Chapter-V

Powers of the Governor in Enacting Laws and Promulgating Ordinances under the Constitution of India

5.1 Introduction:

The State Executive has temporary law making power in emergent situations under the Constitution of India. And the Governor is the head of the State Executive. So, the ordinance making power confers on him by the Constitution itself. Article 213 (1)\(^1\) itself provides that "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". Therefore, the Governor has the power to promulgate an ordinance only when, firstly the Legislative Assembly is not in session and where there are two Houses in a State both Houses are not in session and secondly he must be satisfied that such circumstances exists which render it necessary for him to take immediate action. And in other circumstances, if the Legislature is in session and it is felt that the present law is not able to control the situation and a particular law is immediately needed which is not likely to be passed by the State Legislature due to procedural formalities, the

\(^1\) Constitution of India.
Governor may prorogue either of the two Houses and issue an ordinance. The Governor has the absolute power to prorogue the House.

The ordinance making power of the Governor is co-extensive with the legislative power of the State Legislature to make laws. He can promulgate ordinances only on the subjects on which the State Legislature has power to make laws under the Constitution, including any Appropriation Bills, under Article 209 or, in other words, he can use this power on the subjects mentioned in state list and concurrent list. The Governor can also promulgate the ordinances to amend or to repeal not only another ordinances but also any law passed by the State Legislature, subject to the limitation prescribed under Article 213(1) (a) and even allow the ordinance to operate retrospectively from a date, when the Legislature was in session. On May 29, 1987, the Governor of Orissa promulgated Orissa Forest Produce (Control of Trade) (Amendment and Validation) Ordinance, 1987, (the “Ordinance). The ordinance shall be deemed to have come into force with effect from September 5, 1981, when the principal Act was notified in the Orissa gazette. When this Act was challenged, the Supreme Court held that making amendments with retrospective effect and rendering earlier decisions of Supreme Court ineffective is valid and does not amount to encroachment into judicial

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3 Article 174(2), Constitution of India.

5.2 Nature of the Ordinances:

The primary law making authority under the Constitution is the Legislature and not the Executive. But it is possible that when the Legislature is not in session, circumstances may arise which render it necessary to take immediate action and in such a case, in order that public interest may not suffer by reason of the inability of the Legislature to make law, the Governor is vested with the power to promulgate ordinances. So, Governor can use this power to promulgate ordinances only in the emergent situations and this power is in the nature of an emergency power for taking immediate action where such action may become necessary at a time when the Legislature is not in session. About the necessity to confer this power on the Governor to handle the suddenly developed difficult situation, Dr. B.R. Ambedkar observed that it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be difficult to deal with a situation which may suddenly and immediately arise. The executive must have the power to issue an ordinance when the executive cannot deal with the situation by resorting to the ordinary process of law, because the Legislature is not in session. During the debate in the Constituent Assembly some members of the Constituent Assembly express their apprehension that the executive might postpone the reassembling of the Legislature for an indefinite period by resorting to ordinance making power. Dr. Ambedkar assured


6 Dr. D.C. Wadhwa vs State of Bihar, AIR 1987 SC 579.
the Assembly that there was no ground for such apprehension as the exigencies of
the government would not permit such an action and that even if the Legislature
was prorogued and an ordinance was promulgated, the Legislature had to be
summoned soon as six months should not intervene between the last day of the
sitting in one session and the date appointed for its first sitting in the next
session.\(^7\) 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.\(^8\)

### 5.3 Discretion of the Governor in Promulgating an Ordinance:

Generally to exercise the power to promulgate ordinances the
Governor has to act on the aid and advice of the Council of Ministers. Article 163
(1) of the Constitution provides that there shall be a Council of Ministers with the
Chief Minister at the head to aid and advice the Governor in the exercise of his
functions, except in so far as he is by or under this Constitution required to
exercise his functions or any of them in his discretion. Article 163(3) provides
that the question whether any and if so what advice was tendered by Ministers to
the Governor shall not be inquired into any court. Normally, Governor acts on the
advice of the Council of Ministers but he can also use his discretion, where this
constitution so required and if any question arises whether any matter is or is not a
matter as respect which the Governor is by or under this constitution required to
act in his discretion , the decision of the Governor in his discretion shall be final
and validity of anything done by the Governor shall not be called in question on

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Information, 1977, p. 402

\(^8\) Article 213(2), Constitution of India.
the ground that he ought or ought not to have acted in his discretion. Governor can use his discretion in the following ways:

5.3.1 Satisfaction of the Governor:

Before issuing an ordinance, Governor must be satisfied that the circumstances warranted for its promulgation. Necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole judge as to the existence of the circumstances necessitating the making of an ordinance. His satisfaction is not a justiciable matter. Sarkaria J. said that it is well settled that the necessity of immediate action and of promulgating the ordinances is a matter purely for the subjective satisfaction of the Governor. Subjective satisfaction of the Governor means his personal satisfaction about the existence of necessity, in the given circumstances, for promulgating an ordinance and such satisfaction is conclusive. It cannot be questioned on the ground of error of judgement or otherwise in court. This power is in the nature of emergency power vested with the executive authority to meet unexpected contingency which require immediate action, when the Legislature is not in session. If the Governor is not satisfied about the existence of emergent situation, then he may use his discretion and may refuse to promulgate the ordinance.

In otherwords, Governor generally promulgate an ordinance on the

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9 Article 163(2), Constitution of India.
10 Digest of Supreme Court Cases, Vol. 8, 2004, p. 66.
11 S.K.G Sugar Ltd vs. State of Bihar, AIR 1974 SC 1533,
aid and advice of the Council of Ministers but he is not bound to follow the advice of the Council of Ministers if in his opinion, it is not necessary to promulgate an ordinance immediately, he may ask the government, why the proposed legislation could not wait till the next session of the legislature or may refuse to approve or sign the proposal of the ordinance. In Punjab, when D.C. Pavate was the Governor of Punjab, he used his discretion and did not issue the ordinance. He sent back the proposal of the ordinance to the Ministry. At that time, in the Cabinet meeting it was decided that chairman or directors of a statutory body set up either by Act of Parliament or of the Legislature or by the government should not be disqualified from contesting elections to or continuing as a member of the Legislature. The Chief Secretary to the Government of Punjab accordingly sent an ordinance to this effect for the approval and signature of the Governor. The object of the proposed ordinance was to declare by law that Chairmen or Directors of corporations set up by the Punjab Government under a Central or State Act or registered under the Indian Companies Act, 1956, would not be disqualified from membership of Legislative Assembly or Legislative Council of State. But the Governor was of the opinion that such an important piece of legislation should not ordinarily be passed as an ordinance.

Again, when the proposal of the ordinance namely, the State Legislature (Prevention of Disqualification) Amendment Ordinance sent for the approval of the Governor, he refused to approve the same. The ordinance sought to remove the disqualification attached to a MLA on being appointed a member or chairman of any of the six corporate bodies i.e. Punjab Agriculture Board, Punjab
Agro-Industries Corporation, Punjab State Federation of Consumer Stores, Punjab State Warehousing Corporation, Punjab Financial Corporation and Punjab State Federation of Co-operative Sugar Mills. The Governor was of the view that the ordinance under consideration would have the inevitable effect of encouraging political corruption, which as the head of the State he should try his best to stop. Then, he wrote a letter to the Union Home Minister in which he expressed his own views regarding the Governor’s position in relation to the promulgation of the ordinance. In his reply, the union home minister pointed out that legally a Governor is bound to promulgate an ordinance, if so advised by the Council of Ministers. But it was, at the same time, the Governor’s duty to make all possible efforts to dissuade the Chief Minister from having an ordinance issued if he thought that its provisions are objectionable on considerations of sound public policy or maintenance of right standards in public life.\textsuperscript{14}

The Governor of Kerala Smt. Ram Dulari Sinha refused to sign the Calicut University Ordinance, 1988. The purpose of this ordinance was to amend the Calicut University Act and to make the Vice-Chancellor a disposable one under the government’s pleasure.\textsuperscript{15} Similarly, the Governor of Madhya Pradesh Smt. Sarla Grewal returned three ordinances to the government advising them to present it in ensuing Assembly session. The three ordinances are aimed at changing the multipoint mandi tax to single point tax, the second aimed at stopping the auction of lands for no payments of loans and the third stopping

\textsuperscript{14} Sibranjan Chatterjee, Governor’s Role in the Indian Constitution, Mittal Publications, New Delhi, 1992, pp. 91-92.

\textsuperscript{15} Supra note 2 at 173.
recovery of irrigation cess from farmers. The Governor refused to promulgate these ordinances because such hasty step of a government sidelining the Legislature, when the Assembly session was meeting in few days, was not in line with the democratic policies and legislative accountability. It was an effort of the State Government to bring in progressive policies through short-cut method when its popularity is at stake.\footnote{Id. at 175.}

Similarly, the Governor of Maharashtra SN Krishna sent back Bombay Police (Amendment) Ordinance, 2005. By this ordinance, government wanted to ban dance bars in the State but Governor did not think it fit to sign the ordinance at that time, because it was not an urgent matter and could wait till both the Houses met.\footnote{The Times of India, Jun. 14, 2005.}

\subsection*{5.3.2 To Reserve the Bill:}

There may be other circumstances, when Governor can use his discretion in promulgating an ordinance. When Council of Ministers sends any Bill for promulgating it as an ordinance before the Governor, he can use his discretion by reserving that proposal for seeking the instructions from the President. Proviso to Article 213(1) provides that if (a) a Bill to that effect would under the constitution have required the previous sanction of the President for its introduction into the State Legislature; (b) if the Governor would have deemed it necessary to reserve a Bill to that effect for the President's consideration; (c) an act of the State Legislature to that effect would have been invalid under the constitution without receiving the President's assent.
The obtaining of instructions from the President under above provision is mandatory and without the requisite instructions, promulgating the ordinances would be invalid. So, the Governor has the discretion to reserve a Bill for the consideration of the President, if he thinks it necessary.\textsuperscript{18}

5.4 Duration of such Ordinances:

Article 213 (2)(a) of the Constitution provides that every ordinance promulgated by the Governor 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 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. Any such ordinances may also be withdrawn by the Governor.\textsuperscript{19} Therefore, the maximum life of the ordinances will be six weeks plus six months because the legislature must be summoned not later than six months after the prorogation of the House and an ordinance may be issued immediately after the prorogation of the House. If the government wants that the provisions of an ordinance to be continued then they will bring a Bill to replace the ordinance. But if the Assembly has refused the leave to introduce a Bill incorporating the provisions of the ordinance, it does not amount to a resolution disapproving the ordinance within the meaning of article 213 (2) (a) and it cannot be contended that the ordinance ceased to be operative from the date when the

\textsuperscript{18} Proviso to Article 213 (1) (b), Constitution of India.

\textsuperscript{19} Article 213 (2) (b), Constitution of Indian.
leave to introduce the Bill was refused.

5.5 Re-Promulgation of Ordinances:

Temporary law making power of the Governor may also be extended to re-promulgation of the ordinances. But he can re-promulgate an ordinance only to handle the unforeseen situations and for the public interest. The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance was kept in force for more than 13 years through the process of re-promulgation. During the period 1967 to 1981, the Governor of Bihar promulgated 256 ordinances which were kept alive for periods ranging between 1 to 14 years by re-promulgation from time to time. But when a Public Interest Litigation was filed in the Supreme Court against this practice, The Supreme Court pointed out that re-promulgation of ordinances by Governor without getting them replaced by Acts is contrary to the constitutional scheme. This power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be “Perverted to serve political ends.” The Industrial Dispute (Amendment) Ordinance was issued on 11.10.1995; again it was reissued on 5.01.1996 and again on 27.03.1996. When a case was filled in Delhi High Court to declare these ordinances invalid, government took the plea of busy in urgent public business and court accepted that plea. The Court declared that under these circumstances, re-promulgation of the ordinance is not unconstitutional or illegal.

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21 Supra note 6.
22 Gyanendra Kumar vs. UOI, AIR 1997 Del. 58.
5.6  Judicial Approach:

Regarding the promulgation or re-promulgation of an ordinance, the judiciary has the view that this power conferred on the Governor is an emergency power for taking immediate action when the Legislature is not in session. It is the view of the courts that necessity of immediate action and promulgating an ordinance is purely a matter of subjective satisfaction of His Excellency the Governor. He is the sole judge as to the existence of the circumstances necessitating making of an Ordinance.23 Regarding the re-promulgation of the ordinances, court has the view that Governor cannot assume legislative function in excess of strictly defined limits set out in the Constitution.24 The Court, however, conceded that “there may be a situation where it may not be possible for the government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business in a particular session or the time at the disposal of the Legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the Ordinance. Where such is the case, re-promulgate of the Ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of re-promulgation”. In this context, it further observed:

“It is settled law that a constitutional authority cannot do indirectly

23 Supra note 13.
24 Supra note 6 at 580.
what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision”. 25

5.7 To Sum Up:

Governor is the executive head of the State. Temporary law making power has been conferred on the Governor under the Constitution of India to meet the unforeseen and extraordinary situations to which the ordinary law prevailing at that time cannot handle. He can use this power only when the Legislature is not in session or if the Legislature is in session but it is not possible to pass a law immediately to grip the suddenly arisen circumstances due to procedural formalities, Governor may prorogue the Legislature and issue an ordinance. In promulgating an ordinance Governor generally acts on the aid and advice of the Council of Ministers, but he must be satisfied that it is the demand of the time to take immediate action. The satisfaction of the Governor is his personal satisfaction. So, he is the sole judge as to the existence of the circumstances necessitating making of an ordinance and his satisfaction is not justiciable. It cannot be questioned on the ground of error of judgment or otherwise in court.

If he is not satisfied about the necessity of immediate action, then, he can refuse to sign an ordinance. He may also reserve the Bill for the consideration of the President. The discretionary power of the Governor in

25 Sarkaria Commission Report on Centre-State relations, para 5.18.10.
promulgating an ordinance is not much clear. Governor should be given some more discretionary powers so that he can promulgate the ordinances to meet the emergent situations for the welfare and public interest.