

THE PRESIDENT'S POWER TO PROMULGATE ORDINANCES: A COMPARATIVE STUDY OF INDIA AND USA

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Abstract

An ordinance is a law made by the President. The ordinance making power is the most important legislative power vested on the President to deal with unforeseen and urgent situations. The outstanding feature of an ordinance is its legislative character and its administrative or executive source. The power of legislation by way of the promulgation of ordinances has been vested on the President in India under Article 123 of the Constitution. It is an emergency power which enables the executive to be able to meet any unforeseen or urgent situation arising in the country when the legislature is not in session and for which there is no adequate provision under the already existing laws. The matter has again come up for discussion in India after the passing of notable judgment by the Supreme Court in the case of Krishna Kumar Singh & Anr v. State of Bihar & Ors in 2017. With the current issuance of series of executive orders by the President of United States Mr. Donald Trump, in matters related to the repeal of the Affordable Care Act, changing the rules of federal regulations and enacting the controversial ban on admission to the United States for a range of immigrants and refugees, the presence of a similar power in the United States' system of governance has surfaced. It would be interesting to see whether the United States President has power similar to the President in India. Through this paper, the authors would try to study the historical evolution of the executive's legislative power, the ordinance making power and the power to issue executive orders in India and United States respectively, the judicial control of power if any.

Keywords: *President, Ordinance, executive orders, proclamation, India, United States, judicial review, Article 123, Donald Trump*

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INTRODUCTION

The ordinance making power is the most important legislative power vested on the President to deal with unforeseen and urgent situations. The term ‘ordinance’ is defined by the Oxford dictionary as *an authoritative order* and by the Black’s Law Dictionary as *a rule established by authority*. Ordinance is a law promulgated by a state or national government without the consent of the legislature. For an ordinance to be enforced effectively, it must not be in conflict with any higher law such as state or national law or constitutional provisions.

An ordinance is an act of State which, in its content, partakes of the nature of a legislative act, while, in its source, it is issued by some governmental authority, usually an executive or administrative officer or organ, without the assent of the regular legislative assembly.¹ The outstanding feature of an ordinance is thus its legislative character and its administrative or executive source.²

Ordinances are laws made by the Executive and are unknown to many systems of law. The Monarch in England, for instance, has no legislative power nor for that matter can the Cabinet promulgate a law on its own without being passed by Parliament. It is the absence of the consent on the part of the legislature that is the distinct characteristic of an ordinance. Chief Justice Coke in ‘The Institutes of the Laws of England’ emphasizes this characteristic in the following words: *There is no Act of Parliament but must have the consent of the Lords, the Commons, and the royal assent of the King, and as it appeared by records and our books whatsoever passed in Parliament by this threefold consent, hath the force of an Act of Parliament. The difference between an Act of Parliament, and an ordinance in Parliament, is, for that the ordinance wanted the threefold consent, and is ordained by one or two of them.*³

The English principle of the participation of the popular assembly in the function of legislation has been extended to almost all other countries of the world. Until now it is a fundamental institution of modern Constitutional governance. Yet in all the other countries it has also been found necessary or expedient to grant at least some degree of legislative

¹ Samuel James Hart, The Ordinance making power of the President of United States, Available at: <https://archive.org/stream/ordinancemakingp00hart#page/n1/mode/1up> (Accessed: 10.04.17)

² *Ibid*

³ Ashok H Desai, ‘Government by Ordinances’ [1984], Economic and Political Weekly, Vol XIX No 49 December

discretion to the Executive acting alone. The contrast between statute and ordinance is, therefore, essentially the same in modern government of a democratic country.⁴

A statute is purely a legislative act of the Parliament whereas an Ordinance is an outcome of legislative power given to the Executive. Law making is a complex process in any democratic country. It involves several steps. This intense mechanism is bypassed in case of an Ordinance. Riding pillion, or in other words in case of urgency or the rise of an emergent situation, an Ordinance needs an Executive sanction only.

India and United States of America both adheres to the doctrine of Separation of Powers whereby Constitutionally the power to legislate, execute and judge has been entrusted in three different organs of the government. But there is a curious divergence between the theory and actual constitutional practice. The primary law making authority under the Constitution is the Legislature and not the Executive. But it is possible that when the Legislature is not in session, circumstances may arise which render it necessary to take immediate action and in such a case, in order that public interest may not suffer by reason of the inability of the Legislature to make law, the President/Governor is vested with the power to promulgate ordinances.

The standard conception of the presidency is that the office is constrained by the Separation of Powers and general weakness of the chief executive's formal powers. Yet Presidents have, throughout US history used their executive authority to make policy on their own without interference from either Congress or the Courts. President Goodnow calls it the ordinance power or the power of ordinance, Professor Willoughby names it the ordinance making power while Professor Fairlie has recently spoken of it as administrative legislation. The term was used in England in the fourteenth century to designate an enactment of the King or the King in Council without the assent of Parliament. The power of ordinance, which became more limited than the power of legislation, died out, says Anson, in the fifteenth century, only to be revived in the next as the power of proclamation.⁵

The president has been conferred with the law making power both in India and America. In India the law making power of the President flows from Article 123 of the Constitution of India which empowers the President to legislate by Ordinance in situations which demand

⁴ *Supra* note 1

⁵ James Hart, 'Ordinance Making Powers of the President' [1923] *The North American Review*, Vol. 218, No. 812 University of Northern Iowa, Available at: <http://www.jstor.org/stable/25113061> (Accessed: 15.04.2017)

immediate action. In United States the most significant type of executive legislation is the executive order. Although not explicitly listed in the Constitution, executive orders are generally interpreted as an implied executive power deriving from Article II, Section 3, which says that the President 'shall take care that the Laws be faithfully executed.'⁶

Legislation by Ordinances is not extra-constitutional, but improper and undemocratic. Legislation is the supreme prerogative of Parliament. Under Article 123 of the Constitution, the President is empowered to issue Ordinances, when Parliament is not in session, if he is 'satisfied that circumstances exist which render it necessary for him to take immediate action.' Article 123 is based on section 42 of the Government of India Act, 1935. But the Constitution has incorporated this section from the Government of India Act with a significant difference, which makes it all the more reprehensible. While we have studied about the Ordinance making power of the President under the Indian Constitution, it would be interesting to trace the similarities and dissimilarities of the similar power exercised by the United States' President and understand its dynamics.

HISTORICAL EVOLUTION

➤ *The incorporation of Ordinance making power in the Constitution of India*

Law making function performed by the Executive springs out of pragmatism, a need for urgent and quick law devised to deal with an immediate situation. This need was felt by the British who needed to establish a firm control over the administration in India. The Executive was thus conferred with considerable power and handed to us a unique feature to our legislative system- Ordinance making power of the Head of the State.

The British who staunchly believe in Parliamentary supremacy gave in to the exigencies of ruling a colony with a firm hand, bypassing several accepted beliefs. The word 'ordinance' was 'gifted' to India with the establishment of the East India Company with the First Royal Charter in 1600. The charter gave the company the power '*to make, ordain, and constitute such and so many reasonable laws, constitutions, orders and ordinances...*' which was necessary for the efficient working of the company.⁷

⁶ Megan Covington, 'Executive Legislation and the Expansion of Presidential Power' [2012] Vanderbilt Undergraduate Research Journal Spring Volume 8, citing Phillip J Cooper, 'Power tools for an effective and responsible presidency' [1997] Administration & Society 29.5

⁷ C. L. Anand., *Constitutional Law and History of Government of India* (Universal New Delhi 2008) 476

- **Indian Councils Act, 1861**

The Indian Councils Act, 1861 transformed the Viceroy of India's executive council into a cabinet system of six members. This had an express provision for ordinance making under *Section 23*.⁸ The language makes it abundantly clear that this decision of the Governor General was independent of his council. This provision was meant for emergent situations only, but nowhere has that emergency been defined, it has been left entirely at the satisfaction of the Governor-General, the only qualifying words being; '*for the peace and good government*'. The first ordinance was '*Export of Saltpetre Ordinance, 1861*' followed by '*Dramatic Performances*'⁹, '*Regulation of Meetings*'¹⁰ and '*Cotton Gambling*'¹¹.

- **Government of India Act, 1915**

The Government of India Act, 1915 replaced the 1861 Act. *The Government of India Act, 1915* was an Act of the Parliament of the United Kingdom, which consolidated prior Acts of Parliament concerning British India into a single Act. *Section 72* of the Act states: "*The governor-general may, in cases of emergency, make and promulgate ordinances for the peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Governor-General in Legislative Council; but the power of making ordinances under this section is subject to the like restrictions as the power of the Governor-General in Legislative Council to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Governor-General in Legislative Council, and may be controlled or superseded by any such Act.*"

A total of 78 ordinances were promulgated under this Act. A few examples are, *the Gold (Import) Ordinance*¹², *the Silver (Import) Ordinance*¹³, *the Enemy Trading Ordinance*¹⁴, *the*

⁸ Section 23 reads: "...it shall be lawful for the Governor-General, in cases of emergency, to make and promulgate from time to time ordinances for the peace and good government of the said territories or of any part thereof, subject however to the restrictions contained in the last preceding section; and every such ordinance shall have like force of law or regulation made by the Governor-General in Council, as by this Act provided, for the space of not more than six months from its promulgation...."

⁹ The Dramatic Performances Ordinance, 1876

¹⁰ The Regulation of Meetings Ordinance, 1907

¹¹ The Bengal Cotton Gambling Ordinance, 1912

¹² 1917 (III of 1917)

¹³ 1917 (IV of 1917)

¹⁴ 1916 (V of 1916)

*Treaty of Peace Ordinance*¹⁵, *the Martial Law Ordinance*¹⁶, *the Public Safety Ordinance*¹⁷, *the Indian Press Ordinance*¹⁸, *the Unlawful Association Ordinance*¹⁹ etc. This was the era of awakening of nationalism and many of these ordinances had to do with suppression of anti-colonial sentiment.

- ***Government of India Act, 1919***

The Government of India Act, 1919 extended the power of executive to make laws and with the ordinance making power of Governor-General another special power of legislation²⁰ was given in situations where either chamber of the Indian Legislature refused leave to introduce a bill or failed to pass in the manner the Governor General recommended any bill which was certified by him to be essential for the safety, tranquility or interests of British India or any part thereof. If this were the case the Governor General could enact provisions of the bill despite the opposition of the chamber of legislature.²¹

- ***Government of India Act, 1935***

Under *the Government of India Act, 1935* there were two different provisions with respect to the ordinance making power of the Governor-General, *Sections 42 and 43*. By now

¹⁵ 1920 (I of 1920)

¹⁶ 1919 (I-IV of 1919)

¹⁷ 1929 (I of 1929)

¹⁸ 1930 (II of 1930)

¹⁹ 1930(IX of 1930)

²⁰ Under Section 13.--(1) *Where a governor's legislative council has refused leave to introduce, or has failed to pass in a form recommended by the governor, any Bill relating to a reserved subject, the governor may certify that the passage of the Bill is essential for the discharge of his responsibility for the subject, and thereupon the Bill shall, notwithstanding that the council have not consented thereto, be deemed to have passed, and shall, on signature by the governor, become an Act of the local legislature in the form of the Bill as originally introduced or proposed to be introduced in the council or (as the case may be) in the form recommended to the council by the governor.*

(2) *Every such Act shall be expressed to be made by the governor, and the governor shall forthwith send an authentic copy thereof to the Governor- General, who shall reserve the Act for the signification of His Majesty's pleasure, and upon the signification of such assent by His Majesty in Council, and the notification thereof by the Governor-General, the Act shall have the same force and effect as an Act passed by the local legislature and duly assented to: Provided that, where in the opinion of the Governor-General a state of emergency exists which justifies such action, he may, instead of reserving such Act, signify his assent thereto, and thereupon the Act shall have such force and effect as aforesaid, subject however to disallowance by His Majesty in Council.*

(3) *An Act made under this section shall, as soon as practicable after being made, be laid before each House of Parliament, and an Act which is required to be presented for His Majesty's assent shall not be so presented until copies thereof have been laid before each House of Parliament for not less than eight days on which that House has sat.*

²¹ B Shiva Rao, *The Framing of India's Constitution: A Study* (Universal Law Publishing Co. Pvt. Ltd.) 474

ordinances were not treated as exceptions to the rule but a regular feature of governance. Section 42²² states that Governor-General could promulgate an ordinance only if the legislature was in recess on of advice of Ministers. Consultation with the Ministers was mandatory although he could override their advice.²³ Section 43²⁴ gave the Governor-General the power to promulgate ordinances which he in his capacity felt necessary to discharge the functions that were imposed upon him by the Act. This power depended on his individual discretion and the legislature was excluded and ordinances could be promulgated by the

²² Section 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:*

Provided that the Governor-General-

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section if a Bill containing the same provisions would under this Act have required his previous sanction to the introduction thereof into the Legislature ; and

(b) shall not, without instructions from His Majesty, promulgate any such ordinance if he would have deemed it necessary to reserve a Bill containing the same provisions for the signification of His Majesty's pleasure thereon.

(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) may be 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.

²³ Dr. Subhash C Kashyap, *Constitutional Law of India* (Vol I, Universal Law Publishing Co. Pvt. Ltd. 2008) 1203

²⁴ Section 43.-(1) *If at any time the Governor-General is Power of satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise at any time thereof to act in his discretion or to exercise his individual with respect judgment, he may promulgate such ordinances as in his to certain opinion the circumstances of the case require.*

(2) An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may by a subsequent ordinance be extended for a further period not exceeding six months.

(3) 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 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; (b) may be withdrawn at any time by the Governor- General ; and (c) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(4) 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.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.

Governor-General even while the legislature was in session. Thus he could be said to be a parallel legislative authority with hardly any bars.

Another interesting aspect of the Act was *Section 44*²⁵. It gave unprecedented powers to the Governor-General and introduced a new kind of legislation called '*Governor-General's Act*.' This power was not conditioned by the necessity of '*any immediate action*' and the Governor-General could wield this power of legislation any time he deemed fit in his discretion. *Sections 42* and *43* were circumscribed by the collective satisfaction of Council of Ministers (*Section 42*) and limitation of time (*Section 43*) but *Section 44* vested in the Governor-General broadest of legislative powers in a single person.

Similar to the powers of Governor-General, the Governor had power to promulgate an ordinance under *Section 88*²⁶ of the *Government of India Act, 1935*. This becomes important

²⁵ *Section 44.-(1) If at any time it appears to the Governor-General that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to both Chambers of the Legislature explain the circumstances which in his opinion render legislation essential, and either-*

(a) enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considers necessary; or

(b) attach to his message a draft of the Bill which he considers necessary.

(2) Where the Governor-General takes such action as is mentioned in paragraph (b) of the preceding subsection, he may at any time after the expiration of one month enact, as a Governor-General's Act, the Bill proposed by him to the Chambers either in the form of the draft communicated to them or with such amendments as he deems necessary, but before so doing he shall consider any address which may have been presented to him within the said period by either Chamber with reference to the Bill or to amendments suggested to be made therein.

(3) A Governor-General's Act shall have the same force and effect, and shall be subject to disallowance in the same manner, as an Act of the Federal Legislature assented to by the Governor-General and, if and in so far as a Governor-General's Act makes any provision which the Federal Legislature would not under this Act be competent to enact, it shall be void.

(4) Every Governor-General's Act shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.

(5) The functions of the Governor-General under this section shall be exercised by him in his discretion.

²⁶ *Section 88 (1) If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him ordinances during to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require :*

Provided that the Governor-

(a) shall exercise his individual judgment as respects the promulgation of any ordinance under this section, if a Bill containing the same provisions would under this Act have required his or the Governor-General's previous sanction to the introduction thereof into the Legislature;

(b) shall not without instructions from the Governor-General, acting in his discretion, promulgate any such ordinance, if a Bill containing the same provisions would under this Act have required the Governor-General's previous sanction for the introduction thereof into the Legislature, or if he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the Governor-General.

for the *Government of India Act, 1935* was the fundamental document on which our Constitution framers relied upon.

- ***The Constituent Assembly Debates relating to Ordinance Making Power***

The members of the Constituent Assembly were apprehensive to include ordinance making power of the President in the Constitution. *Article 102 of the Draft Constitution* stated:

- 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) *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 Houses 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 President.*

The Constitutional Adviser *B N Rau* included a clause in his memorandum²⁷ on the ‘*main principles*’ of the Union Constitution which gave the power to the President to promulgate ordinances when Parliament was not in session.. Apprehending the reluctance of the members he added a note- “*The ordinance-making power has been the subject of great criticism under the present Constitution. It must however be pointed out, that circumstances may exist where*

(2) *An, ordinance promulgated under this, section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such ordinance-*

(a) *shall be laid before the Provincial Legislature and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or, if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council.;*

(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 Provincial Legislature assented to by the Governor ; and (c) may be withdrawn at any time by the Governor.*

(3) *If and so far as an ordinance under this section makes any provision which would not be valid if enacted in an Act of the Provincial Legislature assented to by the Governor, it shall be void.*

²⁷ April 30, 1947 the Constituent Assembly appointed the Union Constitution Committee.

the immediate promulgation of a law is absolutely necessary and there is no time in which to summon the Federal Parliament.”²⁸

The views of other members were more or less the same. *N Gopalaswami Ayyangar* gives out the need for a provision on ordinance making powers in our Constitution. He says-“*There can be no objection to the vesting of power of this very limited description for making ordinances in the President. The ordinances can be made only during periods when the legislature is not in session in the case of matters which cannot wait till the next session of the legislature, an ordinance made has got to be placed before the Parliament so soon as possible and shall cease to operate at the expiration of six weeks from the reassembly of the Federal Parliament.*”²⁹

Both *Hriday Nath Kunzru* and *Professor K T Shah* called for restricting the power of the Executive to promulgate ordinances, through greater oversight by legislatures. They were, however, overruled by *Dr B R Ambedkar*, who stated that ordinance-making powers were necessary since existing laws might be deficient to deal with a situation.

To summarise, the amendments sought in *Article 102* of the Draft Constitution were:

1. The President should not be empowered to promulgate an Ordinance when one of the two Houses of Parliament was in session.
2. No Ordinance should deprive the citizens of their personal liberty.
3. An ordinance promulgated by the President shall cease to be effective after 30 days from its promulgation.
4. Every Ordinance shall be laid before both the Houses of Parliament immediately after each House assembles and unless it is approved by either House of Parliament by a resolution, it shall cease to operate.
5. Every Ordinance shall be promulgated only after consultation with the Council of Ministers.

²⁸ Constituent Assembly Debates Vol. III, p.396 Available at <http://164.100.47.132/LssNew/constituent/debates.html> (Accessed: 12.04.17)

²⁹ *Ibid*

Ambedkar rejected the proposal for shortening the tenure of the Ordinances. He justified the extended tenure. According to him in the Draft Provision, *Article 102* did not provide the Executive with any parallel or independent power of legislation. Further, the President is not entitled to issue an Ordinance when the Legislature was in Session. Also, the President “*has no special responsibility, he has no discretion and he has no individual judgment*”.³⁰ Then he said that *Article 102* was analogous to *British Emergency Power Act, 1920*, wherein “*the King is entitled to issue a proclamation, and when a proclamation was issued, the executive was entitled to issue regulations to deal with any matter, and this was permitted to be done when Parliament was not in session.*” Then he explained why such a mechanism as Ordinance was needed in the scheme of the Constitution. He said, “*My submission to the house is that it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise. The executive has got a new situation arisen, which it must deal with ex hypothesi it has not got the power to deal with that in the existing code of law. The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the Power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary process of law because, again ex hypothesi, the legislature is not in session. Therefore it seems to me that fundamentally there is no objection to the provisions contained in Article 102.*”³¹

Ambedkar refuted the proposal for amendment on the ground that under *Article 102(3)* an Ordinance was circumscribed by the same limitations as an ordinary law. Since any ordinary law made by the Parliament is subject to violation of Fundamental Rights, so any law made under *Article 102* would automatically be subject to the same provisions relating to Fundamental Rights.

He then elaborated on the mechanics of an Ordinance that it cannot be promulgated without the advice of Council of Ministers because “*the President could not act and will not act except on the advice of Ministers.*”³² It means an Ordinance can be promulgated even if only one House was in Session as for enacting laws both the Houses of the Parliament are needed. Thus, it was established in the Constituent Assembly Debates that Ordinance making power is an extraordinary measure to be used only in times of emergency. Some of the Amendments

³⁰ *Ibid*

³¹ *Ibid*

³² *Ibid*

sought by the Constituent Assembly members were farsighted and looking at today's situation regarding Ordinances we can safely say that had some of the Amendments been incorporated the Executive would have been stopped from delving into the territory of Legislature so frequently and so callously.

➤ *The evolution of Executive orders and Presidential proclamation in United States of America*

Executive orders and presidential proclamations are mature phenomenon in United States. The President has employed them in some form since 1789, beginning with President George Washington.³³ In 1793, the Washington Administration was wrestling with the idea of issuing a proclamation declaring the United States neutral in the war between England and France. Given the option of calling Congress back into session or issuing a proclamation on his own accord, President Washington chose the latter.³⁴ The next major use of proclamations came during the presidency of Abraham Lincoln who at the outset of a Civil War used an executive order to manage a constitutional crisis when Congress was out of session. Through an executive order, Lincoln called for a suspension of writ of habeas corpus, something that only Congress could do in times of rebellion or invasion. Lincoln explained his actions to Congress, which later passed the Habeas Corpus Act of 1863, officially giving the president the power that Lincoln had assumed.³⁵

During the 19th century executive orders most often supplemented Acts of Congress to carry out minor details. The use and scope of executive orders and proclamations expanded with the presidency of Theodore Roosevelt. While Washington and Lincoln issued only eight and 48 executive orders respectively, Roosevelt was the first to break the 1,000 mark. His theory on presidency, the 'stewardship' theory was based on his view that the President was vested with residual powers which were neither enumerated in the Constitution nor assigned broadly to a specific branch; instead they simply resided in the concepts like national security or public good.³⁶

³³ John C. Duncan, 'A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role' [2010] Vermont Law Review Volume 35:333

³⁴ Congressional Research Service Report on Executive Orders and Proclamations 1999

³⁵ *Ibid*

³⁶ *Ibid*

With the onset of World War I, President Woodrow Wilson was able to expand the discretion of the presidency through the use of emergency powers. World War I and World War II brought dramatic increases in the use of executive orders, as did the years spanning the Great Depression. Franklin D Roosevelt issued 3,522 executive orders during his prolonged presidency. The most significant episode in the post-World War II history of executive orders came during the presidency of Harry Truman.

In 1952, President Truman was leading the nation through yet another war, this time in the Korean Peninsula. During war, the price of critical raw materials like steel is usually fixed. Because the price of steel was unnaturally low, steelworkers weren't receiving their normal wages and raises. The result was a major labor dispute in the steel industry that threatened to cut off the steel supply in a time of war. In an attempt to avoid an all-out strike, Truman brought in the Federal Mediation and Conciliation Service to strike a bargain between the steelworkers union and management. When that failed, he called in the Federal Wage Stabilization Board, but the steelworkers rejected its recommendations. On the eve of a nationwide steelworkers strike, Truman decided to invoke his presidential authority and issue an executive order for the federal government to seize control of the nation's steel mills. The mill owners immediately sued to block the seizure and the case of *Youngstown Sheet & Tube v. Sawyer*³⁷ made it all the way to the Supreme Court. The Court found that the President has acted without statutory or Constitutional authority.

A White House aide to President Bill Clinton described the lure of executive orders this way: '*Stroke of the pen, law of the land*'. President Ronald Reagan used the direct power of executive orders to peel back layers of government regulation that he and his administration believed were hampering economic growth. President George W Bush signed executive orders that approved more aggressive surveillance after 9/11 incident and limited public access to presidential documents. And President Obama has increasingly relied on executive orders to forward his agenda in the face of an intransigent Congress.³⁸

President George W Bush issued several controversial executive orders surrounding the gathering of intelligence in the war on terror. Arguably the most controversial was a secret executive order he signed in 2002, authorizing the National Security Agency (NSA) to eavesdrop without a warrant on phone calls made by US citizens and others living in the

³⁷ [1952] 343 US 579

³⁸ Available at: <http://people.howstuffworks.com/executive-order3.htm> (Accessed: 11.04.17)

United States. The Bush administration defended the secret program as necessary to root out homegrown terrorist plots.³⁹

On his very first day in office, President Obama signed three executive orders to draw a clear distinction between the policies of his administration and his predecessor's.⁴⁰ The president has received sharp criticism for flexing his executive muscle, but even his critics acknowledge that Obama is far from the first president to wield executive orders as a political weapon.⁴¹

The new President Donald Trump is all over the news because of his executive orders and proclamations. In just a few weeks in office, President Trump has made striking use of his power to issue Executive Orders, using them to pave the way for the repeal of the Affordable Care Act, change the rules about federal regulations, and enact a controversial ban on admission to the US for range of immigrants and refugees.⁴²

The use of executive orders across the entire breadth of history of the United States is extensive.⁴³ Many presidents have issued executive orders to aid in implementing administrative processes and to solidify foreign policy.⁴⁴ Additionally, the availability of the expeditious route of the executive order has historically been critical under conditions of national emergency.⁴⁵ There was no uniform name for presidential orders issued in the early years of the United States government, nor was there any numbering or publishing scheme. It was not until 1907 that the federal government adopted a system of enumerating and recording orders systematically.⁴⁶ In that year, the Department of State set up a numbering scheme to organize executive orders retroactively, beginning with those issued by President

³⁹ *Ibid*

⁴⁰ *Ibid*

⁴¹ *Ibid*

⁴² Time Magazine, Available at: <http://time.com/4655131/executive-orders-history/> (Accessed: 11.04.17)

⁴³ *Supra* note 33, citing, John A Sterling, Above the Law: Evolution of Executive Orders (Part One), 31 UWLA L. REV 99, 101 (2000)

⁴⁴ *Supra* note 33, citing, Todd F Gaziano, The Use and Abuse of Executive Orders and Other Presidential Directives, 5 TEX. REV. L. & POL. 273 (2001) (explaining that the Constitution gives no express authority for the President to issue executive orders per se).

⁴⁵ *Supra* note 33, 'The most salient historical examples of the use of executive orders are to be found in times of national crisis. Abraham Lincoln, Franklin Roosevelt, and Harry Truman all faced such periods. All issued controversial and illustrative executive orders.'"

⁴⁶ *Supra* note 33, citing ARTHUR S MILLER, *PRESIDENTIAL POWER IN A NUTSHELL* [1977] 86 (Before 1907 such orders were not systematically numbered . . .").

Lincoln in 1862.⁴⁷ Actual publication of orders began in 1935, under the Federal Register Act.⁴⁸ The number of orders issued prior to the system of enumeration or otherwise outside of it is so uncertain-estimates range from 15,000 to 50,000-that it reveals a great historiographical lacuna in US governmental history.⁴⁹

ORDINANCE MAKING POWER OF THE PRESIDENT IN INDIA

India does not follow the principle of separation of powers of the three organs of state, viz executive, legislature and judiciary; in absolute rigidity because *“the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions.”*⁵⁰ The Executive in India performs varied and broad functions⁵¹ to deal with vagaries of a vast country like India. It is thus bound to exercise functions that fall broadly in the executive realm but also cast a partial shadow in the legislative and judicial sphere.

While the law making power under the Constitution of India is vested in the Parliament, Article 123⁵² empowers the President to legislate by Ordinances, to meet with any circumstances that require immediate action, when Parliament or either House thereof is not in session.⁵³ The Constitution gives power to the Executive to promulgate an Ordinance for a short period of time with a view to enable the Executive to be able to meet any unforeseen or urgent situation arising in the country when the legislature is not in session and for which there is no adequate provision under the already existing laws. The power has been conferred upon the President under Article 123 and to the Governor under Article 213 of the Constitution.

Article 123 empowers the President to promulgate such ordinances as the circumstances appear to him to require when: (a) both Houses of Parliament are not in session; and (b) he is satisfied that circumstances exist which render it necessary for him to take immediate action.

⁴⁷ *Supra* note 33, citing, Phillip J Cooper, *By Order Of The President: The Use & Abuse Of Executive Direct Action* [2002] 16

⁴⁸ *Supra* note 46

⁴⁹ *Supra* note 47

⁵⁰ Justice Y V Chandrachud, in *Indira Nehru Gandhi v. Raj Narain* AIR (1975) SC 1590

⁵¹ M P Jain, *Indian Constitution* (7th Ed 2014, Lexis Nexis New Delhi)

⁵² Article 123 Part V Chapter III of the Constitution of India

⁵³ *A K Roy v. Union of India* AIR (1982) SC 710

An ordinance cannot be promulgated when both Houses of Parliament are in session. Accordingly, an ordinance made when the two Houses are in session is void. It may, however, be made when only one House is in session, the reason being that a law can be passed by both Houses and not by one House alone, and, thus, it cannot meet a situation calling for immediate legislation and recourse to the ordinance-making power becomes necessary.

The provision confers the power formally on the President; but, as already stated, he acts in this matter, as he does in other matters, on the advice of the Council of Ministers and, therefore, the ordinance-making power is vested effectively in the Central Executive. As the Supreme Court has stated: '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.'⁵⁴ This was cleared even in the *Constituent Assembly Debates* by *Hukum Singh* that President is bound to act on the aid and advice of Council of Ministers.⁵⁵ Also *Sir Alladi Krishnaswami Aiyer* stated that the words 'aid and advice' is a constitutional euphemism concerning the powers of President of India and embodies the well-known British convention, where the King always acts on the advice of the ministers even though power is legally vested in him.⁵⁶ Further the same was held by the Apex Court in *A K Roy v. Union of India*⁵⁷, "*the President's satisfaction is therefore nothing but the satisfaction of his Council of Ministers in whom the real executive power resides.*" Satisfaction is a state of mind and not an objective fact.⁵⁸ This statement indicates that the doors of Judicial Scrutiny are open for such Executive action. The satisfaction of the President that 'circumstances exist which render it necessary for him to take immediate action' is a condition precedent to the exercise of the power and is accordingly justiciable to that extent.⁵⁹ The court also held that the satisfaction of the President under Article 123 and

⁵⁴ *R C Cooper v. Union of India* AIR, (1970) SC 564, 587; Also see, *Shamsher Singh v. State of Punjab*, AIR (1974) SC 2192; *R K Garg v. Union of India*, AIR (1981) SC 2138, 2144; *A K Roy v. Union of India*, AIR (1982) SC 710; *Venkata v. State of Andhra Pradesh*, AIR (1985) SC 724; *Nagaraj v. State of Andhra Pradesh*, AIR (1985) SC 551

⁵⁵ *Constituent Assembly Debates* Vol. VIII, p.3126

⁵⁶ *Ibid* Vol X

⁵⁷ *Supra* note 53 at para 16

⁵⁸ H.M. Seervai, *Constitutional Law of India*, (Vol II ,4th Ed., Universal Law Publishing Co., New Delhi) 1130

⁵⁹ *Supra* note 53

of the Governor under Article 213 while issuing ordinances is not immune from judicial review.⁶⁰

The executive's ordinance-making power is not unrestrained. An ordinance can remain in force only for a short duration and is brought under the parliamentary scrutiny at the earliest possible opportunity. The scheme of Art 123 is to place the ordinance-making power subject to the control of Parliament rather than that of the courts.⁶¹ The ordinance is to be laid before each House of Parliament when it reconvenes after the making of the ordinance [Art 123(2)(a)]. The ordinance shall cease to operate at the expiry of six weeks from the assembly of Parliament [Art 123(2)(a)]. When the two Houses of Parliament assemble on different dates, the period of six weeks is to be reckoned from the later of the two dates. It means that Parliament must pass a law to replace the ordinance within six weeks of its assembling. Thus, the maximum duration for which an ordinance may last is 7½ months as under Art. 85, six months cannot intervene between two sessions of Parliament, and the ordinance would cease to operate six weeks after the Parliament meets.⁶²

An ordinance may cease to have effect even earlier than the prescribed six weeks, if both Houses of Parliament pass resolution disapproving it [Art 123(2)(a)]. It may be withdrawn by the Executive at any time [Art. 123(2)(b)]. Parliament's control over the Central Executive's ordinance-making power is thus *ex post facto*, i.e. it is exercised after the ordinance has been promulgated and not before.⁶³

The requirement of laying an Ordinance before Parliament or the state legislature is a mandatory constitutional obligation cast upon the government. Laying of the ordinance before the legislature is mandatory. The failure to comply with the requirement of laying an ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process.⁶⁴

If the provisions made through the ordinance are to continue even after the ordinance comes to an end, Parliament has to enact a law incorporating the provisions made through the ordinance. Since the government enjoys majority in the Lok Sabha, there is no difficulty in

⁶⁰ *Krishna Kumar Singh & Anr v. State of Bihar & Ors* (2017) 3 SCC 1

⁶¹ *Supra* note 51

⁶² *Ibid*

⁶³ *Ibid*

⁶⁴ *Supra* note 60

the House passing the Act. But situation in Rajya Sabha may be different. If the government does not have majority in that House, passage of the Act by that House may become a problem.

The normal democratic legislative process involves the people's representatives in the two Houses openly enacting a law after a full consideration and discussion. An ordinance seeks to circumvent this process for it is drafted secretly in government chambers and is promulgated without an open discussion. The ordinance-making power should therefore be invoked not lightly but only when it is absolutely necessary to do so, and the situation cannot otherwise be met effectively. However, an ordinance partakes of legislative character; it is made in exercise of legislative power and is subject to the same limitations as an Act passed by Parliament.⁶⁵

The Supreme Court has held that the power to make ordinance is not antidemocratic even though the power is vested in the Executive and not the legislature. An ordinance is promulgated on the advice of the Council of Ministers which remains answerable to the Parliament. If the executive misuses or abuses its power, the House of Parliament may not only disapprove the ordinance but may also pass a vote of no confidence against the Council of Ministers.⁶⁶

According to *Article 13(3)(a)*⁶⁷ an Ordinance is 'law'. An ordinance has the same force and effect as an Act of Parliament [Art. 123(2)]. An ordinance comes to an end in the following situations: (a) Resolutions disapproving the ordinance are passed by both Houses of Parliament; (b) if the ordinance is not replaced by an Act within the stipulated period; (c) the executive lets it lapse without bringing it before the Houses of Parliament; (d) if it is withdrawn by the Government at any time.

The power of the President to issue ordinances is co-extensive with the legislative power of Parliament.⁶⁸ An ordinance cannot make a provision which Parliament is not competent to enact [Art. 123(3)]. On the contrary, an ordinance can make any provision which Parliament can enact, except that an appropriation from out of the Consolidated Fund cannot be made by an ordinance [Art 114(3)]. Thus, an ordinance may make provision with respect to a matter in

⁶⁵ *Supra* note 59

⁶⁶ *R K Garg v. Union of India*, AIR (1981) SC 2138

⁶⁷ The Constitution of India, 1950

⁶⁸ *Satpal & Co v. Lt Governor of Delhi*, AIR (1979) SC 1550

Lists I and III, but not in List II, except when proclamation of emergency is in operation. Further, like a law made by Parliament, an ordinance is also subject to Fundamental Rights.⁶⁹

The ordinance comes into effect as soon as it is promulgated. It is mandatory to place an ordinance before the each house of the parliament and the failure to comply with the requirement is a serious constitutional infraction. In case of failure to place the Ordinance before the Parliament, the Ordinance becomes *void ab initio*. It will not give rise to any legally binding consequences.⁷⁰

➤ ***Judicial review of Ordinance making power***

The power of the President or the Governor to promulgate an Ordinance was to be used sparingly to meet unforeseen and urgent situations, as conceived by our Constitution-framers. This has not been the case thus far. Although an ordinance is promulgated in the name of the President/Governor and on his *satisfaction* but in reality it is promulgated on the advice of Council of Ministers and on their satisfaction. The traditional view was that the word '*satisfied*' denotes subjective satisfaction and the court cannot go into the bona fides of such satisfaction of the President or the Governor.⁷¹ This was prior to our Constitution coming into force. This barred judicial review on the reasons behind the '*satisfaction*' of the Governor.

In *Barium Chemicals*⁷² it was held by the Supreme Court that judicial review is not completely ousted in cases where the Legislature empowered an authority to act on its '*subjective satisfaction*' when the need arose. The Court held that since subjective satisfaction was a condition precedent, "*the court can go behind that recital and determine whether they did in fact exist*" for creating circumstances in forming that opinion and it was open for the Petitioner to show that such condition precedent did not exist and any of grounds could be accorded. "*No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable.*" So the authority has to establish a prima facie case that the circumstance did exist or "the action might be exposed to interference".

⁶⁹ *Supra* note 51

⁷⁰ *Supra* note 60

⁷¹ Durga Das Basu, *Commentary on the Constitution of India* (Vol.4 Lexis Nexis Butterworths, Wadhwa, Nagpur, 2005)

⁷² *The Barium Chemicals Limited v. The Company Law Board*, AIR (1967) SC 295

*R C Cooper v. Union of India*⁷³ related to *Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969*. In 1969, when the Central Government decided to nationalise several private sector banks, it got the then Acting President of India, *Mr V V Giri* to promulgate an Ordinance a day before he demitted office to contest the Presidential elections. In this case the Apex Court explained the entire gamut of the exercise of power of the President under *Article 123* in promulgating an Ordinance. The majority in the case however forbore to express any final opinion on this question as the Ordinance had been replaced by the Act by the time the case was taken up. *Ray, J.* dissenting felt that the *Article 123* related to policy and it was to be used in cases of emergency when immediate action was considered necessary and held that the satisfaction of the President is subjective. In brief, the Court clearly held that an Ordinance could be challenged on grounds of mala fide intention or corrupt motive.

In *M/S S K G Sugar Ltd v. State Of Bihar And Ors*⁷⁴, the Bihar Sugar Factories Control Act, 1937 a pre-Constitution Act was under question. It was meant to be a temporary Act but its life was being extended by amending acts. It was asserted by the Court that an enquiry into the question of satisfaction of the President as to need for promulgating an Ordinance is not a justiciable matter.

To overcome the roadblock that the judiciary suggested in form of judicial review of Ordinance promulgated by the President in *R C Cooper* case, the Government reacted by inserting *Clause(4)* in *Article 123* vide *38th Amendment Act, 1975*.⁷⁵ This Clause expressly forbade judicial intervention on the ground of Presidential satisfaction. It was followed by the 44th Amendment which omitted Clause (4) and reinstated the position at the date of the judgment of *R C Cooper Case*. It was observed in *A K Roy's*⁷⁶ case that the effect of this deletion is to open the door of judicial review in a case under Article 123. Prior to this, the term '*satisfaction of the President*' was discussed in the case of *State of Rajasthan v. Union of India*⁷⁷ in which six separate judgments were delivered by a bench of seven judges. Each of the judges unanimously agreed on the fact that if Proclamation of emergency was issued

⁷³ AIR (1970) SC 564

⁷⁴ AIR (1974) SC 1533

⁷⁵ "Notwithstanding anything in the Constitution the satisfaction mentioned in clause (1) shall be final and conclusive and shall not be questioned in any court on any ground"

⁷⁶ *Supra* note 53

⁷⁷ AIR (1977) SC 1361

on irrelevant or extraneous grounds beyond the scope of *Article 356*⁷⁸ then mala fides could be established.

*T Venkata Reddy v. State of Andhra Pradesh*⁷⁹ dealt with the promulgation of the *Andhra Pradesh Abolition of Posts of Part-time Village Officers Ordinance, 1984* which abolished certain village level posts, the Court reiterated that the Ordinance making power of the President and the Governor was a legislative power, comparable to the legislative power of the Parliament and state legislatures respectively. This implies that the motives behind the exercise of this power cannot be questioned, just as is the case with legislation by the Parliament and state legislatures. Further in the case of *S R Bommai v. Union of India*⁸⁰, the scope of Judicial Review was expanded as to where the court told that where the action by the President is taken without the relevant materials, the same would be falling under the category of “*obviously perverse*” and the action would be considered to be in bad faith. The Supreme Court held that the exercise of power by the President under the Article 356(1) to issue proclamation is justiciable and subject to Judicial Review to challenge on the ground of mala fide.

The Constitutional Bench of the Supreme Court in *Rameshwar Prasad v. Union of India*⁸¹ said that the subjective satisfaction of the Governor is not exempt from judicial review. It held “*it is open to the Court, in exercise of Judicial Review, to examine the question whether the Governor’s report (recording his satisfaction) is based upon relevant material or not; whether the facts have been duly verified or not.*” This case was on Executive action under Article 356 but the ratio of the case is applicable to Ordinance making power also.

Recently in the case of *Krishna Kumar Singh & Anr v. State of Bihar & Ors*⁸² seven-judge Constitution Bench of the Supreme Court in has held that re-promulgation of ordinances is a fraud on the Constitution and a subversion of democratic legislative processes. The court also held that that the satisfaction of the President under Article 123 and of the Governor under Article 213 while issuing ordinances is not immune from judicial review. The court held: *The satisfaction of the President under Article 123 and of the Governor under Article 213 is not*

⁷⁸ Article 356 (1) of Constitution of India

⁷⁹ [1985] AIR 724

⁸⁰ [1994] AIR 1918

⁸¹ AIR [2006] SC 980

⁸² *Supra* note 60

immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinise whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all.

EXECUTIVE ORDER

An executive order is a unilateral directive issued by the president to executive branch officials and agencies on how to implement the law. They are generally viewed by the courts as having the force of law, unless they clearly and explicitly violate the Constitution or an existing statute.⁸³ They can be used for a variety of purposes, such as to respond to an economic or international crisis, to implement a law, or to create and implement policy initiatives. Presidents can use executive orders to significantly impact policy. Executive orders only last until they are overturned by the Executive or Judicial branch. An executive order will stand until one of two things happens: either another president overturns it, or a court rules it unconstitutional.

The ability of the president to shape policy with executive orders comes through discretion derived specifically from some statutes or the interpretation of vague language in other statutes and the Constitution.⁸⁴ While presidents can base their authority to issue executive orders on either statutes or the Constitution, the majority appear to rely on specific statutes.⁸⁵ The President's authority to issue executive orders does not include a grant of power to implement policy decisions that are not otherwise authorized by law. Indeed, an executive order that implements a policy in direct contradiction to the law will be without legal effect

⁸³ Alexander Bolton and Sharece Thrower, 'Legislative Capacity and Executive Unilateralism' [2015] American Journal of Political Science, Vol. 00, No. 00, April, citing, Cooper, Phillip J, 'By Order of the President: The Use and Abuse of Executive Direct Action'[2002] Lawrence: University Press of Kansas

⁸⁴ *Ibid*, See also Howell, William G. 2003. Power without Persuasion: The Politics of Direct Presidential Action. Princeton, NJ: Princeton University Press. Mayer, Kenneth R, 'With the Stroke of a Pen: Executive Orders and Presidential Power' [2001] Princeton, NJ: Princeton University Press

⁸⁵ Alexander Bolton and Sharece Thrower, 'Legislative Capacity and Executive Unilateralism', [2015] American Journal of Political Science, Vol. 00, No. 00, April, citing, Rudalevige, Andrew, 'Executive Orders and Presidential Unilateralism' [2012] Presidential Studies Quarterly 42(1): 138–60

unless the order can be justified as an exercise of the President's exclusive and independent constitutional authority.⁸⁶

"Executive Orders are official documents through which the President of the United States manages the operations of the Federal Government." The directives cite the President's authority under the Constitution and statute. They are published in the Federal Register, and they may be revoked by the President at any time. Although executive orders have historically related to routine administrative matters and the internal operations of federal agencies, recent Presidents have used Executive Orders more broadly to carry out policies and programs.⁸⁷

Presidents have historically utilized various written instruments to direct the executive branch and implement policy.⁸⁸ These include executive orders, presidential memoranda, and presidential proclamations. The definitions of these instruments, including the differences between them, are not easily discernible, as the US Constitution does not contain any provision referring to these terms or the manner in which the President may communicate directives to the executive branch.⁸⁹ There is no law or even executive order which attempts to define the term 'executive order' or 'proclamations'.⁹⁰

A widely accepted description of executive orders and proclamations comes from a report issued in 1957 by the House Government Operations Committee: *Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.... In the narrower sense Executive orders and proclamations are written documents denominated as such.... Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only*

⁸⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, [1952] 343 US 579, 638 (Jackson, J. concurring) (stating that where a President "takes measures incompatible with the express or implied will of Congress" that "courts can sustain exclusive presidential control in such case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution ...").

⁸⁷ Available at: [Justice Information Sharing, Website of U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance https://it.ojp.gov/PrivacyLiberty/authorities/executive-orders](https://it.ojp.gov/PrivacyLiberty/authorities/executive-orders) (Accessed: 12.04.2017)

⁸⁸ Other written instruments have historically included administrative orders, homeland security presidential directives, letters on tariffs and international trade. See Congressional Research Service Report, Presidential Directives: Background and Overview by Elaine Halchin.

⁸⁹ Congressional Research Service Report, Executive Orders: Issuance, Modification, and Revocation by Vivian S. Chu & Todd Garvey

⁹⁰ Executive order 10006, October 11, 1948, governing executive order does not define the term executive order.

*indirectly. Proclamations in most instances affect primarily the activities of private individuals. Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority.*⁹¹

The distinction between these instruments i.e. executive orders, presidential memoranda, and proclamations seems to be more a matter of form than of substance,⁹² given that all three may be employed to direct and govern the actions of government officials and agencies. In case of both, the executive orders and proclamations, the effective action sought or directed by the document is an exercise of the Executive power under Article II of the Constitution and must be based on the authority derived from the Constitution or statute.⁹³ Essentially an executive order or proclamation is a written document issued by the President and titled as such by him or at his discretion. The subject matter of each executive order or proclamation can be ascertained from an examination of the document itself.⁹⁴

Moreover, if issued under a legitimate claim of authority and made public, a presidential directive could have the force and effect of law, 'of which all courts are bound to take notice, and to which all courts are bound to give effect.'⁹⁵ The only technical difference is that executive orders must be published in the Federal Register, while presidential memoranda and proclamations are published only when the President determines that they have 'general applicability and legal effect.'⁹⁶

⁹¹ Congressional Research Service Report, Executive Orders: Issuance, Modification, and Revocation by Vivian S. Chu & Todd Garvey, citing, Staff of House Comm. on Government Operations, 85th Cong., 1st Sess., Executive Orders and Proclamations: A Study of a Use of Presidential Powers (Comm. Print 1957)

⁹² *Ibid*

⁹³ See James Hart, 'The Ordinance Making Power of the President of the United States' [1925] Baltimore, the John Hopkins Press

⁹⁴ Executive Orders and Proclamations: A study of a use of presidential powers, Committee on Government Operations [1957] United States Government Printing Office Washington, University of Michigan Libraries, Available at: <https://babel.hathitrust.org/cgi/pt?id=mdp.39015034716152;view=1up;seq=13> [Accessed: 11.04.17)

⁹⁵ *Armstrong v United States*, [1871] 80 US 154, 155-56; see also Phillip J Cooper, 'By Order of the President: Administration by Executive Order and Proclamation', 18 ADMINISTRATION & SOCIETY 233, 240 (August 1986) citing *Farkas v. Texas Instrument, Inc.*, [1967] 372 F.2d 629; *Farmer v. Philadelphia Electric Co.*, [1964] 329 F.2d; *Jenkins v. Collard*, [1893]145 US 546, 560-61

⁹⁶ The Federal Register Act requires that executive orders and proclamations be published in the Federal Register. Furthermore, executive orders must comply with preparation, presentation, and publication

The President's power to issue executive orders derives from three sources. First is the constitutional grant of power per se. Second, Congress may pass statutes that explicitly or implicitly include a grant of power authorizing Presidential action. Third, Article II of the US Constitution provides inherent authority for the President to issue executive orders.⁹⁷

➤ ***Constitutional Authority***

Article II of the Constitution vests the executive power in the President, using a short sentence in a passive voice construction whose unstated agent is, by the nature of the document, the Constitution itself.⁹⁸ This "vesting clause" interacts with Article II, Section 3, which uses another passive voice construction to lay upon the President the specific duty of seeing to the faithful execution of the laws,⁹⁹ which forms the founding rationale upon which the power of the modern executive order depends. It refers to any means or edifice by which the President ensures the faithful execution of the laws, because it must be an apparatus over which the President exercises legitimate control. It thus implies that he may build whatever means he can, or use those means that Congress chooses to build for him. Certainly, a part of that apparatus must be regulatory in nature.

When the President acts in an area in which he has no explicit grant of congressional authority to act, those actions may, depending on circumstances, acquire the force of law by acquiescence. That there is no way for this source of power to emanate from the Constitution per se has found firm ground historically. Nevertheless, Article II is indeed the espoused source of every executive order.¹⁰⁰

➤ ***Statutory Authority***

An executive order will generally cite some statutory authority to give the President the power to carry out the particular law at issue. When an order has this backing, the President is communicating that his use of the order seeks to execute the directives of Congress. Since the

requirements established by an executive order issued by President Kennedy. See Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962) codified 1 C.F.R. Part 19

⁹⁷ *Supra* note 33

⁹⁸ US Constitution Article II, Section 1, cl. 1 ("*The executive Power shall be vested in a President of the United States of America*")

⁹⁹ US Constitution Article II, Section 1, cl. 1 (stating that the President must "*take Care that the Laws be faithfully executed*")

¹⁰⁰ *Supra* note 33

Constitution charges the President with affecting the laws,¹⁰¹ such action is well within the President's universally recognized power. Objections to this type of order may arise if the President's prescriptions actually deviate from the mandates or intent of Congress, despite the ascription. When this is the case, Congress has recourse. Congress may amend the statute referenced in the order so as to cause the order, and hence further prosecution thereof, to contradict it. The disadvantage of this remedy is that the promulgation of executive orders is swift, in contrast to the lenthitude of congressional legislation.¹⁰²

Congress has several ways to approve an executive order other than by adopting a statute that specifically authorizes future presidential action. Congress can imply approval of an executive order through its power of the purse, by funding programs to purchase goods and services established by the order. In fact, the Supreme Court has even taken the fact of continued funding of particular programs, or congressional inaction when given the chance to obstruct the continuance of an executive order, as evidence of congressional ratification.¹⁰³ Alternatively, Congress can enact legislation to ratify the President's actions after their manifestation. Congress also has the power to overturn executive orders after their manifestation when it disagrees with the President's actions. However, the Supreme Court has recognized the President's independent constitutional authority under Article II to act in the absence of express delegation. Finally, courts can intervene to issue findings on the validity of presidential actions.¹⁰⁴

Congress can also give the executive branch the authority to issue policies through express delegation. The Supreme Court has only rejected an effective congressional delegation of power twice in United States history. One of those instances was the case of *ALA Schechter Poultry v. United States*, in which the Supreme Court repealed the National Industrial Recovery Act of 1933, holding that the legislation gave the President so much authority to enact laws governing trade and industry throughout the country, without meaningful restrictions, as to constitute the congressional abdication of its lawmaking role. In response, federal legislation now generally sets express conditions when the executive branch receives policy related authority delegated by the legislative branch. This is normally referred to as an

¹⁰¹ US Constitution Article II, Section 3

¹⁰² *Supra* note 33

¹⁰³ *Ibid*, citing, Alissa C Wetzel, 'Note, Beyond the Zone of Twilight: How Congress and the Court can Minimize the Dangers and Maximize the Benefits of Executive Orders' [2007] 42 VAL. U. L. REV. 385, 417

¹⁰⁴ *Supra* note 33

“intelligible principle.” The intelligible principle normally allows the delegated power to pass judicial scrutiny.¹⁰⁵

➤ ***Inherent powers of the President***

Inherent power takes as its starting point the necessity for the President to act in predictable ways to fulfill his constitutional and congressional mandates. Regardless of the specific source, the President’s authority to issue executive orders invariably originates within the outer realm of the Constitution, according to the theory that an inherent prerogative power exists within the executive office.¹⁰⁶

The President’s inherent authority is the most controversial and contested source of power, because there are no specific boundaries thereto. It is unclear whether the Framers of the Constitution intended for executive orders issued pursuant to implied authority to have the same effect as those issued pursuant to express authority. The extent of the President’s inherent authority to act depends on the interpretation of the Constitution and congressional delegation of specific powers. Opponents of the principle of inherent presidential authority claim that the scope of authority employed when the President issues an executive order pursuant to inherent or implied authority is much broader than that which framers intended.¹⁰⁷ Ultimately, there is no conclusive solution to the problem of determining the outer extent of the executive power.¹⁰⁸

➤ ***Judicial review of Executive Orders***

Executive orders, like other rules issued by the federal government, are subject to judicial review. Presidents’ broad usage of executive orders to effectuate policy goals has led some Members of Congress and various legal commentators to suggest that many such orders

¹⁰⁵ William F Funk et al, *Administrative Procedure And Practice* (4th Edn 2010) 521

¹⁰⁶ *Supra* note 101

¹⁰⁷ KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER [2001] 50–51

“Many legal scholars argue against the notion of inherent powers, concluding that it ‘is incompatible with the very purpose of a limited, written Constitution.’” quoting Bruce Ledewitz, ‘The Uncertain Power of the President to Execute the Laws’, [1979] 46 TENN. L. REV. 757, 770. Presidents have themselves asserted this inherent power as that which they possess beyond that of the Constitution. *Id.* For example, President Franklin Roosevelt believed that it is the President’s duty to do whatever might suit the needs of the nation unless the Constitution forbids it. Thus, the President may infer the existence of implied powers as stemming both from the enumerated powers and from those areas on which the Constitution or congressional statutes are silent.

¹⁰⁸ *Supra* note 33

constitute unilateral executive lawmaking that impacts the interests of private citizens and encroaches upon congressional power.¹⁰⁹ The Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer* established the framework for analyzing whether the President's issuance of an executive order is a valid presidential action.¹¹⁰

When the President issues an executive order to implement a statute, the order serves as an ancillary act of legislation and presents a federal question when controversies arise in relation to the order.¹¹¹ In fact, executive orders commonly bypass avenues of review. The courts generally approve such action as long as it is possible to trace the order to a grant of power arising from the Constitution or congressional mandate. Strictly speaking, no executive order issued in the absence of statutory authority, which confers power on the President for implementation on the legislative model, is construable as a law of the United States. However, the courts have overturned only two executive orders since 1789. This fact illustrates the deference granted to the executive branch, and by implication the President. The first instance involved President Harry S Truman. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court overturned the President's order to seize steel mills.¹¹² The President had issued this order to prevent a work stoppage during wartime.

The second instance involved President Clinton. In *Chamber of Commerce v. Reich*, the D C Circuit Court of Appeals overturned the President's order to withhold government contracts from firms that hired strikebreakers to permanently replace striking employees.¹¹³ This case involved the Federal Property and Administrative Services Act and the National Labor Relations Act. In both of these cases, as the discussions to follow will indicate, the President had proposed to act in stark dissonance from the intent of Congress, once by virtue of prior deliberations of Congress, and the other by virtue of explicit prior statutes.

In *Dames & Moore v. Regan*¹¹⁴, the Court reviewed several executive orders issued by President Reagan which nullified holds on Iranian assets and removed claims against Iran from US courts following the resolution of the Iranian Hostage Crisis. The court took a

¹⁰⁹ Congressional Research Service Report, Executive Orders: Issuance, Modification, and Revocation by Vivian S Chu & Todd Garvey

¹¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, [1952] 343 US 579

¹¹¹ *Farmer v. Phila. Elec. Co.*, [1964] 329 F.2d 3, 7; *Moehl v. E I Du Pont de Nemours & Co.*, [1947] 84 F Supp 427, 428

¹¹² 343 US at 589

¹¹³ 74 F.3d at 1324

¹¹⁴ (1981) 453 US 654

deferential approach to their review and allowed President Reagan's executive orders to stand. Judicial deference in cases concerning executive orders has largely continued, although a number of executive orders have come under review in district courts.

The federal judiciary consistently reviews executive orders, and while the vast majority of executive orders are not overturned by federal courts, some have been ruled unconstitutional by federal courts. In the near-immediate wake of attempted enforcement, District Court Judge Ann Donnell issued a stay on Trump's travel ban.

CONCLUSION

Law making is a complex process in any democratic country which involves several steps. This intense mechanism is bypassed in case of an Ordinance. In case of urgency or the rise of an emergent situation an Ordinance needs only an Executive sanction. This helps to take quick decisions in the time of crisis. The Ordinance making power in India or the power to issue executive orders and proclamations in United States are the most important and extensively used legislative powers vested in the Executive head to deal with unforeseen and urgent situations that may arise in the functioning of the world's largest and the oldest democracy, respectively.

A study into the system of both the countries suggests that similar power has been conferred on the Presidents of both the nations. Although the power has been conferred on the President of India under the Constitution in express provision under Article 123 the same is not the case in United States. The President of United States draws his power of issuing executive orders from three different sources without the express mention of the power in the Constitution. Some orders are issued under express authority conferred by Acts of Congress; others are a result of the necessity of prescribing means for carrying into effect the laws of Congress and treaties exercised under Presidents inherent powers while others are issued in pursuance of Constitutional powers which are so interpreted to give the President the power to issue executive orders.

Law making by executive is a mature phenomenon both in India and United States. A large number of ordinances and executive orders are issued for governance in both the countries. Sometimes they are driven by necessity but most of the times they have political motives. Legislation by Ordinances is not extra-constitutional, but can be improper and undemocratic. Control mechanism has been developed in both the countries to keep a check on the rampant

use of the legislative power of the executive. Approval of the Congress is necessary in case of continuation of ordinance or executive order. Executive orders last until they are overturned by the Executive or Judicial branch: either another president overturns it, or a court rules it unconstitutional. Executive orders and Ordinances like other rules issued by the government are subject to judicial review. The Court can overturn executive order as being invalid or unconstitutional.

Although there has been misuse of the power in both the countries, it cannot be denied that situations that need an urgent action are plenty in such vast countries and this power helps in taking speedy decision when the need arises. In today complex society strict separation of the function of all the organs of the government is practically not possible. Although criticized for being motivated by political goals and capricious, the power is a necessity to run vast nations with complex system.