BLOGS

Ordinance Making Power of President and Governor: Constitutional Law

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Imagine Parliament has just gone into recess, and suddenly the country faces an urgent crisis that cannot wait for the next session. Who steps in, and how?

This is exactly the situation the framers of our Constitution anticipated when they gave the President and the Governors ordinances making power. It is one of the most fascinating, and most debated, powers in Indian constitutional law.

In this article, we break down Article 123 and Article 213 of the Constitution in simple language, along with the landmark cases that have shaped how this power is actually used today.

What Exactly Is an Ordinance?

An ordinance is a temporary law issued by the executive, not the legislature, when the legislature is not in session and urgent action is needed.

Once promulgated, an ordinance has the same force and effect as an Act passed by Parliament or a State Legislature. However, it is never meant to be permanent. It survives only for a limited window and must eventually be approved by the legislature to continue.

This power traces its roots to Section 42 of the Government of India Act, 1935, which allowed the Governor General to issue ordinances during a legislative recess. The framers retained this mechanism, but added important safeguards.

Article 123: The President's Ordinance Making Power

Article 123 of the Constitution empowers the President to promulgate ordinances when Parliament, or even just one House of Parliament, is not in session.

Clause (1) states that the President must be satisfied that circumstances exist which render immediate action necessary. In practice, since the President acts on the aid and advice of the Council of Ministers under Article 74, this satisfaction is really the satisfaction of the Union Cabinet.

Illustration: If Parliament is on a scheduled recess and an unexpected economic crisis demands urgent regulatory action, the Union Cabinet can advise the President to promulgate an ordinance addressing the issue, rather than waiting for Parliament to reconvene.

Key Features of Presidential Ordinances

The ordinance making power under Article 123 comes with several important characteristics that are frequently tested in exams.

Co-extensive with Parliament's legislative power. An ordinance can only be issued on subjects that Parliament itself has the competence to legislate on. If Parliament cannot pass a law on a particular subject, the President cannot issue an ordinance on it either.

Subject to fundamental rights. Since Article 13 defines law to include ordinances, any ordinance that violates fundamental rights under Part III can be struck down, exactly like an ordinary statute.

Limited lifespan. Under Clause (2) of Article 123, every ordinance must be laid before both Houses of Parliament once they reassemble. It ceases to operate six weeks after Parliament reassembles, unless both Houses pass a resolution approving it earlier, or disapproving resolutions are passed sooner.

Can be withdrawn anytime. The President can withdraw an ordinance at any point before this expiry, again acting on ministerial advice.

Cannot exceed Parliament's competence. Clause (3) of Article 123 makes clear that if an ordinance contains a provision that Parliament itself could not have validly enacted, that provision is void.

Article 213: The Governor's Ordinance Making Power

At the state level, Article 213 grants a parallel power to the Governor. When the state legislative assembly, or in bicameral states either House, is not in session, the Governor may promulgate ordinances if satisfied that immediate action is necessary.

The structure closely mirrors Article 123. A state ordinance has the same force as an Act of the state legislature, must be laid before the legislature when it reassembles, and lapses six weeks after reassembly unless approved earlier.

However, Article 213 carries an important extra restriction that Article 123 does not.

The Special Restriction Under Article 213

The proviso to Article 213(1) states that the Governor cannot promulgate certain ordinances without prior instructions from the President. This restriction applies in three specific situations.

First, where a Bill containing the same provisions would have required the President's prior sanction before introduction in the legislature. Second, where the Governor would have felt it necessary to reserve a similar Bill for the President's consideration. Third, where an Act of the state legislature containing similar provisions would have been invalid without the President's prior assent.

Illustration: If a proposed ordinance would affect the powers of the High Court in a manner that would ordinarily require presidential sanction before introduction as a Bill, the Governor cannot issue such an ordinance without first obtaining instructions from the President.

This proviso essentially extends central oversight over certain sensitive categories of state ordinances, reflecting India's quasi federal structure.

Landmark Cases That Shaped This Power

Case law has played a major role in defining the real limits of ordinance making power, since the constitutional text alone leaves several questions open.

R.C. Cooper v Union of India (1970) arose after the President promulgated an ordinance to nationalise fourteen major banks. The Supreme Court held that the President's satisfaction under Article 123 is not entirely beyond judicial review, and can be examined if it is shown to be based on irrelevant grounds. The Court ultimately struck down the ordinance for failing to provide adequate compensation to shareholders, though the challenge succeeded on those substantive grounds rather than on the ordinance route itself.

A.K. Roy v Union of India (1982) confirmed that the President's ordinance making power is indeed subject to judicial review, though the scope of that review remains narrow. The Court held that this power cannot be treated as immune from constitutional scrutiny simply because it originates from the executive rather than the legislature.

T. Venkata Reddy v State of Andhra Pradesh (1985) held that the motives behind promulgating an ordinance cannot be questioned in court, in the same way that the motives behind ordinary legislative action are generally not open to judicial inquiry. This case drew an important parallel between ordinances and regular laws in terms of how courts approach legislative intent.

D.C. Wadhwa v State of Bihar (1987) remains one of the most cited judgments in this area. Bihar had repeatedly re-promulgated the same ordinances year after year, for over a decade, instead of placing them before the legislature for proper debate and conversion into law. The Supreme Court held that this practice amounted to a fraud on the Constitution, since it allowed the executive to bypass the legislature altogether while enjoying continuous lawmaking power. The Court made clear that repeated re-promulgation without legislative scrutiny defeats the very purpose of Articles 123 and 213.

Krishna Kumar Singh v State of Bihar (2017) is the most recent and authoritative word on this subject. A seven judge Constitution Bench held that unchecked re-promulgation of ordinances is constitutionally impermissible. The majority judgment, authored by Justice D.Y. Chandrachud, held that placing an ordinance before the legislature is a mandatory constitutional obligation, not merely a discretionary or directory one. The Court also clarified that rights and liabilities created under an ordinance do not automatically survive once it lapses, unless a genuine public interest or irreversible situation justifies their continuation. Importantly, the Bench reaffirmed that the President's and the Governor's satisfaction while issuing an ordinance remains open to judicial scrutiny.

Why This Topic Matters Beyond Exams

Ordinance making power sits at an interesting intersection of governance efficiency and democratic accountability.

On one hand, it allows the executive to respond swiftly to emergencies without waiting for a legislative session to be called. On the other hand, if misused through repeated re-promulgation, it risks becoming a tool to bypass genuine parliamentary or assembly debate, something the courts have consistently guarded against.

This is exactly why cases like **D.C. Wadhwa v State of Bihar** and **Krishna Kumar Singh v State of Bihar** remain essential reading, since they show how the judiciary has stepped in to preserve the balance the Constitution intended.

Conclusion

The ordinance making power under Articles 123 and 213 reflects a careful constitutional balance between the need for urgent governance and the importance of legislative accountability.

While the text of these provisions grants wide executive authority, decades of judicial interpretation, from **R.C. Cooper v Union of India** to **Krishna Kumar Singh v State of Bihar**, have ensured that this power remains an exception for genuine emergencies, not a routine substitute for the ordinary law making process.