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# Ordinance-Making Power: Constitutional Limits and Judicial Oversight

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**Abstract : Under Article 123 and 213 of the Constitution of India, the President has the power to make an ordinance when the legislature is not in session. The power was provided for as a contingency measure, but it has been used as a regular tool and raises issues of separation of powers and dominance of the legislature. In this paper, the authors explore the limitations imposed by the Constitution of India on the ordinance making powers and how they have been supervised by the judiciary. Through doctrinal research, the authors analyze the constitutional text, Constituent Assembly debates and key rulings beginning with A.K Roy (1982) and ending with Krishna Kumar Singh (2017). The authors find that the courts have shifted from the deference to the executive satisfaction to a stronger scrutiny of the process especially the practice of re-promulgation, while the review of the necessity of an ordinance remains limited. The authors identify the gaps that remain and offer reforms that can be implemented without changing the Constitution.**

**Keywords: Ordinance; Article 123; Article 213; Separation of Powers; Re-promulgation; Judicial Review; Delegated Legislation**

## Introduction

In a parliamentary democracy, the power to legislate rests with the elected legislature. The Constitution of India allows for the circumstance where a need for legislation arises when the legislature is not in session, and it provides for the President, and Governor in a state, to legislate by ordinance. An ordinance carries the same weight and effect as a piece of legislation enacted by the legislature, but it is issued by the executive, without debate, and it is supposed to be temporary (Articles 123 and 213).

Dr. B.R. Ambedkar explained the inclusion of the provision in the Constituent Assembly saying that there can be situations requiring legislation even when the legislature is not able to convene, and that this is the reason why the power was included in the Constitution with certain conditions. These include the executive being satisfied with the situation and the necessity of immediate action, the ordinance must be laid before the legislature, and it must lapse after some time if it does not get approval (Constituent Assembly Debates, 1949). The power of ordinance making was introduced into the Constitution of India following the section 42 of the Government of India Act 1935 and before that, it was common in the colonies, so the history of this provision is also the story of convenience of the executive.

The focus of the paper is the distance between the purpose of the power and the way it is employed in practice. Ordinances have been made on matters of crucial importance even right after the legislature adjourned and some ordinances have been promulgated repeatedly to avoid legislative debate. Such practices challenge the principle that the legislature, not the executive, legislates. The courts have been asked to adjudicate on how they would police the power of ordinance making. In this paper, the authors raise three questions. What are the limitations imposed on the power of ordinance making by the text of the Constitution? How has the judiciary interpreted and enforced these limitations? What reforms are necessary to bring practice in line with constitutional design?

## Literature Review

There are two strands in the literature on ordinance making. First, constitutional scholars provide commentaries on the meaning of the power and secondly, the literature exists on the use of ordinance


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making power in practice. Standard commentaries treat the power as an extraordinary one that is an extension of the executive power, subject to strict interpretation, and the limitations imposed in the Constitution (Seervai, 1993; Jain, 2018). In particular, it is noted that the ordinance making power is co-extensive with the legislative power of the parliament and cannot be employed where the parliament cannot legislate, in particular, to amend the Constitution.

The history of the provision explains the intentions of the framers who accepted ordinance making power reluctantly. They accepted it as a necessary compromise due to the situation in the country and several members pointed out that the provision could be abused. It has been shown that the safeguards of laying and lapse of the ordinances were introduced to respond to that concern (Constituent Assembly Debates, 1949). The point is that the power was not intended as an alternative route for legislation.

The literature on the judicial review of the executive can provide useful background for analyzing the cases on ordinance making power. Sathe (2002) explains the growth of judicial review in India and the growing readiness of the Supreme Court to scrutinize executive satisfaction even in the context of Proclamation under Article 356 of the Constitution. In Bommai v. Union of India (1994) and Rameshwar Prasad v. Union of India (2006) the Court ruled that the executive satisfaction, although it is subjective in form, can be subjected to judicial review in terms of mala fides or the absence of relevant material. This reasoning can serve as an analogy for reviewing ordinances, which also are based on the satisfaction of the executive.

The case law on ordinance making started with early cases on the status of ordinances as laws, continued through A.K. Roy v. Union of India (1982), T. Venkata Reddy v. State of Andhra Pradesh (1985) and D. C. Wadhwa v. State of Bihar (1987) and ended with a seven-judge ruling in Krishna Kumar Singh v. State of Bihar (2017). Commentaries on these cases generally praise the condemnation of re-promulgation but note that the Court did not adopt any test for the necessity of an ordinance and left the issue of the effect of lapsed ordinances open (Jain, 2018).

From this body of literature, three gaps become apparent. First, the relationship between the doctrine of separation of powers and ordinance making power has not been fully explained. Second, there is little analysis on comparing the judicial review of ordinances with the judicial review of other executive satisfactions. Third, the proposals for reform of the system of ordinance making tend to be quite general and assume that constitutional amendments are necessary. This paper responds by connecting the analysis to reforms that can be adopted without changing the Constitution.

## Research Methodology

The study is doctrinal. The author relied on the primary sources, including the text of the Constitution, Constituent Assembly Debates and judgments of the Supreme Court of India, and the secondary sources such as commentaries and monographs. The selected decisions were directly related to the ordinance making power, and the author analyzed them for ratio decidendi and not just the result. The comparative methodology is used here: the cases are analyzed in comparison with each other and with the approach of the Court to other forms of executive satisfaction. No empirical data were collected. The position of the law in this paper is current at the time of writing, and official legislative statistics on the number of ordinances should be obtained when this paper is finalized.

## Constitutional Framework

Under Article 123 of the Constitution of India, the President can promulgate an ordinance if the Parliament is not in session and the President is satisfied that there are circumstances which require immediate action. Under Article 213 of the same Constitution, the Governor can issue an ordinance if the State legislature is not in session and the Governor is satisfied that immediate action is necessary. An ordinance has the same force and effect as the Act of the legislature, subject to the same restrictions. The ordinance must be laid before the legislature upon resuming, and it lapses six weeks after resumption, or earlier if a disapproval resolution is adopted. An ordinance is void to the extent it contravenes the fundamental rights or exceeds the legislative competence of the legislature, and therefore it cannot be used for amending the Constitution. The provisions of the Constitution on the power of the President and the Governor to issue ordinances are compared in Table 1 below and the life cycle of the ordinance under Article 123 is presented in Figure 1.

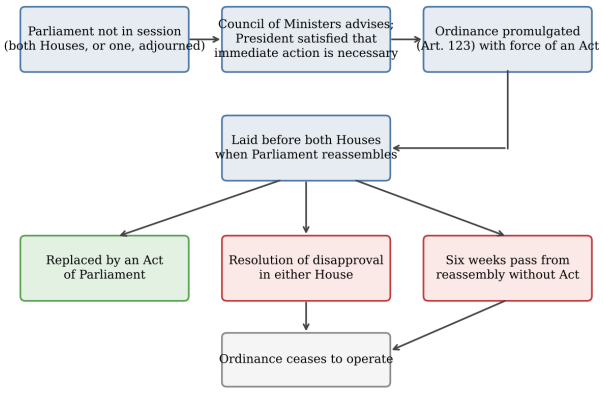
**Table 1. Comparison of the ordinance making powers under Articles 123 and 213**


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| Feature | Article 123 (President) | Article 213 (Governor) |
|---|---|---|
| Condition | Parliament not in session; satisfaction that immediate action is necessary | State legislature (or either House) not in session; same satisfaction |
| Subject matter | Matters on which Parliament can legislate | Matters on which the State legislature can legislate |
| Duration | Ceases six weeks after reassembly, or on disapproval | Ceases six weeks after reassembly, or on disapproval |
| Withdrawal | Can be withdrawn at any time by the President | Can be withdrawn at any time by the Governor |
| Special restriction | Cannot amend the Constitution | Certain matters require previous instructions of the President |

**Figure 1. Life Cycle of the Ordinance under Article 123.**




The textual limitations, therefore, are of four types: a precondition (the legislature is not in session and immediate action is required), a limitation by subject matter (the ordinance is to be within legislative competence and the rights guaranteed by Part III of the Constitution), a procedural obligation (the ordinance must be laid before the legislature) and a limitation by duration (the ordinance expires after a certain period of time). In addition to this, the power is in substance exercised on the advice of the Council of Ministers. In Shamsher Singh v. State of Punjab (1974) the Court held that the Constitution Heads act on the advice of the Council of Ministers, and therefore the ordinance making power is an executive power of the government.

There was another limitation in the text of the Constitution. The Constitution (Thirty-eighth Amendment) Act 1975 declared that the satisfaction of the President and the Governor is final and is not to be questioned in any court. The Constitution (Forty-fourth Amendment) Act 1978 removed this clause, and it is generally understood as a decision to allow for judicial review.

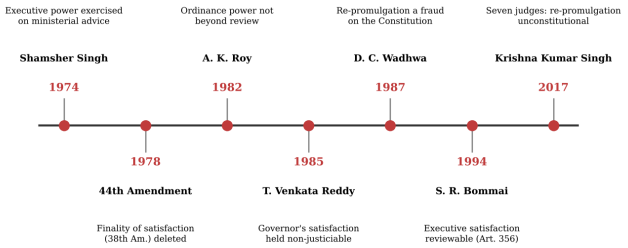
## Judicial Approach to the Ordinance Making Power

**Leading cases that outline the judicial approach are listed in Table 2 and placed in chronological order in Figure 2.**

**Table 2. Leading Cases on the Ordinance Power**

| Case | Court | Principal holding |
|---|---|---|
| Shamsher Singh v. State of Punjab (1974) 2 SCC 831 | Supreme Court (7 judges) | Constitutional heads act on the advice of the Council of Ministers; ordinance power is the government's power |
| A. K. Roy v. Union of India (1982) 1 SCC 271 | Supreme Court (5 judges) | Ordinance-making is not immune from judicial review; the Court declined to interfere on the facts |
| T. Venkata Reddy v. State of A.P. (1985) 3 SCC 198 | Supreme Court (5 judges) | Ordinance is legislation by the executive; Governor's satisfaction treated as non-justiciable |
| D. C. Wadhwa v. State of Bihar (1987) 1 SCC 378 | Supreme Court (5 judges) | Repeated re-promulgation without legislative approval is a fraud on the Constitution |
| Krishna Kumar Singh v. State of Bihar (2017) 3 SCC 1 | Supreme Court (7 judges) | Re-promulgation is unconstitutional; laying before the legislature is mandatory; satisfaction is open to limited review |

**Figure 2. Chronological Order of Developments in the Law on Ordinances.**





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### Deference and the Question of Satisfaction

The first question is whether the satisfaction of the President and Governor, that immediate action is necessary, can be examined by a court. In T. Venkata Reddy the Court treated an ordinance as an exercise of legislative power by the executive and was unwilling to examine the satisfaction of the Governor. In A. K. Roy the Court was ready to accept that the power of issuing an ordinance is not beyond judicial scrutiny, but declined to interfere in the case of the National Security Ordinance. The removal of the finality clause by the Forty-Fourth Amendment and the later decisions on satisfaction under Article 356 support the view that satisfaction is to be reviewed by the courts. In Krishna Kumar Singh the Court confirmed that the power of ordinance making is not beyond judicial review, so the current position is one of limited review of the satisfaction for mala fides, colorable exercise and lack of relevant material.

### Re-promulgation as a Fraud on the Constitution

The most important limitation on the power of ordinance making is the prohibition of repeated issuance of the same ordinance. In D. C. Wadhwa v. State of Bihar the Court considered a State where ordinances have been repeatedly promulgated, some ordinances existed for many years without being laid before the legislature. The Court decided that such a practice is against the constitutional scheme and a colorable exercise of power, and that it was a fraud on the Constitution. In Krishna Kumar Singh v. State of Bihar a seven-judge bench reconsidered the matter and decided that the repeated issuance of the same ordinance is unconstitutional, that the laying of an ordinance before the legislature is mandatory, and that the satisfaction of the executive is not wholly non-reviewable. The Court also addressed the issue of the effect of a lapsed ordinance on rights created under it and stated that this question depends on the facts of the case.

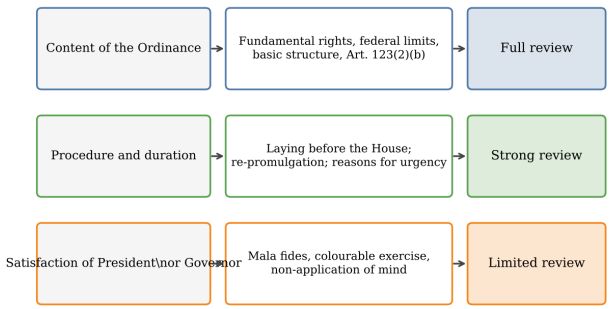
### Substantive Limitations

Apart from procedure, an ordinance is subject to all the substantive limitations of the ordinary legislation. It cannot violate the fundamental rights or exceed the legislative competence of the legislature. The Constitution cannot be amended by the ordinance, since the power to amend lies with the Parliament under Article 368 and, as the Court ruled in Kesavananda Bharati v. State of Kerala (1973), the basic structure of the Constitution cannot be amended by the Parliament. A fortiori, the executive cannot amend the Constitution by an ordinance. Therefore, the review of the content of an ordinance is just as thorough as the review of a statute (Figure 3, Table 3).

**Table 3. Grounds and intensity of judicial review of ordinances**

| Ground | Examples | Intensity of review |
|---|---|---|
| Content | Violation of fundamental rights; lack of legislative competence; breach of basic structure | Full |
| Procedure | Failure to lay before the House; repeated re-promulgation; promulgation while the House is in session | Strong |
| Satisfaction of necessity | Mala fides; colourable exercise; no relevant material or non-application of mind | Limited |
| Effect after lapse | Fate of rights and liabilities created while the ordinance was in force | Decided case by case |

**Figure 3. Grounds of judicial review of ordinances and the intensity of review applied.**




### Analysis

The case law reveals three trends. First, the courts have rejected gradually the idea that the power of ordinance making is purely political. Early cases treated the satisfaction of the executive as non-reviewable, but it became impossible after the removal of the finality clause and the subsequent cases on Article 356. Second, the courts have focused on procedure, where their intervention is the easiest to justify. The prohibition of the re-promulgation protects the constitutional requirement of the temporary nature of the ordinance, and the requirement of laying protects the right of the


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legislature to decide. Third, the courts have been cautious about the necessity of an ordinance, a question that requires political judgment and facts which might be unknown to the Court.

The caution is understandable, but it leaves an important gap. The constitutional requirement of immediate necessity is the only one that prevents the use of ordinances as a convenient means of circumvention of debate. If the requirement is hardly ever met, then the safeguard is formal. The evidence from practice such as the ordinances issued shortly after the session has ended on the matters which could have waited, and the ordinances that were later replaced by Acts, indicates that the requirement is hardly taken seriously. The repeated use of ordinances on controversial matters, followed by quick passage through the legislature, reinforces the suspicion that ordinances can preempt discussion. Instead of substituting its judgment of necessity, the court can ask the executive to state the reasons that made the immediate action necessary and verify them.

The current position on the lapsed ordinances is also unclear. If an ordinance is not approved, then the transactions performed under the ordinance create rights and liabilities that cannot easily be undone. Thus, Krishna Kumar Singh neither framed any general principle nor gave an outright decision in view of the circumstances of the case. The absence of a general rule makes the situation uncertain for the citizenry which has based itself on the ordinance as well as encourages the executive branch to take recourse to a temporary measure which has permanent consequences.

Finally, the role of the legislature itself cannot be ignored. The entire constitutional design relies upon the disapproval by the legislature of those ordinances which are either unnecessary or improper but in practice such a disapproval is hardly ever possible due to the numerical strength of the government in Parliament. As a result, procedural rules and committee scrutiny may carry more weight than judicial review. It is a normal requirement that all the ordinances must mandatorily be referred to the concerned standing committees.

**Table 4. Identified gaps and proposed responses**

| Gap | Proposed response | Route |
|---|---|---|
| No record of reasons for urgency | Statement of reasons laid with each ordinance | Rules of procedure; convention |
| Repeated re-promulgation | Statutory bar on re-promulgation, reinforcing Krishna Kumar Singh | Ordinary statute |
| Weak review of necessity | Review for relevant, genuine and recorded reasons | Judicial practice |
| Fate of lapsed ordinance | Statutory rule on saving of acts done under a lapsed ordinance | Ordinary statute |
| Limited legislative scrutiny | Referral to standing committee within a fixed time | Rules of both Houses |

## Findings

The present study reveals that there is no ambiguity regarding the constitutional limits on the power of making an ordinance in terms of both its text and structure. It is an extraordinary power, conditional on the absence of legislature, limited by the same constraints as an ordinary legislation and temporary in nature. The judicial enforcement of the limits has become stricter in terms of both content and procedure. While the prohibition of re-promulgation is the greatest achievement through Wadhwa and Krishna Kumar Singh, the necessity review is still inadequate and the legal status of a lapsed ordinance remains unresolved. The practice demonstrates that the safeguards of laying and disapproval are ineffective since they depend upon the same executive which passes the ordinance.

## Suggestions

There are four suggestions that flow from the above analysis. Firstly, the executive must issue a statement of reasons for urgency which must accompany the ordinance and be laid before the legislature so that the courts and the legislature get a record to examine. Secondly, there must be a statute from Parliament to prohibit re-promulgation as well as fix the fate of acts done under a lapsed ordinance. The former would place on a firmer ground the principle set out in Krishna Kumar Singh. Thirdly, the Rules of both the Houses must refer each ordinance to standing committees within a specified period of time. Lastly, the courts must frame a test of relevance and genuineness in respect of the executive's stated reasons without impugning the substance of the ordinance. None of the suggested changes requires any constitutional amendment.


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## Conclusion

The power of ordinance-making is nothing but a trade-off between the demands of urgency and deliberation. The Constitution has reconciled the two by giving the executive a narrow, temporary power which is subject to legislative control. The judicial decisions of the Supreme Court have strengthened such control in respect of prohibition of re-promulgation and the existence of judicial review of ordinance-making powers but the necessity review remains weak while several other aspects of ordinance-making remain unclear. Through the use of recorded reasons, statute, committee scrutiny and judicial review, the practice can be brought close to the constitutional design. Thus, the power of ordinance-making can be preserved as a real emergency power and the priority of the legislature in making laws can be ensured.

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