

Ordinance Making Power of the President: Article 123

123. Power of President to promulgate Ordinances during recess of Parliament.—

(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(b) may be withdrawn at any time by the President.

Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

- **Article 123** talks about the presidential powers to promulgate ordinances. An ordinance can be promulgated if:
 - a) either of the House of the Parliament is in session;
 - b) And the President feels a need for immediate action.
- The ordinance which is promulgated by the President will have the same effect as that of an act or law of the Parliament.
- **The essential conditions to be met by an ordinance are:**
 - It shall be presented before both the Houses of Parliament for passing when it comes to the session;
 - The ordinance shall cease to **operate six weeks** after the date of reassembling of the parliament; Where the Houses of Parliament are summoned to reassemble

on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

- The ordinance may also expire if the resolutions disapproving it are passed by both the Houses of Parliament;
- Therefore every Ordinance issued by the president during the Recess of Parliament must be laid before both the houses of Parliament when it reassembles. If the ordinance is approved by both the houses it becomes an act and if Parliament takes no action at all, ordinance ceases to operate on expiry of **6 Weeks** from reassembly of parliament.
- It can be withdrawn at any time by the President;
- **The ordinance must be in consonance to the Constitution of India else it shall be declared void.**
- It is to be noted an ordinance made when both the houses are in session is void. Thus the power of the President to legislate by Ordinance is not a parallel power of legislation.
- **Grounds of promulgation** he can make an ordinance only when he is satisfied that the circumstances exist that render it necessary for him to take immediate action.
- In **RC Cooper vs. Union of India 1970** the Supreme Court held that the president's satisfaction can be questioned in a court on the ground of malafide.
- The **38th Constitutional Amendment Act of 1975** made the president's satisfaction final and conclusive and beyond Judicial review but this provision was deleted by the 44th Constitutional Amendment Act 1978
- Ordinance can be retrospective in nature
- Constitutional amendment cannot be done through ordinance
- In **A K Roy versus Union of India** the Supreme Court held that Ordinance would be subject to the test of vagueness, arbitrariness, reasonableness and Public Interest.
- Scope of Ordinance making power is coextensive with that of Legislative powers of parliament. It means that an ordinance can be issued only on those subjects on which Parliament can make laws.

- The ordinance making power of the president is not a discretionary power, and he can promulgate or withdraw an ordinance only on the advice of Council of Ministers headed by the Prime Minister.

- **R G Garg Vs Union of India 1981**
- The power to promulgate ordinances is a power exerciseable only when both houses of Parliament are not in session and it has been conferred *ex necessitates rie* in order to enable the executive to meet and emergent situation. This Power to promulgate an ordinance is coextensive with the power of Parliament to make laws and President cannot issue Ordinance which Parliament cannot enact into law.

Ordinance making power of the Governor, Article 213

213. Power of Governor to promulgate Ordinances during recess of Legislature.—(1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor 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 shall not, without instructions from the President, promulgate any such Ordinance if—
(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature;
or
(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or
(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance—

a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, 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 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; and

(b) may be withdrawn at any time by the Governor.

Explanation.—Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

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

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

- Under Article 213, the Government can issue an ordinance if the circumstances compel him to do so, when either houses of the legislative assembly are not in session. However, there are certain circumstances under which the Governor cannot issue an ordinance. They are:
 - a) If the bill containing the same provision would require previous sanction of president for its introduction in state legislature
 - b) If the ordinance has certain provisions which the Governor would have reserved for the President in case it were a Bill.
 - c) If the State Legislature has an act with similar provisions and the same would be declared invalid without the President's assent.

- In **D C Wadhwa vs. State of Bihar 1987** the Supreme Court ruled that successive re promulgation of Ordinance without any attempt to get the Bill passed by the Assembly would amount to **fraud on constitution** and the ordinance so promulgated is liable to be struck down. It held that the exceptional power of law making through Ordinance cannot be used as a substitute for legislative powers of state legislative assembly. 256 ordinances were promulgated in the state of Bihar and all of them were kept alive by promulgation without being brought before the Legislature. The court held it 'subversion of Democratic process' and 'colorable exercise of power' and held it amounted to fraud on constitution.

Cases on Parliamentary Privileges

PV Narasimha Rao vs State 1998

The scope of protection of immunity available to the members of parliament is quite wide and is not confined only against judicial proceedings but is available to them against all actions and criminal proceedings or anything said or any vote given by them. The object of protection is to enable members to speak their mind in Parliament freely and fearlessly.

In Re Keshav Singh 1965

In the case of conflict between provisions under article 194 and the provisions pertaining to fundamental rights and attempt will have to be made to resolve the set conflicts by adoption of rule of harmonious construction article 194 and 105 are subject to fundamental rights guaranteed under article 21 and 22.