



Ordinance- Making Power: Issues of Abusing and Disregard of Legislature

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ABSTRACT

Recent controversy relating to an ordinance seeking to amend the Representation of People's Act which was intended to save the convicted legislators from disqualification resulted due to recent Supreme Court judgment, has been a subject matter of great debate. This abuse of power is not only a mark of the present, but in past on several occasions, this power has been misused for political benefits at both the levels. The issue does not lie in its existence in Constitution but relates to mode and manner with unconstitutional motives. This short cut rout of legislation not only weakens the democracy itself, if it is resorted for other than the purposes not meant by Constitution, but strikes upon the very structure of Constitutional system imbalancing the power between the executive and legislature in India. Thus, the issue is serious crying for suitably restraining the power. This paper is indented to examine all related aspects of the problem with an object to look into a mechanism.

Keywords : ordinance, democracy, executive

Introductory Background

Under Article 123¹ and 213 of the Constitution of India, the power to promulgate an ordinance is vested with President of India and Governor of the State respectively. An ordinance has the same force and effect as an Act passed by the Parliament. However, this power is not unbridled. This is qualified one requiring certain conditions to be existed before promulgation of the ordinance- namely, (1) both Houses of Parliament are not in session; and (2) President is satisfied that circumstances exist which render it necessary for him to take immediate action. Further, an ordinance has to be ratified by both Houses of Parliament. Else, it will get nullified after six weeks from the reassembling of the Parliament. This technique of issuing an ordinance has been devised with a view to enabling the executive to meet any unforeseen or urgent situation arising in the Country when Parliament is not in session, and which it cannot deal with under the ordinary law². This power belongs to Parliament. But, with a view to meet extraordinary situations demanding immediate enactment of laws the Constitution makes provision to invest the President with legislative power to promulgate ordinances. An ordinance is only a temporary law. The executive in Britain or the U S A enjoys no such power. This power is not a new to the Indian Constitution. Articles 42 and 43 of the Government of India Act, 1935, gave the same power to the Governor General.

Members of the Constituent Assembly, having experience of abuse of such power, were understandably wary of including the same in the Constitution. Both Hriday Nath Kunzru and Professor K.T. Shah³ called for restricting the executive's power to promulgate ordinances through greater oversight by legislatures. They were, however, overruled by Dr B.R. Ambedkar on the ground of necessity of 'immediate action'.

Like other executive powers of the President, this power is also exercised in the same way i.e. on the aid and advice of the Council of Ministers⁴ and therefore the ordinance making power is vested effectively in the Central Executive⁵. However, the president has the right to send the ordinance back to the cabinet once to review its decision⁶. But if the Cabinet sends it back, he will have to sign it.

Instances of misuse of ordinance-making power

Before this very recent ordinance⁷ seeking to amend the Representation of People's Act⁸, there was promulgation of the National Food Security Ordinance on July 5, just shortly before the Parliament session, raised many eyebrows indicating political motives of bypassing the legislature and raising the issue of propriety. This is not a rare example of promulgation of ordinance. Over 600⁹ ordinances have been promulgated in India. Except 1963, not a single year has gone by without the government resorting to the ordinance-making power. In fact, in 1994, 34 ordinances were promulgated, the highest in a year till date. Also, in this year itself, the government has promulgated four more ordinances, including the Criminal Laws (Amendment) Ordinance, which amended India's rape laws. This clearly shows that the ordinance-making power was not used for the purpose it was meant for, but to deal with failures in negotiating the legislative process. The fact that within the first 20 years after the Constitution was adopted, over 30 ordinances were promulgated a few days before Parliament began or after it ended, never met the emergency criteria. However, there are provisions in Constitution which keep democratic checks upon the political plan of the government like the ordinance has to stand the test of Parliament and be passed within six weeks of the session. But this is not appeared to work when we come to 1967-81 in Bihar, the years Bihar Governor promulgated 256 ordinances while assembly passed only 189 Acts. Of them, many were re-promulgated several times. Sugarcane ordinance was promulgated and re-promulgated for 13 years and the other examples¹⁰. There were also instances where 50 ordinances were promulgated in a day¹¹. The Supreme Court in famously known as 'Ordinance Raj' Case emphasized that "the power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be perverted to serve political ends". It is the function of the Legislature which is a representative body to make law; the Executive cannot continue the provisions of an ordinance in force without, going to the Legislature. "If the Executive were permitted to continue the provisions of an ordinance in force by adopting the methodology of re-promulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-making function of the Legislature".

Criticizing the practice in trenchant terms, the Court observed: "The executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law-making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution but by laws made by the executive"¹².

The other side of the discussion is that in many cases where ordinances have been promulgated, the necessity for promulgating them has been extremely debatable in Parliament. For example, The Telecom Regulatory Authority of India (TRAI) was created in 1997 first by an ordinance and then by an Act of Parliament. The Minister in charge stated that the ordinance route was taken since ". We were facing difficulties in attracting private investment without an authority like the TRAI. Private investors were not convinced about our ongoing processes of privatization and liberalization" Similarly, the Electricity Regulatory Commissions Ordinance was promulgated on April 25, 1998, one day before the government of the day decided to convene the next session of Parliament. The National Commission for Minority Educational Institutions (Amendment) Ordinance, 2006, was promulgated in January 2006, even though Parliament was to convene from February 16, 2006. In both cases, no satisfactory reason was given for promulgating these ordinances in haste. Thus, there are so many examples in which the justification was set out on the grounds of delays by parliamentary committees and at others by giving reasons that do not seem to meet the *necessary... to take immediate action* test.

Judicial perception

As per the Constitutional scheme, it is very much clear that the law making power of the President is co-extensive with law making power of Parliament. The grounds to challenge the power are same. To promulgate an ordinance is in nature of an emergency power. In regard of the subject-matter of Ordinances, the position is the same as applies to Parliament and ordinances are also "Law" under article 13 applying the same reasoning. Further it is well settled that ordinance-making power is a legislative power given to the President and was not similar to the exercise of his executive powers¹³. In *K. Nagaraj and Ors*¹⁴, case, the Court said that though an ordinance can be invalidated for contravention of the Constitutional limitations which exist upon the power of the State legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any more than any other law can be. An executive act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature. Further, the Court made it clear that the ordinance-making power being a legislative power, the argument of *mala fides* is misconceived. The legislature, as a body, cannot be accused of having passed a law

for an extraneous purpose. Its reasons for passing a law are those that are stated in the Objects and Reasons and if no reasons are so stated, as appear from the provisions enacted by it. Even assuming that the executive, in a given case, has an ulterior motive in moving legislation, that motive cannot render the passing of the law *mala fide*. This kind of '*transferred malice*' is unknown in the field of legislation. Thus, an Ordinance cannot be invalidated on the ground of (a) non-application of mind (b) ulterior motive or ulterior purpose; any more than a law passed by the legislature. In recent case, *Gurudev datta VKSSS Maryadit vs. State of Maharashtra*¹⁵ also, The Court reiterated the position by saying that Legislative malice is beyond the pale of jurisdiction of the law Courts. However, in 1994 the principles laid down in *S. R. Bommai v. Union of India*¹⁶, draw the scholarly view to invite this situation making subject to the same judicial review.

Prof. Jain on the issue suggests from different approach to bring the situation under judicial review power. He says that the Constitution itself differentiates between an Act and an ordinance as is very clear from the phraseology of Art. 123 or 213. An ordinance has a temporary life; it is not a permanent law like an Act. The very fact that an ordinance lapses automatically after a while, and has to be replaced by an Act of the Legislature shows that the Constitution does not confer the same status on an ordinance as that of an Act. Even the Supreme Court does not treat an ordinance as being on all fours with an Act. In the eyes of the Court itself, an ordinance is a merely temporary expedient—an inferior kind of law. Accordingly to treat 'legislation' by the executive as *pari passu* with legislation by a legislature, as has been done in the above cases, does not appear to be sound¹⁷.

Conclusion and suggestions

Since the inception of the Constitution, in majority cases the power of ordinance-making has been a subject matter of controversy. It disturbs the balance between executive power and legislative powers by bringing into the element of arbitrariness into the Constitutional system which further disturbs the rule of law structure. Whenever, such power is exercised in such a manner as above discussed. It clearly indicates that this is a disregard of legislature. Till now it is settled that an ordinance can be challenged on the ground that (a) it directly violates a constitutional provision or (b) the President has exceeded his constitutional power to make an ordinance, or (c) has made a colorable use of such power (e.g. by successive re-promulgation of an Ordinance¹⁸. Further, it should be made subject to judicial review in line of the principles evolved in *S. R. Bommai's*¹⁹ case by making strong judicial review mechanism. A line should be drawn between an ordinance and an Act passed by legislature on the reasoning and scheme upon which the aid and advice of cabinet is set out by latest judgments of the Courts in India.

REFERENCES

- (1) If at any time, except when both Houses of Parliament are 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 circumstances appear to him to require. 2. Ambedkar B. R. Constituent Assembly Debates (Proceedings)- Volume VIII, Friday, the 20th May 1949. 3. Ibid. 4. Article 74 (1) of Indian Constitution "There shall be Council of Ministers with the Prime Minister at the head to aid and advise President who shall, in the exercise of his functions, act in accordance with such advice" 5. R.C. Cooper v. Union of India, AIR 1970 SC 564,587, ("The Ordinance is promulgated in the name of the President and in a Constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction.") 6. Inserted by the constitution (Forty-fourth Amendment) Act 1978. 7. It has been believed that this ordinance rushed through with political motives- to bail out convicted Congress MP Rashid Mashood and possibly also Rastriya Janata Dal Chief Lalu Prasad, one of whose cases is soon come up for judgement. 8. On July 10, Supreme Court struck down section 8 (4) of the Act which allowed convicted lawmakers to hold on to their seats during pendency of their appeals. 9. Hindustan times New Delhi, July 23, 2013. 10. Four other ordinances, each was re-promulgated for eleven years. Six examples are also there in Bihar for ten years kept alive among other number of ordinances. 11. Supra Note 7, Democracy Made easy, 27 Sept. 2013. 12. Dr. D.C. Wadhwa and Ors. Vs. State of Bihar and Ors. 14. AIR1987SC579, JT1987(1)SC70, Para 6. 13. A.K. Roy vs. Union of India AIR 1982 SC 790. Also see R.C. Cooper vs. Union of India (bank | nationalization case), AIR 1970SC 564. 14. K. Nagaraj and Ors. Vs. State of Andhra Pradesh and Anr. AIR1985SC551, 1985(33)BLJR485, Para 31 and 36. Also see T. Venkata Reddy vs. State of A.P. (1985) 3 SCC 198 (Para 9). 15. (2001) 4 SCC 534, 544-546 (paras 12 and 13). 18. supra Note 12. 19. Supra Note 16. (1994) 3 SCC 1. See Basu D. D. *Commentary on the Constitution of India* 6th Ed. Vol. H, PP. 216-20. 20. Jain M. P., Indian Constitutional Law, Vth Ed. (2007), P. 366.