Power of the Executive to Promulgate Ordinances…Is it Actually Needed?

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In 1947, after a tremendously long struggle for independence, India, our motherland, finally realized her dream of achieving independence from her British masters. Over two years after the fact, when the recently printed Republic gave itself its Constitution, it included Articles 123 and 213, giving a recharged rent of life to the very Ordinance-production control that had been seriously censured years before just like an underhanded weapon in the hands of colonial rulers for the suppression of the locals. Furthermore, today, the septuagenarian nation that we are, that prides itself on its dedication to democracy and the rule of law, we find that executive Ordinances have turned into the favoured method for presenting legislative enactments; that progressive governments from each shade of political opinion have made liberal utilization of this instrument; even the most standard and commonplace statutes are regularly being introduced by issuing Ordinances, after which the law-making body is given a fait accompli; that undoubtedly, Ordinances issued on the guidance of the Ministers, instead of Bills presented and discussed in Parliament or State Assemblies, has become normal. Despite this, I believe that the power of the Executive to promulgate ordinances should be amended, so that the Executive's actions can be kept in check by the legislature and the judiciary. In this essay, I have made a note of the various instances from where the need to amend the power of the Executive arises (certain cases which justify the need for amending the Executive's power of promulgating ordinances).

In undivided India (now Bangladesh, India and Pakistan, in alphabetical order) the Governor General was empowered under section 72 of the Government of India Act, 1915 and later section 42 of the Government of India Act, 1935, to issue Ordinances as an emergency measure on those subjects which fell within the legislative powers of the fledgling colonial Legislature. Such power was to be exercised only when the Federal Legislature was not in session, and could remain in force for not more than six months, though extendable in certain situations for another six months. However, the main issue was with the Governor-General's power to issue Ordinances under section 42, which transformed under our 1950 Constitution into Article 123 at the Federal or National level, and Article 213 at the level of States, or territories. Tragically, despite being strictly against the practice of this semi authoritative power by Britain's Governor-General, the founders of our Nation joyfully exchanged sides once they were established in power, and between 15th August, 1947 and the encircling of our Constitution on 26th January 1950, Parliament was bypassed no less than ninety-nine times by issuing Ordinances under the extremely same section 42 of the 1935 Act. Maybe as a consequence of this liberal utilization of enactment by the official, the Constituent Assembly, when it wrangled about the requirement for Ordinance-production powers, ignored every one of the naysayers, and demanded that such arrangements were much

required and were in any occasion supported in by supervening control by Parliament and the State Legislatures. Also, the deathblow was conveyed by Dr. B. R. Ambedkar, who asked why anyone would question the thought processes of future governments or lawmakers, and demanded that such powers would be utilized just as a part of impossible crises.

Going simply by the dialect of Article 123[1] (mainly the same for current use as that of Article 213, which applies to the States), maybe Ambedkar's certainty was legitimized. Similarly as with section 42 of the 1935 Act, on which it is based, Article 123 must be conjured when the Houses of Parliament are not in session, and it requires the President to be fulfilled that conditions exist which render it vital for him to make prompt move to enact a law which can't anticipate the re-gathering of Parliament. Such law made by Presidential pronouncement must be laid before both Houses of Parliament promptly upon their reassembly, and should cease to work six weeks after reassembly, unless not approved by resolutions go by both Houses before that date. The Article makes it clear that while an Ordinance will have an indistinguishable compel and impact from an Act of Parliament, on the off chance that it makes any arrangement which Parliament is not skilled to order, then such arrangement might be void. However, this soon came to be misused by the successive administrators, who started using this power of issuing Ordinances as an easy and readymade solution in order to avoid legislative burdens.

In a report published by the Lok Sabha, the House of the People or Lower House of Parliament, in November 2015[1], it was revealed that in the 64 years from 26th January 1950 till 31st December 2014, the President of India promulgated 679 Ordinances, more than 10 per year on an average. However since averages can be misleading, and tending to conceal facts that as many as 34 Presidential Ordinances were issued in 1993, 32 in 1996, and 31 in 1997. Here, crucial questions arise as to how urgent were the issues/situations that the President faced such that he could not await the reassembly of Parliament 679 times in 64 years, or that 34 laws needed to be urgently enacted without awaiting the reassembly of Parliament in 1993? Both of these questions haven't been answered quite clearly. Time and again the Supreme Court has sought to restore the sanctity of legislative process by cautioning against misuse of Ordinances, but each time it has ended up in homilies and advice, which unfortunately are not seen as binding by the next Bench that deals with this issue.

The Lok Sabha Report of November 2015 highlights the anguish of several Speakers of the House in the first three decades of the Republic, who strongly criticized the bypassing of Parliament in this manner, but expressed their inability to do anything about it due to Parliamentary convention. However, the Supreme Court of India, which was not bound by any constraints of convention, remained a silent spectator to this pernicious practice. Instead of interpreting the Constitutional provisions on the anvil of a free nation governed by the rule of law, the Supreme Court was persuaded to accept judgements handed down by the Privy

[1]http://164.100.47.192/loksabha/writereaddata/Updates/EventLSS_635907162497207518_presidential_address_english.pdf

Council in the cases of Bhagat Singh v. King Emperor[2], Raja Bahadur Kamakhya Narain Singh v. Commissioner of Income Tax[3], and Lakshmidhar Misra v. Rangalal, AIR 1950, where the Governor General's satisfaction on the need for an Ordinance was held to be beyond judicial scrutiny. This was partially rectified in the case of A.K. Roy v. Union of India[4], the Supreme Court noted that clause (4) of Articles 123/213, which had been inserted by the Constitution (Thirty-Eighth) Amendment Act, 1975, had been deleted by the Constitution (Forty-fourth Amendment) Act, 1978, thus strongly suggesting that Parliament itself identified the requirement of judicial review of the President's satisfaction. But even though the Constitution Bench in A.K. Roy (supra), held that it could be contested that the Forty-fourth Amendment left no doubt that judicial review is not excluded in respect of the President's satisfaction, yet, the Court left that question undecided. Later on, in the case of S.R. Bommai v. Union of India,[5], a 9-judge Bench of the Supreme Court held that judicial review is a part of the basic structure of the Constitution, and consequently found that the satisfaction of the President prior to issuing a proclamation to suspend the State Legislature under Article 356, was open for discussion before the higher courts, and this logic was expanded in the case of Rameshwar Prasad v. Union of India[6]. In Indra Sawhney v. Union of India [7] the Supreme Court held that judicial review could, in a fit case, extend even to examining the underlying rationale and motivation for passing an Act of Legislature, and especially for questioning the existence of a state of affairs which the Legislative enactment declares to be in existence.

Another territory in which our Supreme Court has been inside and out excessively liberal in its elucidation of Ordinances is in allowing the Executive to proclaim Ordinances with unlimited retrospectivity. While it is alright for the elected legislature to make a law which works reflectively in specific conditions, it seems ludicrous to peruse such a power into the restricted legislative function bestowed upon the Executive for meeting new emergencies until the following session of the legislature. Considering that an Ordinance must be declared when the legislature is not in session, and stops existing six weeks after the session recommences, it is ridiculous to permit the Executive to make a law that extends into the past, with the end goal that it spans numerous periods when the legislature was in session, and consequently when, the Executive had no energy to make an Ordinance. However, by translating (wrongly, in my view) the words "same force and effect as an Act" on the premise of a roundabout and imperfect reasoning, the Supreme Court has held that an Ordinance can be retrospective in the same way as an Act of Parliament or a State Legislature. Perhaps the only aspect on which the Supreme Court held the executive within the bounds that the framers of the Constitution intended, is in the matter of re-promulgation of Ordinances.

The lesson which Constitutional draftsmen might draw from the Indian experience is to avoid conferring legislative powers upon the executive, and, if such powers are unavoidable, to

[2] AIR 1931 PC 111; 58 IA 169
[3] AIR 1943 PC 153; 70 IA 180
[4] (1982) 1 SCC 271
[5] (1994) 3 SCC 1
[6] (2006) 2 SCC 1
[7] (2000) 1 SCC 168

make any such enactment strictly time-bound and transitory. Keeping the above instances in mind, I conclude by holding the opinion that the Executive's power to promulgate ordinances must indeed be amended in order to keep the Executive from misusing this power.