

# Ordinance Making

## Power of the President

### [UPSC Notes]

#### Ordinance Meaning

According to Article 123 of the Constitution, ordinances are the laws that are promulgated by the President of India, which are done with the recommendation of the Union cabinets and become effective in the country. Only when the Parliament is not in session, the ordinance can be enacted and by which the Government of India takes immediate action, which is in the legislative process. In the same manner, only when the Legislative Assembly is not in session the Governor of the state can promulgate an Ordinance.

#### What is Ordinance Making Power?

Ordinance making power is not a legislative provision but an emergency provision. The ordinance can only be promulgated on those subjects on which Parliament is empowered to legislate, that is, Union list or Concurrent list. A Constitutional Amendment can also be done through an ordinance.

The ordinance cannot be issued if both houses are in session, and is subject to Judicial Review.

Ordinance making is an emergency provision that should be avoided in a normal sense, and the maximum life of the Ordinance is 6 months or 6 weeks.

In the last 2 years, the present NDA government has repromulgated four ordinances-

- The Coal Mines (special provisions) Ordinance, 2014.
- The Land Acquisition Ordinance.
- The Negotiable Instruments (Amendment) Ordinance, 2015.
- Enemy Property Ordinance.

#### History of Ordinance Making Power

Ordinances were included in the Constitution of India by the Government of India Act 1935 by which the Governor-General has authority to promulgate ordinances. If there are circumstances that compel the governor general to take immediate action, then only he can exercise this power by Sections 42 and 43 of this Act.

Some members of the Constituent Assembly stressed that the ordinance power of the President is contrary to the morality of the constitution and is extraordinary during the debate regarding the ordinance-making power. To deal with the situation that can occur

without warning when either one or both houses are not in session, this provision was created.

Experts suggest that Ordinance power should be used only during an emergency.

## Ordinance Making Power of the President: Constitutional Provisions

The following are the constitutional provisions of the Ordinance Making Power of the President:

- The ordinance can be retroactive.
- It is considered invalid if the ordinance is issued during a session of parliament.
- To stay a law, the Parliament has to approve the ordinance within 6 weeks of its reassembly.
- The occurrence of Acts and Laws by the ordinance remains in force until its validity expiration.
- The power to issue the ordinance by the President of India is one of the rarest leadership powers in the world.
- It cannot be seen as a substitute for the President's legislative powers.
- Only on matters for which the Parliament is empowered to legislate, Ordinances can be issued.
- Through the ordinance, the fundamental rights of citizens cannot be crossed out.
- If both houses of the Parliament pass a resolution that disapproves of it, then the ordinance order becomes null and void.

## Article 123 of the Indian Constitution

Under Article 123, the ordinances that are promulgated and an Act of the Parliament both have the same force and effect, but every such ordinance-

- a. Shall we lay before the Parliament and shall cease to operate after the six weeks from the reassembly of the Parliament?
- b. The ordinance may be withdrawn by the President at any time.

The Article 123 of the Indian Constitution states that:

- 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.
- An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance –
  - 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, of before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

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

## Limitations of Ordinance Making Power of the President

The following are the limitations of the ordinance making power of the President:

- The President can only promulgate an Ordinance when either of the houses of the Parliament is not in session.
- The ordinance must be passed by the parliament within 6 weeks of the reassembling of the parliament if once an ordinance has been passed.
- Without the conviction of the President that there are circumstances that require immediate action, the President cannot issue the ordinance.
- The President can promulgate and withdraw an ordinance only on the advice of the Council of Ministers headed by the Prime Minister, that is, his power of Ordinance making is not discretionary.

## Difference between Ordinance Making Power of President and Governor

The Ordinance making powers of the President and Governor are:

<b>Ordinance Making Power of President</b>	<b>Ordinance Making Power of Governor</b>
If either Lok Sabha or Rajya Sabha is not in session or if both are not in session, then the President can promulgate the ordinance.	When the Legislative Assembly is not in session, then Governor can promulgate an ordinance. In the case of a bicameral legislature, when both the legislative assembly and legislative council are not in session, then Governor can promulgate an ordinance.
The President can roll out an ordinance only for matters on which Parliament can make laws.	Only on matters on which state legislature can make law, the Governor can roll out an ordinance.
The President ordinance and Parliament Act will have the same effect on policies.	Both the Governor, as well as State, acts, have the same effects on the policies.

The President can withdraw the Ordinance at any time.	The Governor can also withdraw his Ordinance at any time.
The power of the President to promulgate the ordinance is not discretionary.	The power of the Governor to promulgate the ordinance is not discretionary.

## Judicial Safeguards for Ordinance

In the *R.S. Cooper v. Union of India of 1970* case, Supreme Court held that to issue the ordinance, the President's decision could be challenged on the ground that no 'immediate action was required and that primarily to avoid the debate and discussion in legislature, the ordinance was passed.

The Supreme Court held in the *DC Wadhwa v. State of Bihar (1987)* case, that the executive's legislative power to issue ordinances should be used in exceptional circumstances.

The Supreme Court ruled in the *Krishna Kumar Singh v. State of Bihar* case, that the power to issue an Ordinance is not absolute.

## Ordinance Making Power of the President- Justified or Not?

A new clause 4 was added to Article 123 by the 38th Constitutional Amendment Act, according to which, to issue an Ordinance, the satisfaction of the President is final and for any reason cannot be appealed to the court. However, the satisfaction of the President to issue the ordinance becomes subject to Judicial Review means it can be challenged in a court of law if it is based on bad faith, corrupt motives, or has any malaise of intent by the 44th Constitutional Amendment Act.

Only when the President is satisfied that circumstances make it necessary for him to take immediate action then only he can make an ordinance. The Supreme Court held in the Cooper case of 1970, that the satisfaction of the President can be questioned in a court on the ground of malafide. Further, the scope of Judicial Review was expanded by the *S.R. Bommai v. Union of India* case, according to which any action taken by the President without the relevant materials, would be considered to be unfaithfulness.

## Recent Ordinances Issued by the President

To amend the act, adding an arrangement to punish those assaulting doctors or staff of hospitals, the Government of India declared the proclamation of an Ordinance, 'The Epidemic Diseases (Amendment) Ordinance 2020' on 22 April, 2020.

The three central farm laws were first brought through the Ordinance course, which later on was replaced by laws in Parliament. The three farms' laws are-

1. The Farmers Produce Trade and Commerce (Promotion and Facilitation) Ordinance
2. The Farmers (Empowerment and Protection) Agreement on Price Assurance, and

3. Farm Services Ordinance.

