ORDINANCES IN INDIA: ADMINISTRATIVE NECESSITY OR A POLITICAL TOOL?

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ABSTRACT

Ordinances, the provision of which is contained in Article 123 of the Constitution of India, derives their literal meaning from the Latin word 'ordinare' means 'to set in order'. Though ordinance is not defined in Article 123, a plain reading of the Article suggests that it is a law, which is temporary, promulgated by the President without the adoption of the due procedure of making a statute and is enforced in the state of unforeseen circumstances. Under Article 123, the Central executive is enabled with extra-ordinary powers to meet any unforeseen and urgent situation when Parliament is not in session, by promulgating an Ordinance. It is enacted in the name of the President but the Council of Ministers render a political attribute to the provision: Determining "satisfaction" to the fact that there is an urgency for the law is non-justiciable or can be judicially reviewed is still not very clear. There are many instances where the Ordinances are passed in the matters of political implications and as a pro-active step to meet the constitutional aim of social justice, but of course to fulfil the political purpose. In a recent judgment of the Supreme Court, Justice D.Y. Chandrachud mentioned the irresponsible use of the Power as the "Fraud on Democracy". The author in this article aims to analyse the political fervour behind some of the recent ordinances promulgated; to study the transformative approach of the judiciary over the period and to subvert the misuse of the ordinances in India.

KEYWORD(S): Ordinance; Administrative Necessity; Article 123

1. INTRODUCTION

Ordinance derives its literal meaning from the Latin word 'ordinare' which means 'to put in order'. In the context of the Indian Constitution, the provision of the ordinance is contained in Article 123. A plain reading of art.123 suggests that an ordinance is a legislation passed by the president on the advice of the council of ministers without following the due procedure of law in a situation when there is urgency for doing so because of unforeseen circumstances. This extraordinary power is not given to the executive in other developed democracies such as America, UK, Australia, or Canada. Though, the legislative role has been given to the executive i.e., the President. While, in other cases, it has to be carried out with the advice of the Council of ministers, only if they are "satisfied" that urgency of promulgation of an ordinance exists. The President has been given the power to exercise his discretion in many other circumstances, for instance, Article 352. Here, he needs to act on his "satisfaction", but how far his satisfaction matters in the advice of the Council of Ministers. Thus, this is always a question of judicial

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review. In *R.C. Cooper V. Union of India*[1], the Supreme Court agrees that it is always the satisfaction of the council of Ministers on which the President promulgates an Ordinance. This decisive role of the Council of ministers which is a political component of the Indian democracy has made the promulgation of ordinances a tool to meet their political ends. Numerous ordinances and their use have always been questioned from the one that was promulgated way back in 1930 to try Bhagat Singh and his allies to that of in 2018 to criminalise triple talaq. Some of the ordinances, like to nationalise banks are promulgated when the session of the parliament was about to begin. Thus, there is a need to look into the possible reasons and motives of such ordinances. Some of the pertinent issues that need to be dealt with are: what circumstances shall be termed and interpreted as the emergency? What are the possible options left with the President in case of the absence of his "satisfaction" about the existence of an urgent situation to promulgate an ordinance? Should the ordinances be given the status of legislative Acts and be given immunity to the judicial review on the grounds same as that to an Act passed in a Parliament? How judiciary has transformed its outlook on the excessive use of Ordinances and whether these judicial moves can help put a check on the misuse of the provision? The research work presented here would deal with such issues concerning the Ordinances.

2. HISTORICAL EVOLUTION

The first-ever reference of Ordinance can be found in the Government of India Act 1919. Sec 13 of the same Act refers to making an Act out of a Bill that is not passed in the legislative council. Though the word 'Ordinance' is not used in the provision it speaks about the circumstances where Governor's legislative council "has refused to introduce, or has failed to pass in a form recommended by the governor, any Bill relating to a reserved subject"[2]. In such circumstances "the governor may certify that the passing of the Bill is essential for the discharge of his responsibility for the subject and thereupon, the Bill shall pass, notwithstanding that the council has not consented thereto, be deemed to have passed and on signature by the governor may become an Act of the local legislature in the form of the Bill as originally introduced or proposed to be introduced in the council". The provision thus, states about making of law without going through the normal legislative procedure.

[1] AIR 1970 SC 564.

[2] Government of India Act, 1919.

Further, the Government of India Act 1935 also had the provision of passing an Ordinance in a clear and precise way by including Sec 42 in Chapter IV i.e., Legislative Power of Governor-General.

Sec 42 of the Act says-

> "42. -(1) If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require.
> (2) An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance-
> (a) shall be laid before the Federal Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature or if before the expiration of that period resolutions disapproving it are passed by both Chambers, upon the passing of the second of those resolutions;
> (b) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General; and
> (c) maybe withdrawn at any time by the Governor-General.
> (3) If and so far as an ordinance under this section makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void."

The ordinance-making power of the President that was contained in article 102 of the draft Constitution was elaborately discussed and debated in the Constituent Assembly and the backdrop of power's misuse under the British Rule. Special reference was given to the Public Safety Ordinances passed by the Governor-General in British India and how most of those ordinances were converted to Acts that accidentally or maybe strategically took away the personal liberty of innocent people. The members favoured limiting the powers given to the executive to prevent the possible misuse of the same.

3. THE CONCEPT AND THE CONSTITUTIONAL PROVISION

The ordinance making power in Indian Constitution is an exception to the concept of Separation of Power which was further declared as the basic structure of the Constitution. Art.123 speaks about promulgating Ordinances and making laws for a short duration. It gives power to the executive to make laws in case of any unforeseen and urgent situation.

Art 123 speaks about "Power of President to Promulgate Ordinance during the recess of Parliament:

> "(1) If at any time, except when both Houses of Parliament are in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may pass such Ordinance as accordingly.
> (2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance:
> (a) shall be laid before both House of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament or if, before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
> (b) may be withdrawn at any time by the President explanation where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for this clause.
> (3) If and so far as an Ordinance under this article makes any provision which would not be competent to enact as according to the constitution, it shall be declared void." (CHAPTER IV THE UNION JUDICIARY)

The provision confers the power to the President but as in other matters also. President exercises those powers keeping into consideration the advice of the council of ministers too. Therefore, indirectly, it is the power vested in the council of ministers exercised through the President. The satisfaction about whether the circumstance in which it is urgent and necessary to issue an ordinance exists or not is purely the subjective satisfaction of the executive.

The same has been observed by Supreme Court, when it stated "The Ordinance is promulgated in the name of the President and Constitutional sense on his satisfaction, the truth is that they are promulgated on the advice of his Council of Ministers and their satisfaction."[3]

An Ordinance takes in its scope all the matters on which the Parliament is empowered to legislate. In *A.K. Roy V. Union of India*[4] , the Supreme Court declared the ordinance a law for Article 21 and thus, shall be subject to fundamental rights. As it is coextensive with the legislative power of the Parliament, it can make any provision which the Parliament can enact. The exception being the provision to appropriate from the consolidated fund. It can touch upon List II only in the circumstances that the Emergency is in operation. The contention in the

[3] *R.C. Cooper V. Union of India*, AIR 1970 SC 564.
[4] AIR 1982 SC 710.

Supreme Court ruling in *R.K. Garg V. Union of India*[5] saying that Ordinance cannot amend or alter the tax law was thus rejected in A.K. Roy's case.

4. ORDINANCE AS A TOOL OF PUBLIC POLICY FOUNDATION

A policy may be defined as the 'product of political influence, determining and setting limits to what the State does.' It is also an explanation of the solution you achieved after solving a particular problem. The tools of public policy that may be in the form of authorization, prohibition, or prescription need political intervention but to validate such intervention a fair procedure in the formulation of such policies is required. Such a process involves negotiation, bargaining, and accommodation of different interests to legitimize the policy formulation. There are many modals of Policy formulation namely the Rational Modal, Incremental Modal, Group Theory Modal, Elite Modal, systems Modal, and Institutional Modal.

The statutory Acts which are the formalisation of the Policy for the society follow the systems and the institutional modal of Policy Formulation. In the institutional modal, many people or agencies come together to formulate the policy with the help of rules or procedures. In this, the modal policy is the result of an internal agenda of the political institution which was then validated by the law-making body. In the systems modal, political agencies respond to the demands and desires of the people. The policy is the result of playing a role by the various institutions. Inputs are given by various interest groups which subsequently results in a policy. Such procedures can be seen in the steps taken to formulate a law in the legislative body. Taking into consideration the legislative process of policy formulation, Law-making involves stages such as –

1. Presentation of draft Bill before the cabinet committee which releases it for public comment.
2. Modification based on public inputs
3. Vetting by the cabinet to see that it has kept to agreed terms and principles and not in contravention of any other policy.
4. Legal approval by the legal advisors
5. Tabling the Bill in the parliament by the concerned Minister.

[5] (1981) 4 SCC 675.

6. Bill is debated in the Parliament and passed to become law based on voting

The process in itself includes the voice of every stakeholder, whether a policy is formalised by Institutional or the system modal, it gives voice to the people for whom it is formulated in the process of legislative law-making when it is debated and vetted by the representatives of the people in the house. The ordinances, on the other hand, are the imposition of the political opinion of the ruling party as it never involves the discussions and debates by the representatives in the assembly. The law in the form of the ordinance is though, temporary legislation and need to be tabled for the constitutionally valid legislative process within a stipulated time but the abuse of the provision to meet the emergency has been noticed when it is opted by the ruling party for securing the political edge over the rivals. The discussion on some of the ordinances promulgated during different periods may highlight the vulnerability of the ordinances to the practice of adoption of shortcuts to the process of legislation in India.

5. SOME ORDINANCES AND THE POLITICAL FERVOUR

The much talked about and debated ordinance was that of Nationalisation of Bank in 1969, during the Indira Gandhi regime. The ordinance was the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance 1969 which was soon followed by an Act with the same name. Going into the background of the ordinance, it was aimed at channelizing the resources towards the sectors such as agriculture, small-scale industries, entrepreneurs, and to provide access to banks in the remote and rural areas. The move was debated in the cabinet with some voices of dissent, the strongest voice was that of Morarji Desai who was serving as the Finance Minister during that period and was removed from the position after his dissent. Though the ordinance should be promulgated after the cabinet think it was an emergency but, in this matter, the ordinance was promulgated without the statistical studies, divided cabinet on the issue, and only one day before the session of the Parliament started. The political reasons behind the ordinance are widely written and discussed in various writings and political history with evidence of how the public support rallied behind Mrs. Indira Gandhi after it. The ordinance was later on passed as an Act but by then all the dissenting voices were made silent by the supporting voices from the benefitting public, which could have created an uproar in the Parliament at the time of the debate on the matter.

The National Security Ordinance 1980 was promulgated on 22nd September 1980 and was one of those ordinances that received almost negligible opposition. Later, the Act named National Security Act was passed in the Seventh Lok Sabha and subsequently in Rajya Sabha with much ease. The Ordinance was aimed to provide the provision of detention of people without trial in certain circumstances where the need may arise to prevent a person from acting "in any manner prejudicial to the defence of India" or "the security of the State" or "prejudicial to public order or maintenance of supplies and services essential to the community". The ordinance was promulgated without having any emergency for the same. It seems to be a protective action of Mrs. Indira Gandhi who came back to power after a turbulent political past that she faced. The only need may be understood as an action to subvert the criticism and opposition of her policies and giving rebirth to the infamous Maintenance of Internal Security Act, which was repealed during the Janata Government with a new name.

Coming to recent times, while some of the ordinances have ignited the debate of whether there was the notion of public welfare as the reason behind them or the political motives supervening. Though, some of them can justify themselves. The demonetization ordinance named as The Specified Bank Notes (Cessation of Liabilities) Ordinance 2016 promulgated on 30th December 2016, preceded by a notification of such effect on 8th November 2016 may be criticized for not having time for preparation and to deal with the situation, but no political motives were traced behind it. It was not only the instance of demonetization, but it had happened earlier in the year 1978 through an Ordinance only. Such moves are meant to curb corruption and inflation thus, has to be done without letting people know such a measure was going to be in place—because otherwise, it would have failed. Other Ordinances that can be said to have promulgated in good faith for meeting the beneficial measures and to remove the legal hurdles in the growth of the nation are Enemy Property (Amendment and Validation) Ordinance, 2016; Indian Medical Council (Amendment) Ordinance, 2016; Citizenship (Amendment) Ordinance, 2015; Coal Mines (Special Provisions) Ordinance, 2014. On the other hand, some of the ordinances are promulgated to achieve some political ends such as "ordinance to amend the Telecom Regulatory Authority of India Act to facilitate the appointment of ex-TRAI chief Nripendra Mishra as principal secretary to the prime minister (an ordinance that was purely meant to address the whims of the premier and had no consequence for the citizens at large), and the

other to amend the Andhra Pradesh Reorganisation Act for transfer of a cluster of villages for the Polavaram project"[6].

In April 2018, the Criminal Law Amendment Ordinance was passed which provides the provision of the death penalty to the rapists of women and children up to 12 years of age. The ordinance was a reaction to the infamous Kathua rape case that occurred in the State of Jammu and Kashmir in January 2018. The earlier Criminal Law Amendment Act came in 2013 which was also a reaction to the Rape case popularly known as the Nirbhaya rape case. The Amendment Act of 2013 came after a detailed report of the Justice Verma Committee and was based on the recommendations of the report. Ordinance of 2018 was a penal policy brought in haste as the matter was sensitive due to the place where it occurred and due to the accused being Priests of the village. The ordinance was meant to act as the political saviour to the ruling government as the BJP government was banking on the 'Hindutva' wave in the upcoming election and the involvement of Hindu religious leaders (priests of the local temple). The Ordinance was promulgated to pacify the outrage of the public as well as that of opposition on the matter. The ordinance which was later passed as an Act in both the houses of the Parliament was not backed by any research or the study on the effectiveness of such punishment in curbing the crime.

The ordinance to criminalise triple-talaq though aimed at gender equality but was promulgated to get some political mileage. The moves taken in the direction of social justice should have a thorough debate and discussions in the Parliament before giving it a legislative shape. The Ordinance i.e. The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 for the first time was promulgated on 19th September 2018. As this Ordinance was to expire on 22nd January 2019, the Government introduced the Bill with the same name before the Parliament. Though the Bill was passed in the Lok Sabha, it faced huge opposition in the Rajya Sabha where it got stuck as the opposition demanded it to be tabled before the select committee. The right move should be to table it before the committee and have a discussion in it as well as among the various stakeholders concerning this proposed law. But the government re-

[6] Punit Nicholas Yadav, Ordinance Raj: Rule by Diktat, India Legal, *available at* http://www.indialegallive.com/special-story/ordinance-raj-misuse-of-a-constitutionally-granted-right-47915.

promulgated the ordinance on 10th January 2019 just 2 days after the end of the winter session. The same ordinance was promulgated for the third time on 21st February 2019 as a Bill that was stuck in the Rajya Sabha was about to lapse with the dissolution of the Lok Sabha in May. This promulgation was alleged to be done in the wake of the forthcoming general election in which the benefits from the ordinance can be reaped in the form of Muslim votes. The recent one, which was promulgated in UP to recover the damages for damaging the public and private property from those accused of rioting in UP while protesting against CAA and NRC[7]. There may be political motives behind it but on the surface, it seems to be an administrative necessity. The same ordinance has been challenged in the Allahabad High Court and we must wait for the Court to give its ruling in this matter. The question that arises by such ordinance is whether the laws touching the social and religious problems shall be dealt with the help of the provisions meant for exceptional and emergency use. The repeated enactment of such ordinances also raises concerns as raised by the Supreme Court of India in multiple rulings which will be discussed further in the study.

6. JUDICIAL REVIEW OF THE ORDINANCE MAKING POWER

The provision of the Ordinance vesting power in the executive head has always been the subject of judicial review. The review had been done concerning the provision contained in the Government of India Act 1935. The review has also been done after the Constitution of India came into force. It is always a question before the Court that who is supposed to judge whether the state of emergency exists or not? In *S.K.G. Sugar Ltd V. State of Bihar*[8], while analysing the Governor's power under Article 213 which is similar to ordinance power of the President under Article 123, the court commented that an Ordinance is subject to "subjective satisfaction" of the governor and concerning the existence of circumstances making the ordinance necessary.

The question was earlier raised in *R.C. Cooper V. Union of India*[9], and the Supreme Court, while examining the constitutionality of the Banking Companies (Acquisition of Undertakings) Ordinance, 1969 which sought to nationalise 14 of India's largest commercial banks held that

[7] Uttar Pradesh Recovery of Damages to Public and Private Property Ordinance, 2020.
[8] AIR 1974 SC 1533.
[9] AIR 1970 SC 564.

the President's decision could be challenged because 'immediate action' was not required, and the Ordinance had been passed primarily to by-pass debate and discussion in the legislature.

Pursuant to this decision, the 38th Constitutional Amendment inserted clause 4 into Article 123 of the Constitution-making the "satisfaction" of the President in relation to the circumstances that existed for the promulgation of the Ordinance non-justiciable. However, in the *State of Rajasthan Vs. Union of India*[10], the Supreme Court said that Presidential Satisfaction can be challenged on the basis of mala fide. Further, the clause was deleted by the 44th Constitutional Amendment 1978, and the status quo on the matter was restored.

In *A.K. Roy V. Union of India,*[11] while examining the constitutionality of the National Security Ordinance, 1980, the Court argued that the President's Ordinance making power is not beyond the scope of judicial review as it is not purely a political question. However, it did not explore the issue further as there was insufficient evidence before it and the Ordinance was replaced by an Act. It also pointed out the need to exercise judicial review over the President's decision only when there were substantial grounds to challenge the decision and not at "every casual and passing challenge".

The Judgment in *S.R. Bommai V. UOI*[12] , strengthened the decision in the *State of Rajasthan V. Union of India*[13] when it said that the Presidential proclamation of emergency under Article 356 can be challenged on the grounds of mala fide, which suggest that judicial review of other Presidential proclamation including Ordinances. The view of the court in Bommai's case was further supported by the Constitutional Bench in the case of *Rameshwar Prasad V. Union of India*[14] in which the court decides about the judicial review of powers under art. 356, in the same lines as in Bommai's case.

[10] AIR 1977 SC 1361.
[11] AIR 1982 SC 710.
[12] AIR 1994 SC 2113.
[13] AIR 1977 SC 1361.
[14] (2006) 2 SCC 1.

The Court took a different stand in *T. Venkata Reddy V. State of Andhra Pradesh*[15]. The court said that ordinance-making power is a legislative power of the President and Ordinance stands on the same footing as the legislative Act passed in the Parliament. Therefore, bears all immunities as available for the legislative acts. It can be challenged if it transgresses the Constitutional limit but cannot be challenged based on improper motives, non-application of mind, or the ground of its propriety, expediency, and necessity. The decision does not foreclose the judicial review of the ordinance but limits the grounds of the review only. Later in *B.A. The Hasnabha V. State of Karnataka*[16], the Supreme Court again supported the contention in T. Venkat Reddy's case that Ordinances are at par with the legislations and can only be challenged on the grounds on which legislation can be challenged. In this particular case, Karnataka High Court declared an Ordinance promulgated by the Governor as being mala fide. On the appeal to the Supreme Court, it was held that mala fide cannot be attributed to the legislature as a body and the governor acts as a substitute to the body of legislature while making ordinance.

One of the ways to misuse the ordinance is to re-promulgation of it multiple times. In *D.C. Wadhwa V. State of Bihar*[17], the Apex Court showed its concern about the establishment of the "Ordinance Raj" by re-promulgating ordinances without putting them before the House of Parliament. In this particular instance, around 257 ordinances were re-promulgated by the Governor of Bihar and kept alive for up to 14 years. The Court called it a "colourable exercise of power" and "subversion of the democratic process", and thus unconstitutional.

A similar case to the D.C. Wadhwa came again before the court where ordinances were re-promulgated in Bihar without laying them before the Parliament. Pronouncing the majority judgment in *Krishna Kumar Singh V. State of Bihar*[18], Justice Chandrachud said that the ordinance making authority is not an ultimate entitlement but "conditional upon a satisfaction that circumstances exist rendering it necessary to take immediate action", and it's also not beyond the judicial review.

[15] AIR 1985 SC 724.
[16] AIR 1998 Kant.91.
[17] (1987) 1 SCC 378.
[18] Civil Appeal No.5875 of 1994.

The court has thus tried to maintain the balance between the provision of emergencies and the legislative power conferred upon the Parliament.

7. CONCLUSION

The provision of Ordinance though was introduced by the Government of India Act 1919 for the first time in India. It was the provision that is present neither in American nor in the English Constitution but present in India from the pre-constitution era and as well as in the Constitution drafted and adopted in India after independence. The provision of Ordinances is to be invoked at the time of emergency circumstances. Though, what would be the emergency is solely on the satisfaction of the President and cannot be questioned in the Court of Law for mala fide. The Ordinances are put at par with the legislative Act and thus carry all the immunities available to the Legislations passed by the Parliament. The same has been duly established by the court in multiple judgments passed on the issue. As the President of India acts upon the recommendations of the cabinet on the issue, the provision has been misused many times by the ruling party to impose the policy for purely political reasons or to gain some political edge upon the opposition. Nevertheless, many ordinances have been promulgated which were the need of the time. The enactment of ordinances due to public pressure on some social issues is the most criticised as they were promulgated without any background study and sometimes to appease a particular section of society thus creating unrest in the other sections. Re-promulgation of ordinances without putting it before the house of Parliament has been the prominent form of misuse of the provision and the Apex Court has declared it as a fraud to the Constitution. The Ordinance-making power was conceived as the power to be used sparingly to meet the urgent circumstances and shall be used to address the urgent non-political administrative requirements. Moreover, the issue of the validity of the decisions taken as a result of authority given by a particular Ordinance, after the lapse of the ordinance remains unanswered and has not been conclusively settled by the Judiciary also.