

The rising health problem of human is drawing attention who are becoming pregnant in their early ages which would affect the health of both mother and the child whose number runs into crores. The State should take remedial measures immediately without delay otherwise the human resources and health security would fall into jeopardy.

### **Conclusion :**

The treatment of women on par with men would be possible only when empowerment of women, cultivation of

modern science, analytical study of human society is made with strict laws by abolishing the religion and fiction which retards the human body and mind. Especially in India, personal laws pertaining to marriage, succession, divorce, maintenance, adoption, are not uniform due to which the liberty of women is at peril, and the State is daring not for enactment of uniform civil code like uniform Criminal Procedure Code.

The State is secular and still it has apprehended the break down of Constitutional machinery in the event of enactment and implementation of Uniform Civil Code.

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## **JUDICIAL REVIEW OF ORDINANCE MAKING POWER UNDER THE INDIAN CONSTITUTION – PARAMETERS AND PERSPECTIVES**

*By*

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There are three important organs in a State. They are – Legislature, Executive and Judiciary. The function of the Legislature is to make laws. The function of the Executive is to implement the laws made by the Legislature. The function of the Judiciary is to interpret the laws and also exercise control over the Executive action.

Sometimes when the Legislature is not in session to make the laws, urgent situation may arise to pass some enactment or law. Under such circumstances, to meet such emergency situation, the President may issue ordinances. These ordinances have the force of law till the Legislature assembles and makes a regular law, the ordinance should be in force. The dictionary meaning of the word 'ordinance' is 'an official order'. It is derived from the French word 'ordenance'. This power of the President is in addition to the other powers which are vested in him under the Constitution of India. The

President is the Head of the Executive. This power which is provided to the President under the Constitution is also available to the Governor of the State. In other words, Governor can also issue ordinances.

The Constitution has conferred extensive Executive powers on the President. The Executive power of the Union of India is vested in him. He is the Head of the Indian Republic. All Executive functions are executed in the name of the President, authenticated in such manner as may be prescribed by rules to be made by the President<sup>1</sup>.

***Ordinance making power of the President under Article 123 of the Constitution of India :—***The most important legislative power of the President is his Ordinance-making power. If at any time, where both Houses of the Parliament

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1. Article 77.

are not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may issue such Ordinance as the circumstances appear to him to require. The Ordinances issued by him shall have the same force as an Act of Parliament. Such Ordinances, however, must be laid before both Houses of Parliament and shall cease to operate, at the expiry of six weeks from the date of re-assembly of Parliament, unless a resolution disapproving it is passed by both Houses before the expiration of six weeks. The President may, if he likes, withdraw such an Ordinance any time. An Ordinance promulgated under Article 123 is a law having the same force and effect as an Act of Parliament. It cannot be treated as an Executive action or an administrative decision. The Ordinance-making power has been vested in the President to deal with unforeseen or urgent matters.

In no country, except India, the Executive is vested with legislative power. The Indian Constitution expressly confers power to make Ordinances on the President. The power to make Ordinances is justified on the ground that the President must be armed with powers to meet with serious situation when the Houses of Parliament are not in session. It is no difficult to imagine the cases when ordinary law-making powers may not be able to deal with a situation which may suddenly and immediately arise. Article 123 cannot be said to be undemocratic. In such circumstances, the Executive must have power to take immediate action by issuing Ordinances. With all the Constitutional safeguards there is possibility of abuse of the Ordinance-making power by the Executive.

The case of *D.C. Wadhwa v. State of Bihar*,<sup>2</sup> furnishes a glaring example of abuse of Ordinance-making power. The Court pointed out that between 1967 and 1981 the Bihar

Governor promulgated 256 Ordinances and all these were kept alive for periods ranging from one to 14 years by re-promulgation from time to time. Out of these 256,69 were re-promulgated several times with the prior permission of the President of India. The Court called it a subversion of the democratic process and “colourable exercise of powers” and held that this amounted to a fraud on the Constitution and hence unconstitutional. The Executive cannot usurp the function assigned to the Legislature under the Constitution. The matter was brought before the Court by a professor who had carried a detailed research in the matter. The Court directed the Bihar Government to pay Rs.10,000/- to the petitioner for expenses as a result of whose research work the abuse of the Ordinance making power by the Government was brought to the knowledge of the Court.

***Arguments against the Ordinance making power :—***The ordinance will survive for a total period of 71/2 months in all. The underlying presumption of this scheme is the absence of political skulduggery in the exercise of these powers. The exercise of these Executive powers is not preceded by any debate. Passing of a statute is preceded by a Bill containing all the provisions, which on passage becomes an Act. The provisions of the Bill are debated both in the Lok Sabha and the Rajya Sabha. An ordinance can be sprung on an unsuspecting people. It has become the Executive practice to unleash law and order and public order legislation by way of ordinance, not because of its urgent need but because it is contentious and the Government may find its passage difficult. There has also been a gradual subversion of the power of the Parliament into a body, which merely endorses its assent to the law passed by an ordinance, which then becomes an Act. This practice has, in crucial periods, reduced the Parliament to a secondary body called upon to nod its head in approval of Executive law making.

2. (1987) 1 SCC 378

In *D.C. Wadhwa's* case (1987) the Supreme Court pointed out that if reasons are not present in the provision as interpreted by the Court it would amount to colourable exercise of power. "Such a stratagem would be repugnant to the Constitutional scheme, as it would enable the Executive to transgress its Constitutional limitation in the matter of law making in an emergent situation and covertly and indirectly arrogate to itself and usurp the law making power of the Legislature. That would be subverting democratic process which lies at the core of the Constitutional scheme" The fact that it is the first act of re-promulgation and not the tenth is irrelevant. The first is the beginning of abuse and the tenth evidences the habit of abuse.

***Arguments in favour of Ordinance making power:***—It is also worth to note that whether ordinance making power can be so exercised as to make the country an ordinance raj. An eminent academician Ms. Anupama Goel<sup>3</sup> expressed some important views on this point. These views may be summarized as under:

Due to the unique history of India, Constitutional and legal developments have been widely influenced by many factors. Vast and varied experiences, ups and downs of different eras bashed by invasions and colonization may have made us over conscious and careful that we tend to pre-empt and prevent every untoward incident. Presumably, with this thought preview, the makers of the Indian Constitution envisaged the power to legislate with the Executive head of the State.

The first glimpse of the provision regarding the legislative power of the Executive given under Article 123 of the Constitution of India, reminds of the similar power vested in the Governor General in

British India conferred under the Government of India Act, 1915 and the Government of India Act, 1935. The exercise of such a plenary power by a single person on his or her "individual" judgment sounds dictatorial or colonial, but it has been retained and incorporated in the Constitution of independent India after due deliberations and discussions in the Constituent Assembly and with a safeguard that this Constitutional power, like most others vested in the Executive head is exercisable only on the aid and advice of the Council of Ministers which consists of and is answerable to the people of India through their representatives.

Under Article 123 which finds mention in Chapter III of Part IV of the Constitution, the legislative powers are conferred on the President for the exercise in extraordinary situation. Power to promulgate ordinance is an incident of the division of sovereign functions of the Union and "a matter of high policy". If the President is satisfied that the circumstances exist which render it necessary for him to take immediate action he is under no bar or prohibition to act on advice of its Council of Ministers and to issue an ordinance. Article 123 is incorporated as guidance and not as a condition of the exercise of power. Under Article 123, power to promulgate ordinance is conditioned by the presence of the following three circumstances:

1. Recess of Parliament
2. Legislative competence
3. Subjective satisfaction

***Recess of Parliament:*** The mechanics of the President's legislative power was devised in order to take care of urgent situations, which cannot cope up with delay. Under the Constitution, Parliament is the sole repository of legislative powers of the Union, but only with a view to meet extraordinary situations demanding immediate

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enactment of laws when Parliament is not in session, this emergency power has been conferred on the President and the Governor. In *Maru Ram v. Union of India*<sup>4</sup> the Supreme Court has opined :

“It is fundamental to the Westminster system that the Cabinet rules and the Queen reigns....”

Constitutionally, the Governor is but a shorthand expression for the State Government and the President is an abbreviation for the Central Government. The legislative power is conferred ex necessitate, on the Executive, when the legislative power of both the Houses of Parliament is not exercisable and the emergent situation cannot brook any delay. As a safeguard, and to acknowledge the supremacy of Parliament, it is provided that every ordinance promulgated by the President must be placed before the Legislature and it would 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 Houses, upon the passing of the said resolution and/or withdrawal thereof by the President/Governor at any time.

Article 85 (Article 174 deals with the Governor) enjoins that the Legislature shall meet at least twice a year and also that six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. Since an ordinance made by the President/Governor ceases to operate at the expiration of six weeks from the reassembly of the Legislature, it is obvious that the maximum life of an ordinance cannot exceed seven-and-a-half months unless it is replaced by an Act of the Legislature or disapproved by the resolution of the Legislature before the expiry of that period or withdrawn by the President/Governor.

**Legislative competence** :—Ordinance issued by the President under Article 123 is nothing but “law” as defined under Article 13 of the Constitution of India. Whether the exercise of legislative power by Parliament or the President, that is to say, whether it is an enactment by Parliament or an ordinance issued by the President, all limitations on the exercise of such power continues to govern as the ordinance-making power of the President is coextensive with the legislative competence of Parliament, which is set out in Chapter I of Part XI of the Constitution of India. The power is also circumscribed by the limitations under Articles 13(1) and 13(2) and the basic structure of the Constitution.

Legislative power of the Executive has been conferred by the Constitution-makers for a necessary purpose and it is hedged in by limitations and conditions similar to that of the Central and State Legislatures. There is otherwise no qualitative difference between an ordinance issued by the President and an Act passed by Parliament. Every ordinance has to be ultimately tested and scrutinised on the touchstone of Constitutional requirements and criteria before becoming a “complete and proper law”.

**Subjective satisfaction** :—The word “satisfied” under Article 123 denotes “subjective satisfaction” of the President that extraordinary circumstances exist which renders it necessary to take immediate action. Existence of such circumstances and the necessity of immediate action make this satisfaction “composite”.

Issuance of ordinance without there being unusual and exceptional circumstances makes this satisfaction incomplete and improper. The existence of circumstances and the need to promulgate an ordinance must satisfy the reason of a reasonable person.

The legislative power to issue an ordinance being conditional, the question as regards the

4. (1981) 1 SCC 107 at 146-47, para 61

existence of circumstances which compelled the issuance of ordinance is justiciable and it is open to judicial review whether the power was exercised on the basis of relevant circumstances which establish the necessity to take immediate action or whether it was exercised for a collateral purpose.

Like any other Constitutional power, the exercise of ordinance-making power is also based on the aid and advice of the Council of Ministers. The President and the Governor be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers having a narrow area of power. The two highest dignitaries in our Constitutional scheme must act not on their own judgment, but in accordance with the aid and advice of the Ministers.

*Vide* the Constitution (Thirty-fifth Amendment) Act, 1975, Article 123(4) was inserted making it beyond judicial review. It was, however, deleted by the Constitution (Forty-fourth Amendment) Act, 1978. Parliament, thus, did not consider it safe or proper to entrust untrammelled powers to the Executive to issue ordinances.

The force of the contention that the question whether the preconditions of the exercise of the power conferred under Article 123 are satisfied or not cannot be regarded as “political question” and kept beyond judicial review. The position and powers of the Indian President are different. The faith and confidence posed in the President has been sustained and proved for well over half a century during which approx. 580 ordinances were promulgated by the President and not even a single instance has come to light regarding usurpation or excess of power being used by the President. Judicial review of the President’s satisfaction regarding its necessity to issue an ordinance is not totally excluded. The compelling circumstances, their urgency

and conjunction to the content and substance of the ordinance can all be reviewable, except motive or propriety of the President’s satisfaction as utmost faith and reliability has been contemplated by our Constitution makers.

**Conclusion :—**This Article 123 is intended to enable the President to promulgate Ordinance during the recess of Parliament. The President’s power is no higher and no lower than that of the law making power of the Parliament. The satisfaction of the President must be as to the existence of circumstances which render it necessary for him to take immediate action and such satisfaction has to be on the advice of the Cabinet. Undermentioned decisions support these propositions:

- (i) *Cooper v. Union of India*<sup>5</sup>
- (ii) *State of Rajasthan v. Union of India*<sup>6</sup>
- (iii) *A.K. Roy v. Union of India*<sup>7</sup>
- (iv) *Nagaraj v. State of Andhra Pradesh*<sup>8</sup>

The sanctity and credibility of laws and the institutions mainly depend upon the person and his perception. The same power, which has never been misused by the Central Executive, has flagrantly been misused by the State Executive for many years against which the Supreme Court of India has taken cognizance of. In the State of Bihar, the Governor promulgated 256 Ordinances between 1967 and 1989. All these Ordinances were kept alive for periods ranging between 1 to 14 years by re-promulgating from time to time. The exercise of making mass re-promulgation of ordinances on the prorogation of the session of the State Legislature continued unabated and was done methodologically and with a

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5. AIR 1970 SC 564

6. AIR 1977 SC 1361

7. AIR 1982 SC 710

8. AIR 1985 SC 551

sense of deliberateness. The Supreme Court took sharp notice of it and held that:

“[I]t would be a colourable exercise of power on the part of the Executive to continue an ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of re-promulgation. It is settled law that a Constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a Constitutional provision inhibiting the Constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the Constitutional provision.”

“Such a stratagem would be repugnant to the Constitutional scheme, as it would enable the Executive to transgress its Constitutional limitation....” “There must not be ordinance raj in the country.”

According to the Constitutional provisions, the Executive is always answerable to the Legislature and if there is any misuse or abuse of the legislative power by the Executive, the Legislature can always pass a resolution disapproving the ordinance or can pass a vote of no confidence in the Executive. There is in the theory of Constitutional law a complete control of the Legislature over the Executive. The safeguard

against misuse or abuse of power by the Executive would dwindle in efficacy and value accordingly if the legislative control over the Executive diminishes and the Executive begins to dominate the Legislature. The Supreme Court has rightly pointed out that

“...‘The Constitution has therefore provided safety-valves to meet extraordinary situations. They have an imperious garb and a repressive content but they are designed to save, not destroy, democracy. The fault, if any, is not in making of the Constitution but in the working of it.’ ”

Therefore, impervious use of any power creates despotism which tends to thwart basic human decency, dignity, discipline and rule of law. Ordinance-making power, a rare and unique power under the Constitution of India, essentially to meet urgent situations should only be used conscientiously and diligently only in emergent circumstances where there is no other legislative alternative.

It is clear from the above analysis that the legislative power of making ordinances is being misused at times by the Executive. This is by no means a healthy trend. It should be kept in line with the Doctrine of Separation of Powers, which is a basic feature of the Constitution of India and while issuing ordinances, the Executive is not supposed to usurp the function of the Legislature.

## LAW OF PLEA BARGAINING IN INDIA – AN OVER VIEW

By

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### *Abstract*

Indian Criminal Justice System has been ineffective in providing speedy and economical justice. Because Courts are fully

burdened with astronomical cases, and the trial life span is inordinately long and the expenditure is very high. Subsequently majority of cases are arising from criminal jurisdiction and the rate of conviction is very