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PROCEDURAL COMPLIANCE IN EXECUTIVE LAW-MAKING: ASSESSING THE INSTITUTIONAL IMPACT OF UN-LAID ORDINANCES ON LEGAL CERTAINTY

~ *Monami Hazra*

ABSTRACT

The Constitution of India empowers the Executive wing of the government to make laws without prior permission from the legislature where a situation exists that needs immediate legislative action and the legislative body is not in session. This extraordinary power operates at both sphere of the government (the union and the states). The President of India has the power to promulgate an Ordinance when satisfied that there exists an emergency situation that needs legislative action when both Houses of Parliament are not in session. Similarly, the Governor of any State has the power to promulgate an Ordinance when the State Legislative Assembly or the State Legislative Council is not in session and there exists an emergency requiring immediate legislative action. However, this mechanism relies entirely on strict constitutional checks and balances to be exercised by the legislative body. This critically assess the stability of this law passed by the executive wing that has the same force and effect of an Act passed by the legislative body. Further, it would examine the chaotic impact of this temporary law on the rights, public liabilities and criminal penalties. This paper highlights the confusion inflicted upon citizens and administrative systems arising due to executive failure to comply with the mandatory procedural compliance of laying these ordinances before the legislature within the stipulated timeframe that ultimately decides the fate of these laws.

Keywords: Executive Law-Making, Procedural Compliance, Legal Certainty, Institutional Impact, Rights and Liabilities of citizens.

INTRODUCTION AND HISTORICAL BACKGROUND

India follows a Parliamentary System of government. The main feature being, a close relationship of the executive and the legislature, there is Fusion of Power between the executive and the legislature unlike the United States of America that has strict separation of powers among the organs of the government.¹ Article 123 empowers the President of India with a legislative function². Under this article, the President may promulgate an Ordinance if he is satisfied that circumstance exists that needs immediate action and both Houses of the Parliament are not in session and such Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament³. A similar legislative power is vested in the Governor under Article 213⁴.

This Ordinance making-power in India is not a post-independence concept but an inheritance from British Colonial Rule.⁵ The Indian Councils Act, 1861 was the first Act to introduce the ordinance-making power in India. It granted the Governor-General (Viceroy) absolute power to pass temporary laws during emergencies without consulting his council. Later, The Government of India Act, 1935, the framework was later structured into Sections 42 and 43 of this Act. The British used this tool extensively to suppress the Indian freedom struggle and bypass native legislative bodies.⁶

Having witnessed its abuse by the British, prominent members of The Constituent Assembly such as Prof. K.T Shah and Hriday Nath Kunzru feared that it would led to establishment of dictatorship by the executive and therefore they opposed this power in the constitution.⁷

However, Dr. B.R Ambedkar, the Chairperson of the Constitution Drafting Committee strongly defended this provision. He argued that the power was a matter of pragmatic necessity to deal with exceptional circumstances.⁸ He stated that existing laws might be inadequate to handle a sudden emergency, and since the President acts on the advice of a democratic Council of Ministers, it could not be compared to colonial tyranny. Moreover,

¹ K.K. Ghai, *ISC Political Science for Class XII* 67(Kalyani Publishers, 2023)

² India Const. art. 123, cl. 1

³ India Const. art. 123, cl. 1

⁴ India Const. art. 213, cl. 1

⁵ M.P. Jain, *Outlines of Indian Legal and Constitutional History* 412 (7th ed. 2014)

⁶ M.P. Jain, *Outlines of Indian Legal and Constitutional History* 412 (7th ed. 2014)

⁷ 8 Constituent Assembly Debates 210-214 (May 23, 1949) (statements of Prof. K.T. Shah & Pandit Hriday Nath Kunzru).

⁸ 8 Constituent Assembly Debates 215 (May 23, 1949) (statement of Dr. B.R. Ambedkar)

in 1950, assembling MPs from across the country took days or weeks.⁹ If a crisis (like a natural disaster, war, or economic shock) occurred while Parliament was in recess, the country could not be left in a legislative vacuum.

ANALYSIS OF THE CONSTITUTIONAL PROVISIONS AND THE PRECEDENTS

Article 123¹⁰ and Article 213¹¹ provides a mandatory condition that must be followed when an Ordinance is being promulgated by the President in case of the Union or the Governor in case of a state. It mandates that such Ordinance shall be laid before both Houses of the Parliament in case of Union¹² or before the State Legislative Assembly (and the State Legislative Council, where applicable) in case of State¹³ and shall cease to operate at the expiration of six weeks from the reassembly of such legislative Houses or it shall cease to operate before the expiration of six weeks, if a resolution disapproving such Ordinance is passed by both Houses of Parliament in case of Union and the State Legislative Assembly and the State Legislative Council in case of State. Through this mandatory condition, the Constitution preserves the core function of the legislature and eliminate executive overreach. Regardless of this mandatory step laid by the Constitution, the Executive has deliberately tried to bypass the legislature's debate and discussion and thus constituting procedural failure in the Ordinance making process.

The judicial check was first strictly enforced by the Supreme Court of India in the landmark case of *D.C Wadhwa v. State of Bihar (1987)*¹⁴ as the court observed that the executive cannot usurp the law-making function of the legislature, ruling that the continuous re-promulgation of ordinance without facing parliamentary scrutiny constitutes a “colorable exercise of power” and a “fraud on constitution”.¹⁵

This Jurisprudence was further solidified by a seven-judge bench in the case of *Krishna Kumar Singh and V. State of Bihar (2017)*¹⁶. It was held that the Ordinance making power is subject to control of the legislature over the executive and the failure to lay an Ordinance before the legislature constitutes serious infraction of the constitutional obligation as it

⁹ 8 Constituent Assembly Debates 215 (May 23, 1949) (statement of Dr. B.R. Ambedkar)

¹⁰ India Const. art. 123, cl. 2(a)

¹¹ India Const. art. 213, cl. 2(a)

¹² India Const. art. 123, cl. 2(a)

¹³ India Const. art. 213, cl. 2(a)

¹⁴ *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579.

¹⁵ *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579.

¹⁶ *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1

impacts upon the ability of the legislature to deal with the Ordinance. Thus, the Supreme Court solidified legislative supremacy in law-making process by ruling that ‘laying’ an Ordinance before legislature is not merely directory rather mandatory in nature and failure to comply with this constitutional obligation operates as a separate ‘fraud on constitution’ and thus rendering such ordinance with no legal effect.¹⁷

LEGAL CERTAINTY AND INSTITUTIONAL IMPACT

On failure of the executive to mandatorily lay the Ordinance before the legislature within six weeks from the reassembly of the Houses impacts on the legal validity, stability and effectiveness of the law. Article 123¹⁸ and Article 213¹⁹ clearly lays down that an Ordinance can be promulgated by the executive under exceptional circumstances and such Ordinance would have the same force and effect of an Act of the Parliament. It is to note that such power is not absolute and eliminates any kind of executive overreach by explicitly mandating that the Ordinance has to be discussed in the legislative houses within the stipulated timeframe otherwise it renders the Ordinance to not the same force and effect of an Act of Parliament since its very inception.

Furthermore, this procedural negligence creates catastrophic policy instability for corporate institutions, infrastructure developers and for people at large. Here are certain highly debated examples of Ordinances that caused severe public chaos and economic strain:

- The Banking Companies (Acquisition of Undertakings) Ordinance (1969):²⁰ Rushed through past midnight by the Indira Gandhi government just two days before a scheduled parliamentary session to nationalize 14 major commercial banks. This aggressive bypass of legislative debate led to the historic *R.C. Cooper v. Union of India* (1970)²¹ case, where the Supreme Court first heavily warned that using ordinances purely as a political shield to dodge legislative friction undermines the constitutional order.

¹⁷ *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1

¹⁸ India Const. art. 123, cl. 1

¹⁹ India Const. art. 213, cl. 1

²⁰ *The Banking Companies (Acquisition and Transfer of Undertakings) Ordinance*, No. 8 of 1969

²¹ *R.C. Cooper v. Union of India*, AIR 1970 SC 564

- The Sanskrit Schools Management Ordinances, Bihar (1989–1992)²²: The state executive took over private Sanskrit schools via a temporary decree, but instead of laying it before the assembly, re-promulgated the exact same ordinance seven consecutive times before letting it vanish. When it died, thousands of newly employed teachers were left completely stranded without pay, creating a devastating human crisis and decades of exhausting litigation that severely overburdened the state judiciary.
- The Land Acquisition (Amendment) Ordinance (2014)²³ Aimed at easing land buyouts for industries by dropping mandatory social impact assessments, this faced heavy parliamentary resistance and was re-promulgated three times. The resulting legal limbo caused massive financial anxiety for corporate developers, who halted infrastructure investments because they could not guarantee their land rights would remain valid if the temporary law eventually lapsed.²⁴
- The Three Farm Ordinances (2020)²⁵: This Ordinance was promulgated during the COVID-19 pandemic recess. Through this Ordinance, agricultural markets were overhauled. This Ordinance completely bypassed parliamentary standing committee and this lack of democratic transparency blindsided the farming community and therefore triggered the largest, longest, and most disruptive agrarian protests in modern Indian history which ultimately forced the executive to fully repeal them.²⁶
- The Government of NCT of Delhi (Amendment) Ordinance (2023)²⁷: This Ordinance was issued to seize control over the administrative postings of civil servants, this ordinance was passed just days after a five-judge Supreme Court bench ruled in favor of the elected Delhi government. Overriding an apex court

²² *The Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance*, No. 32 of 1989 (subsequently re-promulgated multiple times)

²³ *The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance*, No. 9 of 2014

²⁴ Joyita, *Land Acquisition: An overview of proposed amendments to the law*, PRS Legislative Research (Mar. 16, 2015)

²⁵ *The Farmers' Produce Trade and Commerce (Promotion and Facilitation) Ordinance*, No.11 of 2020

²⁶ Subhasish Dey, *The Three Farm Bills*, The India Forum (Mar. 8, 2022)

²⁷ *The Government of National Capital Territory of Delhi (Amendment) Ordinance*, No. 1 of 2023

judgment through Ordinance, created an acute constitutional deadlock, leaving bureaucrats paralyzed and freezing city welfare projects for months.²⁸

- The Insolvency and Bankruptcy Code (Amendment) Ordinance (2017)²⁹: Through this Ordinance promoters of defaulting corporate companies were banned from bidding for their own assets during bankruptcy auctions. This Ordinance primarily targeted to catch corporate fraudsters but it also created absolute corporate chaos by disrupting major ongoing debt restructuring plans, frozen banking pipelines, and forced administrative asset management tribunals into a complete procedural standstill while markets waited for parliamentary clarification.³⁰
- The Uttar Pradesh Unlawful Conversion of Religion Ordinance (2020)³¹: This Ordinance was promulgated by the Governor of Uttar Pradesh in 2020 which criminalized fraudulent or forced religious conversions through marriage. This Ordinance led to wrongful citizen detentions as the police enforcement agencies actively misapplied its ambiguous terms and forced the accused to prove their innocence.³²

CONCLUSION

The main objective of this exceptional power of the executive was to eliminate any issue that was supposed to be created due to legislative vacuum but recent trends and patterns reveal how this power is crossing the constitutional limits. Not only there is a violation of the mandatory procedure laid by the constitution but also a negative impact is being created on the people and the institutions bound by it. If an Ordinance fails to comply with the mandatory procedure of laying the Ordinance before the legislature, it is not only stripping away its legal force and effect but also making the actions taken during the period when the Ordinance was in operation to be null and void.

²⁸ Gauri Kashyap, *War Over Control of Delhi Resumes*, Supreme Court Observer (July 23, 2023)

²⁹ *The Insolvency and Bankruptcy Code (Amendment) Ordinance*, No. 7 of 2017

³⁰ *Over the years, ordinances have turned into a procedural device*, IASbaba Analysis (Oct. 21, 2015)

³¹ *The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance*, U.P. Ordinance No. 21 of 2020

³² *Ordinances that mocked the Constitution*, Citizens for Justice and Peace (Feb. 15, 2021)