Ordinances & Administrative Legislations: Discretion Involved in a Legislative Power Vested in the Executive

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Abstract

The Constitution makers instilled a very important legislative power in the hands of the Executive to meet exigent circumstances, such that there arises an immediate need to enact certain laws, which cannot wait for the Central or State legislative assemblies to reconvene. This is referred to as the power of issuing Ordinances. It is essentially a sub-set of delegated legislations, complete with its pros and cons. Through the course of this paper, the authors attempt to capture the history behind legislative delegation, tracing its evolution from the pre-independence era, to its post-independence development through relevant judicial precedents, while critically examining the extent and scope of judicial review attached to President and Governor-promulgated ordinances, respectively, in the past. The discretionary power awarded to the respective executive heads and the notion of subjective satisfaction is also dealt with extensively, while testing it at the touchstone of the age-old concept of separation of powers and studying as to whether it upholds its intended objective till date or has simply become a tool to surpass the Legislatures' authority and power.

I. Introduction

The method of promulgation of an ordinance has been designed in such way to enable the Executive to tackle any urgent & unforeseen situation that the country may face when the Parliament or the State Legislatures are not in session and the situation can't be taken care of with the help of any existing law. This power actually belongs to the Parliament and the State Legislatures. However, with a view to meet extraordinary situations demanding immediate enactment of laws, the Constitution of India provides for provisions to invest the President and the Governor with the legislative power to promulgate ordinances. An ordinance is only a temporary law.

Under Article 123 of the Constitution of India, the President of India is vested with the power to promulgate Ordinances having the same force and effect as an Act of Parliament.[2] Similarly, under Article 213 of the Constitution of India,[3] the Governor of a State is vested with the power to promulgate Ordinances having the same force and effect as an Act of the Legislature of the State assented to by the Governor. The power to promulgate ordinances is something which is not an entirely new concept introduced in the Indian Constitution. Articles 42 and 43 of the Government of India Act, 1935, enacted during the British reign, conferred similar powers of issuing ordinances on the Governor General of India. The system of delegated legislation is a source of multiple confusions. It serves as an excuse for the parliamentarians, as a protective guard for the bureaucrats and as a provocation for the priests of the Indian Constitution. The sphere of State action has expanded enormously in the modern age. It has become practically impossible for the legislature to provide laws complete in all necessary details, Therefore, the system is appreciated as a necessity on one hand and criticized as an abdication of power on the other. Many people consider this

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[2] INDIA CONST., art. CXXIII.

[3] *Ibid.*

form of law making as inevitable in a fast growing economic, technological, psychological and administrative world. Others criticize it as a misuse of power by parliamentarians and a way to escape from the responsibility imposed upon them by the public.[4]

Delegated Legislation is often mistaken as a modern problem. It is not. It is a historic question which troubled and agitated men's minds very soon after the beginning of what we call law and legal administration. It is not wholly a problem of democracy. It existed and exists as a problem in every context of Government, whatever be its ideals or its policies. Its forms have changed, its repercussions have changed, but its core remains.

II. History of Delegation of Powers of Legislative Character

The British Government as a 'colonial power' felt the necessity and the urge to arm its Chief Executive in colonies with such legislative powers as he could, on an emergency situation, invoke at will, without having a risk of refusal or without having openly to account for it, in order that he may fulfil his mission, with the minimum of delay, of protecting the British interest and the reign. The ordinance making power served as a ready instrument for this purpose.

On August 1, 1861, by a British statute namely the Indian Councils Act, 1861, this extraordinary power of issuing ordinances was conferred on the Governor General, the Chief Executive of the Government of India. In India, the word *'ordinance'* has never been a popular word because during the days of Indian Freedom Movement, ordinances were increasingly utilized to curb and kill national aspirations and urge for political liberty. To the British, it provided for a handy weapon of mass repression and suppression. On July 20, 1915, the British Parliament enacted The Government of India Act, 1915 which repealed The Indian Councils Act, 1861.

Under this new Act also, the power of issuing Ordinances was vested with the Governor General by virtue of Section 72 of the said Act. The Government of India Act, 1935 also provided for similar powers of issuing ordinances, in cases of emergency, to the Governor General by virtue of Section 42 of the said Act. The Government of India Act, 1935 served as Provisional Constitution from 1947 to 26th January, 1950. It was only on 26th January, 1950 that the Constitution of India came into force.

Some members of the Constituent Assembly were reluctant to place the power of issuing ordinances in the hands of the executive. Both, Professor K.T. Shah & Hriday Nath Kunzru, were against the decision of including such powers in the Constitution because they had experienced the misuse of such powers during the British rule. Dr. B.R. Ambedkar, however, overruled them on the ground of necessity of 'immediate action'. Therefore, under Articles 123 and 213 of the Constitution of India, the President of India and the Governor of a State respectively were vested with the power to promulgate Ordinances, as previously mentioned. Greek political theory and legal concepts as expounded by Plato and Aristotle in the small City States did not face the complex problems of delegated legislation as in the modern age, although, they did have occasion to notice whether the representative was limited or not in his powers of representation. With the Romans, delegation was an acknowledged problem and the Roman concept of '*delegatus non potest*

[4] P. B. Mukharji, *Delegated Legislation*, 1 JILI 465, 492 (1959).

delagare' was born of many tears.

The modern origin of delegated legislations lies in opposition to centralization. Bentham and his disciple, Chadwick, were pleading for devolution, so that subordinate bodies could be given greater power to legislate. The reason why they chose to advocate that cause was that Local Self-Government provided the best nursing ground for training in democracy. Local Self-Government and municipal administration provided the first occasion for delegation of legislative powers and legislative functions. The atmosphere was considerably helped by the Pluralists and the Syndicalists with their particular ideas of self-sufficient government and organization for different groups in society. Imperialism and colonialism of the 18th and 19th centuries further advanced the cause of delegation. The next step was the introduction of the principles of delegation, to courts and judicial procedure. The British Judicature Acts are important land-marks in the history of delegated legislation. All this is 19th century history. The 20th century legal outlook opened with shining faith in parliamentary sovereignty and legislation but before half the century was over, the world was engulfed in two Wars.

The First & the Second World Wars are responsible, to a large extent, for an unexpected increase in delegated & subordinate legislations on the ground of 'immediate action'. These wars needed a mechanism which could take immediate decisions without any unnecessary delay. The then existing legal machinery was not smooth enough to take decisions on such an emergency basis and hence, the only solution was to delegate these powers of taking decisions into the hands of the subordinate agencies who were also charged with carrying them into effect. Since then, emergency legislations became a new normal in the world of law making. In this atmosphere and speed of emergency, the frontiers between the principles and procedures became blurred. They first came as Statutory Rules and Orders blessed by the English Rules Publication Act of 1893 and later acquired the more dignified designation of Statutory Instruments under the English Statutory Instruments Act of 1946.

III. Judicial Review of Ordinances in India

In *SKG Sugar Limited v. State of Bihar*,[5] the Supreme Court stated that Governor's satisfaction is a very subjective term and can't be questioned on the ground of error of judgment. An enquiry into the question of satisfaction is not a justifiable matter. However, in the Bank Nationalization Case,[6] the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, was challenged. The Supreme Court kept the question open that whether 'President's satisfaction' comes under the ambit of judicial review or not.

In *T Venkata Reddy v. State of Andhra Pradesh*,[7] the Supreme Court has ruled that ordinance making power is a legislative power of the executive and hence is clothed with the same attributes and immunities of legislation. Any ordinance can't be questioned on the grounds of improper motives or non-application of mind. Following this, the Apex Court held, in *K Nagaraj v. State of Andhra*

[5] S. K. G. Sugar Limited v. State of Bihar, AIR 1974 SC 1533.

[6] Rustom Cavasjee Cooper v. Union of India, AIR 1970 SC 564.

[7] Venkata Reddy v. State of Andhra Pradesh, AIR 1985 SC 724.

Pradesh,[8] that:

> "The power to issue an ordinance is not an executive power, but is the power of the executive to legislate. An ordinance can't be invalidated on the ground of non-application of mind."

In these cases, the Supreme Court seems to have gone too far in immunizing an ordinance from judicial review. It does not seem to be correct to treat an ordinance on all fours with an Act passed by Parliament.[9] However, in relation to exercise of emergency power, a power analogous to promulgation of ordinances, in S.R. Bommai v. Union of India,[10] a Bench comprising of nine Judges of the Supreme Court rejected an argument calling for restricting the Court's power to review executive actions. They asserted that any exercise of power by the President, promulgation of ordinances being one, may be scrutinized to ensure that it is in conformity with constitutional preconditions.

The Constitutional Bench of the Supreme Court, in *Rameshwar Prasad v. Union of India*,[11] disapproved the view expressed in *State of Rajasthan v. UOI*[12] and reaffirmed the ratio in *Bommai*'s case that the subjective satisfaction of a Constitutional authority including the Governor, is not exempt from judicial review. A single Judge of the Karnataka High Court in *State of Karnataka v. BA Hasanabha*[13] declared an ordinance promulgated by the State Governor as being mala fide. The Judge referred to the *Bommai* case in support of his approach. But, on appeal, a bench of two judges reversed the single judge's judgment and ruled that the power to make an ordinance being legislative in nature, the concept of mala fides cannot apply thereto. The Court depended on *Nagaraj* for support and did not refer to *Bommai.*

As per the prevailing position, while the satisfaction of the President or of the Governor as to the existence of circumstances necessitating issuing of an Ordinance cannot be examined by the Court, it is competent for the Court to inquire whether in exercise of his Constitutional power, the President or the Governor had exceeded the limits imposed by the Constitution upon the exercise of that power or not. The law is very clear that the Governor is the sole judge of the question whether emergent circumstances exist to necessitate the promulgation of an ordinance. That is a non-justiciable matter.

It is interesting to note that the Government of India enacted the Constitution (Thirty-Eighth Amendment) Act, 1975 to expressly provide (through inserting clause IV in Article 123) that the satisfaction of the President (or of the Governor) shall not be questionable in any court on any ground. By the Constitution (Forty-Fourth Amendment) Act, 1978, the same clause was omitted.

IV. Governor's or President's Discretion While Issuing an Ordinance

[8] K. Nagaraj v. State of Andhra Pradesh, AIR 1985 SC 551.

[9] M. P. JAIN, INDIAN CONSTITUTIONAL LAW (8h ed. 2018).

[10] S. R. Bommai v. Union of India, AIR 1994 SC 1918.

[11] Rameshwar Prasad v. Union of India, AIR 2006 SC 980.

[12] State of Rajasthan v. Union of India, AIR 1977 SC 1361.

[13] State of Karnataka v. B. A. Hasanabha, AIR 1998 Kant 210.

The power of the President of India to promulgate ordinances, like his other executive powers, is exercised by him on the aid and advice of the Council of Ministers and hence, the ordinance issuing power actually rests with the Central Executive only. The President can send the ordinance back to the Cabinet once to review its decision, but if the Cabinet returns it back unchanged, the President will be bound to approve it.[14]

However, the Governor enjoys some discretionary power in issuing ordinances. Normally, the Governor acts on the advice of the Council of Ministers but he can also use his discretion where the Constitution so requires.[15] In case of a confusing situation as to whether the Governor should or shouldn't have acted in his/her discretion under the Constitution of India, the decision taken by the Governor in his/her discretion will be final. The validity of any action taken by the Governor will not be called in question in a court of law on the ground that he/she should or shouldn't have acted in his/her discretion.[16]

The Governor will not be bound by the advice of his Ministers under the situation if the proposals to be made in the form of an ordinance fall against the limitations of the Article 213(1) of the Constitution or contrary to the Articles 31, 202, 254, 286, 288(2) and 304 of the Constitution. It is natural that the Governor would exercise his individual judgment in this situation. This individual discretion was applied by the Punjab Governor, *Dr. D.C. Pavate*, when the Akali-led-coalition Government headed by Mr. P.S. Badal advised the Governor to issue an ordinance for the appointment of the Legislator as the member of the Board and Corporation. The Governor sent the ordinance back to the Ministry and asked to show cause as to how and why this action was urgently needed.

The ordinance can be issued by the Governor when the Bill on any issue is pending in either of the Houses of the Assembly after it has been passed by the other, and the Government feels that passing of it is an urgent need. The Cabinet of the State will advise the Governor to promulgate an ordinance regarding the same. For this purpose, the Governor may prorogue one of the Houses of the Assembly in order to give effect to the Bill in the form of an ordinance. It is also interesting to note that an ordinance can be given retrospective effect even from the date on which both the Houses were in session.[17]

D.D. Basu is of the opinion that it is not a discretionary power of the Governor. He must exercise this power with aid and advice of the Ministers. The Supreme Court has ruled that "the satisfaction contemplated for the promulgation of an ordinance is not that of the Governor or President but of the Council of Ministers."[18] In other words, the actual power belongs to the Council of Ministers and the Governor is simply its mouth piece.

V. Executive Discretion in Administrative Legislations

[14] INDIA CONST., art. LXXII, cl. 1.
[15] INDIA CONST., art. CLXIII, cl. 1.
[16] INDIA CONST., art. CLXIII, cl. 2.
[17] Jnan Prosanna Das Gupta v. The Province of West Bengal, 1949 CriLJ 1.
[18] *Supra* note 6.

In Indian democracy, it is rarely seen that the Judiciary interferes with executive discretion & legislative wisdom. There may arise a situation where the civil liberties of an individual or a group of individuals are violated by fanciful & unreasonable exercise of discretionary power by the executive in moving a legislation. Occasions may arise when the executive does not take the initiative in bringing a legislation for the purpose of regulating or curbing a social evil or when the discretion conferred on it by the legislature to enforce a legislation is not exercised. But for its prophetic direction to the executive to structure its discretion in a field involving legislative wisdom, the decision in *Aeltemesh Rein v. Union of India*[19] would have been viewed as ordinary, or even criticized.

The facts that can be gathered from the judgment show that a lawyer alleged to have committed a criminal offence had been handcuffed while he was being brought to the trial court. The act of the police in handcuffing the accused was challenged as contrary to law. In *Aeltemesh Rein*, the Supreme Court noted that neither the Union Government nor the Delhi Administration had issued necessary guidelines on the circumstances under which the person arrested could be handcuffed or fettered. In conformity with the criteria laid down in *Prem Shankar Sukla*,[20] the court directed the Union Government to frame rules and guidelines within three months and to circulate them among the states and union territories.

The second direction in *Aeltemesh Rein*was in connection with a provision in the Advocates Act, 1961. Section 30 of the Act has not been brought into force so far. This provision says that an advocate entered in state rolls shall be entitled as of right to practice throughout the territories in India to which the Act extends. However, the Court noted that the presence of certain laws which prohibit lawyers from representing cases creates complicated questions of law.

VI. Separation of Power vis-a-vis Delegated Legislation

While probing into the possibility of directing the executive to put the provisions into force, the court found a hurdle. In a previous case, *A.K Roy v. Union of India*, it was held that no writ of *mandamus* could be issued to the executive on whom the legislature had already conferred the discretion to bring a legislation into force. Although, it approved the above ruling, since in the case under comment, the Court was obviously unhappy with the long and inordinate delay in implementing the concerned provision of the law. True, that the discretion as to when to implement the provision is conferred on the executive, courts do not interfere with this discretion. However, by using an ingenious juridical technique and noting that the discretion given to the executive for bringing the provision into force is not an arbitrary one, the court issued a direction to consider the question as to whether the executive could exercise the discretion one way or the other. The significance of *Aeltemesh Rein* lies elsewhere. The directions in the case involve important questions of relationship among the three wings of government. Is the old notion of strict separation of powers practicable in modern democracy? If so, how far are the checks and balances permissible? Procedurally, the directions in *Aeltemesh Rein* relate to the exercise of discretion by the executive. Substantively, the directions are closely connected with the legislative powers of the executive.

[19] Aeltemesh Rein v. Union of India, AIR 1988 SC 1768.

[20] Prem Shankar Sukla v. Delhi Administration, AIR 1980 SC 1536.

While in one direction, the executive was asked to lay down relevant criteria for handcuffing, in the other, it was asked to come to a definite conclusion on the question as to whether or not a statutory provision be brought into force. Primarily, these are sectors where legislative wisdom will be the guiding factor.

In a parliamentary system, the executive is the leader in the field of legislation. It decides which area requires regulation and hence legislation. It decides whether or not to bring a legislation. Suppose, in this decision-making process, the executive falters or it misguides or misleads the legislature; are there no remedies available for the affected people? Are the courts left with no power to intervene and correct the error? Judicial attitude to these problems has been lukewarm. The Courts are only concerned with the constitutional validity of the legislations. Courts do not entertain petitions challenging statutes on the grounds of non-application of mind or mala fide intention of the executive.

In *State of H.P. v. A Parent of a Student, Medical College, Shimla*,[21] a committee set up in pursuance of a direction from the court recommended legislation for curbing ragging in college campus. The High Court gave a direction to the government to implement that recommendation. But the Supreme Court was reluctant to approve this judicial enthusiasm. It said that the direction was an indirect attempt to compel the state government to initiate legislation. According to the Court, to initiate legislation is a matter for the executive branch of the government and not one within the sphere of judiciary.

VII. Conclusion

It is now well settled that in a rule of law society, unfettered discretion is a contradiction in itself. Whenever discretion is vested in an authority, that authority shall exercise the discretion in an objective manner considering all relevant and germane criteria and ignoring all irrelevant and extraneous matters. The executive has to exercise the discretion vested in it in a just, fair and reasonable manner.

[21] State of H. P. v. A Parent of a Student, Medical College, Shimla, AIR 1985 SC 910.