent situations, not to avoid legislative scrutiny and discussion.

Keywords: *ordinance, re-promulgation, separation of powers, legislative authority.*

INTRODUCTION

India chose a parliamentary system after independence. The drafting committee for the Indian constitution divided and delineated the functions of the several government departments, namely the executive, legislative, and judicial, resulting in the separation of powers. The doctrine of separation of powers ensures that each of the three branches' liabilities, obligations, and powers are plainly characterized. It likewise fills in as an arrangement of balanced governance to ensure that the organs' powers are not really abused or taken advantage of. The assembly is responsible for making regulations; given the nation's enormous and various populace, there is a requirement for thought, conversation, and discussion on each issue of public concern; in any case, the constitution permits the chief to step in and pass a regulation in case of a crisis when the council isn't in the meeting. Ordinances have a similar effect as laws approved by the legislature; the executive's capacity to issue ordinances is one of the most significant functions. Despite the fact that ordinances were once thought to be an emergency measure, the number of ordinances approved has grown in recent years. Along with an increase in the number of ordinances approved, there has been a rise in the number of ordinances that have been promulgated. The central government's recent decision to re-promulgate the Commission for Air Quality Management in the National Capital Region and Adjacent Areas Ordinance, 2020 has raised several concerns about the practice of issuing ordinances and also the constitutionality of the re-promulgated ordinances.

WHAT ARE ORDINANCES?

“Articles 123 and 213¹ of the constitution award the president and governor the position to pass regulations in case of crises/cases requiring prompt impact while the assembly isn't in the meeting; these regulations are known as ordinances, or regulations declared by the executive power when the council isn't in the meeting. These executive ordinances will have a similar

¹ Constitution of India, 1950, art.123 and art.213

effect as regulations instituted by the assembly. The ordinances are set to terminate following a month and a half after the re-gathering of the council. The president of India can take on ordinances under Article 123 of the Constitution, though the governor of the state has the ability to pass regulations in a crisis under Article 213 of the Constitution.”

Governor	President
<p>A governor's ordinance has the same effect and force as a law or acts approved by the state legislature.</p>	<p>The national president's ordinance will have the same effect and force as a central government act.</p>
<p>The governor's ability to issue ordinances is coextensive with the state legislature's legislative power, therefore he can only do so on matters where the state legislature can enact laws.</p>	<p>The president's ability to issue ordinances is as broad as parliament's legislative power; nevertheless, he can only issue ordinances on matters that parliament can legislate on.</p>
<p>Under the following three conditions, the governor cannot enact an ordinance without the president's approval:</p> <ul style="list-style-type: none"> • If a bill has the identical elements that needed the President's prior approval before it could be introduced in the state assembly. • If it is judged essential to reserve a law with the identical provisions for the President's consideration • If a state legislature act containing the 	<p>.With the exception of altering the constitution, the president does not need any instructions to promulgate an ordinance.</p>

identical elements would have been unconstitutional if it had not received the President's consent.	
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ORDINANCES AND THEIR CONSEQUENCES

No matter what the way that articles 213 and 123 of the constitution enables the governor and president to make regulations in the midst of crisis, there has been a ton of discussion about the executive's statute-making authority. A few think that the executive's power conflicts with the soul of the constitution, and furthermore that the ceaseless giving of ordinances brings about an Ordinance Raj.

- One of the essential issues with the statute is that the president rarely practices official tact; all things considered, the president simply proclaims them; in reality, the committee pastors choose if the mandate is fundamental. The ecclesiastical impact can here and there prompt mediation.
- The constitution's arrangements don't specify a most extreme number of ordinances that the president can take on in a specific timeframe. Since the parliament isn't in the meeting and the requirement for heinous acts exists, this absence of explicitness might prompt the president to pass however many ordinances he wants.
- The greatest issue or trouble with the ordinances is the re-promulgation of the ordinances; the conversation about whether they ought to be legitimate or unconstitutional has been happening for quite a while.

RE-PROMULGATION OF ORDINANCES: VIOLATION OF THE SPIRIT OF CONSTITUTION?

Re-promulgation of ordinances generally has been a hot issue for thought and discussion and has recently become even more so, given the significant increase in the number of laws being promulgated in recent years.

The following three processes can be used to decide if ordinances should be re-promulgated:

- The titles of both ordinances
- “Examining the contents of both Ordinances to see if the context and substance are comparable
- If the original and later versions of the Ordinance have identical legislative entries, it is a re-promulgation.

The national government recently agreed to re-enact the Commission for Air Quality Management in the National Capital Region and Adjoining Areas Ordinance, 2020, which established the commission for air quality management in the National Capital Region.”² This latest ruling has raised various new problems about the procedure of issuing ordinances and revoking them. A review of the history of ordinances published since independence reveals that this ability to make ordinances has been utilised regularly, rather than being used as an emergency provision or a last resort.

ORDINANCES ISSUED AND PROMULGATED TIMELINE

- The 1950s: Ordinances were approved at a rate of about 7.1 per year in the early 1950s, particularly the central ordinances.
- “1980s: The number of ordinances issued gradually increased in the late 1960s and early 1970s. In Bihar, for instance, 256 ordinances were enacted.
- The 1990s: In the 1990s, there was a tremendous increase in the number of ordinances issued, with an average of over 19.6 every year.
- The decade of 2010: The number of ordinances issued gradually decreased in the 2010s, with an average of 7.9 being issued every year.
- 2019-20: The number of ordinances issued in the United States has climbed to 16 in the last year.

² Madan Lokur, ‘An ill-conceived overbroad and vague ordinance’ (*The Hindu*, 2 January 2021) <<https://www.thehindu.com/opinion/lead/an-ill-conceived-overbroad-and-vague-ordinance/article33475179.ece>> accessed 24 February 2022

- 2020-21: The laws released in 2020 have grown to 15 and 4 ordinances have been issued in 2021.”³

The number of ordinances being issued each year has grown dramatically, as has the number of ordinances being re-promulgated. It may be claimed that India has been suffering from an ordinance Raj for the past eight years, which has resulted in a rapid surge of re-promulgation of ordinances.

In recent years, *the Centre has re-promulgated an ordinance.*

- The Securities Laws Ordinance was re-enacted for a three-year period in 2013-2014.
- 2014-2015: The land purchase legislation, which was first passed in 2014, was twice re-enacted in 2015.
- “2016-2019: In 2018, the Indian Medical Council ordinance was issued, then in 2019, it was re-issued.
- The Commission for Air Quality Management in the National Capital Region and Adjacent Areas Ordinance was just re-promulgated for the 2020-2021 year”⁴.

Re-promulgation of ordinances by the states

- In Bihar, it was claimed that 69 ordinances were re-promulgated, with about 11 of them being maintained alive for almost a decade.
- Kerala, Maharashtra, and Karnataka have enacted 41, 24, and 21 ordinances, respectively. Kerala has re-promulgated one of its ordinances for the fifth time in 2021.

A CRITICAL EXAMINATION

The issue of regular re-promulgation of ordinances isn't new, yet it has become more common lately. What's more, this abrupt flood raises worries about its constitutionality. Various causes

³ M.R. Madhavan, 'The Ordinance route is bad, repromulgation worse' (*PRS Legislative Research*, 19 April 2021) <<https://prsindia.org/articles-by-prs-team/the-ordinance-route-is-bad-repromulgation-worse>> accessed 26 February 2022

⁴ Madan Lokur (n 2)

have been brought all through the years to decide the constitutionality of the ordinances; the absolute hugest examples relating to re-promulgation of ordinances include:

*D C Wadhwa v State of Bihar*⁵

“In *D C Wadhwa v the State of Bihar*, the Supreme Court featured the blatant development in the number of ordinances declared. There were 256 ordinances distributed, and they were totally held essentially for 1-14 years by regularly re-promulgating them. The court established that progressive re-promulgation of ordinances with similar texts without attempting to pass bills would be an infringement of India's constitution; the court additionally held that the executive's remarkable ability to pass regulations ought not to be treated as a substitute for the law-making body's authoritative power.”

Krishna Kumar Singh v State of Bihar

“This is the milestone choice that announced the re-promulgation of ordinances to be a constitutional infringement. The 7-judge court observed that the executive's power doesn't comprise an equal regulation-making expert for this situation. The purpose of this case was to shed more light on the difficulties that Re-promulgation of Ordinances poses to the legislative's law-making authority. In this decision, the court stressed the parliament's authority in drafting laws, as well as the fact that ‘ordinances are only supposed to be utilised in extraordinary instances.’⁶”

SUPREME COURTS POSITION IN THE QUESTION OF RE-PROMULGATION

The Supreme Court announced in 1986 that the re-promulgation of ordinances was contradictory to the fundamental precepts of the constitution and disruption of popularity-based administrative methodology and that the instrument might be used by the executive to disregard the council. As a result, the executive branch may be entrusted with legislative duty.

⁵ *D.C. Wadhwa v The State of Bihar* (1987), AIR 579

⁶ *Krishna Kumar Singh & Anr v State of Bihar* (2017) 2 SCJ 136

SHOULD IT BE PERMISSIBLE TO RE-PROMULGATE AN ORDINANCE?

Ordinances, as we have stated, are not a healthy activity in a democratic society; they contradict the constitution's essential framework and should only be utilised in severe cases of emergency. Assuming the mandated way was unfortunate, the Re-promulgation course is far more detestable; comparable to ordinances, Re-promulgation of ordinances has various troubles, including:

Usurpation of regulative power: Ordinances are a special case for the official's regulation-making capability in conditions of crisis, and henceforth these regulations have an expiry date. In any case, at whatever point a law is re-promulgated, the life expectancy of the statute is delayed, bringing about power usurpation.

The separation of powers hypothesis is being addressed: In the noteworthy choice of *Kesavananda Bharati v State of Kerala*, the Supreme Court of India perceived that the division of powers is a critical part of the constitution and that the component of the law is certainly not an option in contrast to the law-making body, yet rather an arrangement if there should be an occurrence of crisis. By basically re-promulgating the ordinances, the organization might establish long-lasting regulation with next to no discussion or conversation.

Disregarding the Supreme Court's choice: As recently expressed, the Supreme Court has said unequivocally that the re-promulgation of ordinances goes against the constitution's fundamental system. With the recent re-promulgation of various regulations, it is reasonable to say that both the centre and the state have opted to disregard the Supreme Court's ruling. Apart from the few difficulties mentioned above, the ability to issue ordinances has been abused even during times of genuine emergency.

Re-promulgation of ordinances amidst a pandemic: While the COVID 19 pestilence has affected the entire planet, making everyday exercises troublesome, a similar pandemic is being used as a cover to proclaim and re-promulgate various regulations. A pandemic is an emergency that necessitates the adoption of appropriate laws to manage the country during times of crisis. Ordinances are great in this case since the emergency necessitates quick action;

nevertheless, according to various studies, the government is using the epidemic as a pretext to pass laws without debate or discussion. The government has approved 11 ordinances since March, five of which are broadly connected to the COVID epidemic. All of the other regulations, including the Banking Regulation (Amendment) Ordinance and the three agriculture-related acts, are unconnected to the epidemic, prompting some experts to doubt their usefulness.

IS IT PERMISSIBLE TO RE-PROMULGATE? (RECOMMENDATIONS)

Following considering numerous factors, it very well might be inferred that re-promulgation of ordinances is a break of the constitution's soul; regardless, the following huge inquiry is whether such training ought to be allowed. Conditions might foster that require quick activity, in which case a mandate or the re-promulgation of a current law might become basic. In this manner, I feel that prior to re-promulgating a law, the executive should attempt to address all of the following issues, which can also serve as guidelines for re-promulgation:

- Is this a problem that requires immediate attention?
- Is it absolutely necessary to promulgate/promulgate an ordinance, or is there another option?
- Is the topic of the ordinance that has to be re-enacted relevant to the present state of emergency?

CONCLUSION

The separation of powers thought is a fundamental part of the constitution. Per this, the law-making bodies have the ability to make regulations, however, in a crisis, the executive can intercede and take on ordinances that have similar power as regulations supported by the assembly, with the special case that ordinances have a six-week expiry date when the parliament has reassembled. The fundamental issue of this executive authority is the re-promulgation of ordinances. While a Constitution never expressly permitted it, it has been a well-established practice, with Ordinances being re-declared consistently. Re-promulgation of ordinances is against the soul of the constitution and ought to be avoided except if absolutely

vital. The executive must exercise restraint; both the state and the federal governments are breaking the constitution by often re-enacting ordinances; the other two institutions, the judiciary and the legislature, should check this practice, since failing to do so abdicates their role as well.