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# CONTOURS OF CONSTITUTIONAL POWER

Essays on Governance and  
Accountability in India



**PROF. (DR.) V.J. PRANESHWARAN**  
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Essays on Governance and Accountability in India

Edited by

**PROF. (DR.) V.J. PRANESHWARAN**

**DR. VIDYA SELVAMONY**

CMR University, School of Legal Studies, Bengaluru

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## Foreword

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The Constitution of India is not merely a legal document; it is a living framework that continually negotiates the delicate balance between power and accountability. The essays brought together in *Contours of Constitutional Power: Essays on Governance and Accountability in India* engage with this dynamic equilibrium, offering thoughtful, critical, and timely reflections on some of the most pressing constitutional questions confronting the nation today.

This volume emerges from a shared intellectual commitment to examine how constitutional authority is exercised, restrained, and, at times, contested within India's democratic structure. The contributors explore a wide spectrum of themes from emergency provisions and federal relations to electoral integrity, parliamentary privilege, and judicial innovation. What unites these diverse inquiries is a common concern: how power, when constitutionally sanctioned, must remain anchored in the principles of legality, accountability, and constitutional morality.

Several essays in this collection interrogate the architecture of federalism and the shifting balance between the Union and the States. They reveal how constitutional design, judicial interpretation, and political practice often interact to produce outcomes that either reinforce or strain the federal compact. Whether through the lens of trade and fiscal powers, gubernatorial discretion, or the evolving role of the President, the essays collectively highlight the ongoing tension between central authority and regional autonomy.

Equally compelling are the analyses of constitutional institutions entrusted with safeguarding democracy. The Election Commission, as explored in multiple contributions, stands as a vital pillar of democratic legitimacy, yet its independence is meaningfully tested by questions of accountability and structural design. These discussions underscore that institutional autonomy cannot exist in isolation; it must operate within a framework that permits scrutiny and ensures fidelity to the rule of law.

The volume also turns its attention to the role of the judiciary, particularly in its evolving use of innovative powers such as suo motu jurisdiction. While such developments reflect an expansion of access to justice and a commitment to constitutional values, they also raise critical questions about institutional boundaries and the risks of overreach. This nuanced engagement reflects a mature understanding

that judicial power, like all constitutional authority, must be exercised with restraint and responsibility.

Emergency powers and executive lawmaking are examined with particular rigor, revealing the inherent tension between necessity and misuse. Whether through the analysis of Article 356 or the ordinance-making power, the essays demonstrate how exceptional provisions, though constitutionally legitimate, demand heightened vigilance. Their misuse has the potential to undermine democratic processes and erode public trust, making judicial oversight and constitutional discipline indispensable.

Importantly, the collection does not confine itself to critique alone. It also engages with constructive constitutional thought—reimagining federal balance, strengthening local governance, and refining doctrinal tools such as the doctrine of pith and substance. These contributions reflect a forward-looking approach that seeks not only to diagnose constitutional challenges but also to envision pathways for reform and renewal.

At its core, this book is a reflection on constitutional responsibility. It reminds us that the endurance of a constitutional democracy depends not solely on the text of the Constitution but on the integrity of those who interpret, implement, and inhabit its institutions. Power, in this sense, is never absolute; it is always conditioned by accountability, guided by constitutional values, and subject to the scrutiny of both courts and citizens.

The essays in this volume are marked by analytical depth, doctrinal clarity, and a commendable engagement with contemporary constitutional debates. They collectively contribute to an ongoing conversation about the nature of governance in India and the standards by which it must be judged.

It is hoped that this work will serve as a valuable resource for scholars, practitioners, and students alike, and that it will inspire further inquiry into the evolving contours of constitutional power in India. More importantly, it stands as a reminder that the strength of a Constitution lies not in its authority alone, but in its capacity to ensure that authority is exercised with responsibility, restraint, and respect for the democratic spirit it seeks to uphold. I congratulate all the 13 contributors for their timely work on a subject which has immense value not only to the students of Constitutional Law but also to every citizen.

**Prof. Dr. T.R. Subramanya, MPhil & PhD (JNU)**  
Dean, School of Legal Studies, CMR University, Bengaluru

## Executive Summary

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*Contours of Constitutional Power: Essays on Governance and Accountability in India* is a scholarly collection that examines the constitutional distribution, exercise, and control of public power within the Indian legal system. Bringing together contributions on federalism, executive authority, parliamentary privilege, electoral accountability, emergency powers, and judicial innovation, the volume explores how constitutional institutions function within a framework shaped by legality, restraint, and democratic responsibility.

The essays collectively address a central concern of Indian constitutionalism: the need to balance power with accountability. Several chapters examine the structure of Indian federalism and the tensions that arise between the Union and the States, particularly in relation to the office of the Governor, the role of the President, trade and fiscal regulation, and the continuing evolution of cooperative federalism. Other contributions focus on legislative and executive authority, analysing parliamentary privileges, ordinance-making power, and the safeguards designed to prevent misuse of constitutional mechanisms.

A significant part of the volume is devoted to institutions that uphold democratic legitimacy. The Election Commission of India is examined through the lens of independence, accountability, and legal immunity, while emergency provisions are studied in terms of both constitutional design and the risks of executive excess. The volume also considers the judiciary's expanding role, especially through the development of suo motu jurisdiction, and reflects on the tensions between judicial responsiveness and institutional restraint.

Taken together, the chapters demonstrate that constitutional power in India is never absolute. Its legitimacy depends upon structure, constitutional morality, and the ability of institutions to remain accountable to democratic principles and the rule of law. The book therefore serves as both an academic contribution and a reflective study of governance in contemporary India.

This volume is intended for scholars, students, researchers, and practitioners interested in constitutional law, public law, federalism, democratic institutions, and the evolving relationship between authority and accountability in India.

## Editorial Policy

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This volume is an edited academic collection intended to promote rigorous engagement with questions of constitutional law, governance, public accountability, and democratic institutional design in India. The editorial process has been guided by the objective of producing a coherent and credible scholarly work while preserving the individual voice and analytical approach of each contributor.

All chapters included in this volume were reviewed and selected on the basis of relevance to the central theme of the book, clarity of argument, originality of analysis, and engagement with constitutional doctrine, legal principles, and contemporary institutional issues. The editors have sought to ensure that each contribution meets acceptable academic standards in structure, reasoning, citation, and presentation.

Submissions were reviewed for thematic consistency, conceptual clarity, and legal accuracy. Editorial intervention was undertaken where necessary to improve language, organization, formatting, citation style, and overall readability. Such intervention was limited to editorial refinement and standardization and was not intended to alter the substantive views of the respective authors. Responsibility for the arguments, interpretations, and conclusions expressed in each chapter remains with the individual contributor.

In preparing this volume, an effort has been made to maintain uniformity in chapter presentation, headings, references, footnotes, and stylistic conventions. Variations arising from the nature of the subject matter or authorial method have been retained where appropriate, provided that they do not affect the academic coherence of the collection.

This book is intended solely for academic, research, and educational purposes. The inclusion of any chapter in this volume does not imply institutional endorsement of every individual proposition advanced therein. The editorial team has aimed to present a balanced and intellectually serious body of work that contributes meaningfully to the study of constitutional governance in India.

## Preface

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This volume, *Contours of Constitutional Power: Essays on Governance and Accountability in India*, emerges from a shared academic commitment to reflect upon the changing character of constitutional governance in India. The Constitution does not merely allocate authority among institutions; it imposes discipline upon power, demands accountability from public bodies, and creates the normative framework through which democratic governance must be judged. The chapters brought together in this volume engage with these concerns through a close study of constitutional doctrine, institutional practice, and contemporary legal debates.

The essays in this collection address a wide range of themes, including federal balance, executive authority, parliamentary privilege, electoral governance, emergency provisions, and judicial innovation. While each contribution examines a distinct constitutional problem, all of them are united by a common inquiry: how constitutional power is exercised, limited, and justified within a democratic framework. The volume therefore seeks not only to describe legal structures, but also to assess the deeper constitutional values that sustain them.

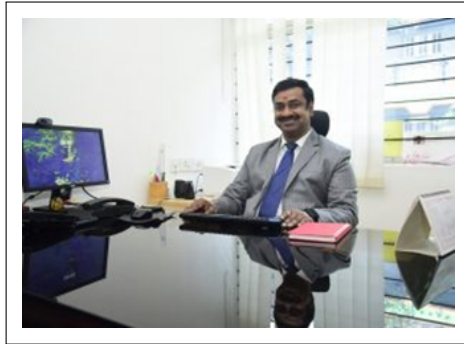
This book has been prepared as an academic contribution intended for students, scholars, researchers, and practitioners interested in constitutional law and public governance. In editing this volume, care has been taken to preserve the substantive voice of each contributor while ensuring clarity, consistency, and coherence in presentation. It is hoped that this work will encourage deeper engagement with the principles of constitutionalism, institutional responsibility, and democratic accountability in India.

Prof. (Dr.) V.J. Praneshwaran  
Dr. Vidya Selvamony

## Editors

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**Prof. (Dr.) V.J. Praneshwaran**  
**Dr. Vidya Selvamony**



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Director, CMR University, School of Legal Studies, Bengaluru

Prof. (Dr.) V.J. Praneshwaran graduated in Law and then completed his LL.M. in Constitutional Law, M.Phil. in Law, and Ph.D. from Bangalore University. After obtaining significant experience in legal practice, he chose to pursue his passion for teaching. With core experience in practicing law, client counselling, and teaching, his illustrious career spans over 23 years. His Ph.D. thesis, titled “*A Study of Laws Relating to Armed Forces and the Protection of Human Rights in India*”, reflects his understanding of the need for equal treatment and respect for human rights in disciplined organisations such as the Indian Armed Forces. A committed nationalist, he has consistently sought to contribute to nation-building by imparting, organizing, and encouraging legal literacy, legal education, and legal awareness initiatives at various levels. He also serves as a patron of Legal Aid Trust, a registered NGO.



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Adv. (Dr.) Vidya Selvamony is a distinguished legal scholar, practicing advocate, and social reformer with over 25 years of experience in the legal field. She currently serves as a Visiting Faculty at CMR University School of Legal Studies, Bengaluru.

In addition to her academic role, she is the Managing Trustee of Legal Aid Trust, a non-governmental organization dedicated to legal literacy, constitutional awareness, and accessible legal aid.

She is a certified trainer and External Member on Internal Committees under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, providing guidance and policy training across numerous corporate and institutional bodies.

Her doctoral research focused on “*Exploitation of Children in the Tourism Industry: An Assessment of the Legal Measures and Their Inadequacies in India.*” Her work reflects a deep commitment to child rights, legal awareness, and social justice.

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## How to Use This Book

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This volume is designed to be used both as a continuous academic text and as a reference work on specific themes within Indian constitutional law. Readers may approach the book chapter by chapter according to their area of interest, or read it as a collective study of governance, institutional accountability, and the constitutional control of public power.

The opening materials provide the conceptual and editorial framework of the book. The table of contents offers a thematic guide to the chapters, while the introductory sections situate the collection within the broader landscape of constitutional scholarship and democratic governance in India.

Each chapter may be read independently. Every contribution addresses a distinct constitutional issue and is structured to assist focused academic use. Readers interested in federalism may turn to the chapters on the President, Governor, local self-government, trade and fiscal powers, and the doctrine of pith and substance. Those concerned with democratic institutions may consult the chapters on parliamentary privilege, the Election Commission, and electoral accountability. The chapters on ordinance-making power, emergency provisions, Article 356, financial emergency, and suo motu jurisdiction may be used for targeted study of exceptional constitutional powers and institutional safeguards.

Footnotes and reference sections are intended to support deeper research. Readers are encouraged to use them to trace constitutional provisions, judicial precedents, and scholarly authorities relevant to each topic. The glossary and abbreviations sections may be consulted alongside the substantive chapters for ease of reference.

This book is particularly useful for postgraduate students, legal researchers, academic writers, and practitioners who seek a structured and theme-based engagement with constitutional issues in India. It may also serve as a supplementary reading resource for courses in constitutional law, public law, federalism, legislative process, and judicial review.

## List of Abbreviations

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<b>AIR</b>	All India Reporter
<b>Art.</b>	Article
<b>Arts.</b>	Articles
<b>cl.</b>	Clause
<b>cls.</b>	Clauses
<b>Const.</b>	Constitution
<b>ed.</b>	Edition / Edited by
<b>Govt.</b>	Government
<b>ibid.</b>	Ibidem (in the same source)
<b>id.</b>	Idem (the same author / source)
<b>J.</b>	Journal
<b>LL.M.</b>	Master of Laws
<b>No.</b>	Number
<b>p.</b>	Page
<b>pp.</b>	Pages
<b>Prof.</b>	Professor
<b>Pt.</b>	Part
<b>SCC</b>	Supreme Court Cases
<b>SC</b>	Supreme Court
<b>Sec.</b>	Section
<b>Secs.</b>	Sections
<b>v.</b>	Versus
<b>Vol.</b>	Volume
<b>W&amp;M</b>	William and Mary
<b>U.K.</b>	United Kingdom
<b>U.S.</b>	United States

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# Introduction

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The Constitution of India stands as one of the most ambitious and carefully structured frameworks of governance in the modern world. It does far more than establish institutions; it creates an intricate system of power, restraint, and accountability designed to sustain a diverse and dynamic democracy. At its core lies a continuous effort to reconcile competing imperatives: central authority and regional autonomy, democratic responsiveness and institutional stability, and the independence of constitutional bodies alongside their accountability to the rule of law. This balance is neither static nor self-sustaining. It evolves through constitutional practice, judicial interpretation, and political experience.

*Contours of Constitutional Power: Essays on Governance and Accountability in India* is a compilation of scholarly papers written by students of LL.M. (Constitutional Law) at CMR University School of Legal Studies. This volume is situated within the evolving constitutional landscape and reflects a collective academic engagement with some of the most pressing questions in Indian constitutional governance. It examines how power is distributed, exercised, contested, and ultimately controlled across the Indian State. Rather than treating constitutional law as a fixed set of rules, the contributions in this collection approach it as a living system, one that adapts to real-world governance challenges. While each paper focuses on a specific institution or doctrine, together they reveal a unifying concern: the ongoing effort to maintain constitutional balance in a complex democracy.

At the centre of this discussion lies the idea of federalism. The Indian Constitution adopts a federal structure with a strong unitary bias, allowing flexibility in governance while attempting to preserve the autonomy of States. This inherent tension becomes visible across multiple institutional contexts. The office of the President, for instance, reflects a striking constitutional paradox. Although formally vested with extensive executive authority, the President operates largely within the framework of ministerial advice. This raises an important question: whether the office functions merely as a ceremonial head or as a constitutional sentinel capable of safeguarding federal balance during moments of crisis.

This question becomes even more significant when examined alongside emergency powers. Article 356, designed as a safeguard against the breakdown of constitutional machinery in the States, has historically occupied a controversial

position. While intended as an exceptional measure, its repeated use has raised concerns about political misuse and central overreach. Judicial intervention has played a crucial role in placing limits on this power, gradually transforming it into a more regulated constitutional mechanism. In contrast, the rarely discussed provision of financial emergency under Article 360 introduces a different dimension, where economic instability can justify extensive central control, revealing the fragile balance between fiscal necessity and federal autonomy.

The complexity of federalism is further reflected in the role of the Governor. Conceived as a constitutional link between the Union and the States, the Governor embodies both neutrality and discretion. However, this very ambiguity has often placed the office at the centre of political controversy, particularly in situations involving government formation or legislative uncertainty. These instances highlight how constitutional design, when combined with political realities, can produce outcomes that test the limits of federal balance.

These tensions are not confined to executive authority alone but extend into the legislative sphere. Parliamentary privileges, while essential to ensure legislative independence, also present challenges due to their uncodified nature and potential for misuse. The resulting friction between privilege and fundamental rights underscores the broader constitutional dilemma of balancing institutional autonomy with accountability. A similar concern arises in the context of executive law-making through ordinances. Although the ordinance-making power serves as a necessary tool for urgent situations, its increasing use raises important questions about the erosion of parliamentary deliberation and the expansion of executive authority beyond its intended limits.

Beyond these institutional dynamics, the volume also turns to the role of independent constitutional bodies in sustaining democratic legitimacy. The Election Commission of India occupies a central position in this regard. Entrusted with ensuring free and fair elections, its independence is fundamental to the credibility of democratic governance. However, contemporary developments, particularly relating to appointment processes and enforcement challenges, raise concerns about whether this independence is sufficiently protected in practice.

Closely connected to this is the broader constitutional question of how independence should be balanced with accountability. The debate surrounding legal immunity for Election Commissioners illustrates this tension clearly. While some degree of protection is necessary to enable impartial decision-making, excessive insulation risks undermining the rule of law. The challenge, therefore, lies

in designing institutional frameworks that protect autonomy without removing accountability.

In this landscape, the judiciary plays a defining role as the interpreter and guardian of the Constitution. Its evolution from a passive adjudicator to an active constitutional actor is particularly evident in the development of suo motu jurisdiction. By initiating proceedings independently, the Supreme Court has expanded access to justice and addressed systemic failures in governance. At the same time, this expanded role raises important concerns about judicial overreach and the limits of institutional legitimacy, reinforcing the need for balance even within judicial activism.

At a doctrinal level, constitutional balance is maintained through interpretative principles that introduce flexibility into governance. The Doctrine of Pith and Substance exemplifies this approach by allowing courts to focus on the true nature of legislation rather than rigid classifications. This ensures that governance remains practical while respecting constitutional boundaries. However, as seen in the regulation of trade and commerce under Part XIII, constitutional structures can sometimes produce asymmetry, where formal equality masks a deeper centralisation of power. This raises important questions about the evolving character of Indian federalism.

Importantly, the discussion in this volume extends beyond the Union and State levels to include local self-government. The constitutional recognition of Panchayati Raj Institutions and Urban Local Bodies marks a significant shift towards decentralised governance. These institutions bring democracy closer to the people, enhancing participation and accountability at the grassroots. Yet, their effectiveness remains dependent on the extent of actual devolution, reflecting the continuing gap between constitutional vision and institutional reality.

Viewed together, the chapters in this volume present a deeply interconnected account of constitutional governance in India. They demonstrate that constitutional power is not concentrated in a single institution but distributed across a network of actors, each operating within defined yet often contested boundaries. The real challenge lies not merely in the existence of these powers, but in how they are exercised.

The central insight that emerges from this collection is clear: the vitality of the Constitution depends not only on its text, but on the integrity, restraint, and accountability of the institutions that operate within it. Constitutional design provides the framework, but it is constitutional practice that determines its success.

In a period marked by rapid political, economic, and technological change, the need to continuously reassess the balance between power and accountability has become increasingly urgent. This volume contributes to that ongoing conversation. It does not simply describe constitutional structures; it seeks to understand their functioning, question their limitations, and explore their future.

Ultimately, the Constitution is not just a framework of governance, but a promise of just governance. Whether that promise is realised depends on how power is exercised, limited, and justified. It is this enduring question that lies at the heart of this book.

# **Executive Lawmaking through Ordinances in India: Constitutional Limits, Judicial Control, and Democratic Accountability**

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## **Abstract**

The ordinance-making power under Article 123 of the Constitution of India constitutes a distinctive feature of executive authority, enabling temporary lawmaking in situations demanding immediate legislative intervention. Conceived as an emergency mechanism, this power allows the executive to respond swiftly when Parliament is not in session. While ordinances carry the same legal force as statutes enacted by Parliament, their temporary nature and dependence on subsequent legislative approval underscore the constitutional commitment to parliamentary supremacy.

However, the increasing frequency of ordinance promulgation has generated serious constitutional concerns, particularly relating to executive overreach and the erosion of democratic deliberation. Judicial interventions have sought to impose limits on this power, emphasizing its exceptional character.

This paper critically examines the historical origins, constitutional framework, judicial interpretation, and practical application of ordinance-making power in India. It argues that while the mechanism remains necessary, its misuse poses significant risks to democratic governance, thereby necessitating institutional safeguards and constitutional discipline.

**Keywords:** *Ordinance making power, Executive, Constitution, Parliament, Judicial Interpretation.*

## **1.1 Introduction**

The power of executive lawmaking through ordinances constitutes a significant feature of the constitutional framework of India. The Constitution recognizes situations where immediate legislative action may be necessary even when the Parliament is not in session. To address such situations, the Constitution confers upon the President of India the authority to promulgate ordinances under Article 123 of the Constitution of India<sup>1</sup>. This provision allows the executive to enact temporary laws with the same force and effect as legislation passed by Parliament<sup>2</sup>. Although this mechanism is designed to meet urgent and unforeseen circumstances, it has also raised significant constitutional questions regarding the balance between executive power and parliamentary supremacy<sup>3</sup>.

The ordinance-making power has its roots in colonial legislative practices, particularly in the Government of India Act 1935, which granted similar powers to the Governor-general to promulgate ordinances during emergencies<sup>4</sup>. The framers of the Constitution of India retained this provision with the intention of ensuring administrative continuity in exceptional circumstances<sup>5</sup>. During the debates of the Constituent Assembly of India, members acknowledged that while such a power was necessary, it also had the potential to be misused by the executive if not exercised with constitutional restraint. Therefore, the ordinance power was structured as a temporary and conditional mechanism subject to parliamentary approval.

In a parliamentary democracy, the primary function of lawmaking belongs to the legislature. Ordinances represent an exception to this general principle because they enable the executive branch to temporarily perform a legislative function<sup>6</sup>. While ordinances are intended to operate only when Parliament is not in session, their increasing use in practice has generated debate about whether governments sometimes rely on them to bypass legislative scrutiny and debate<sup>7</sup>. Critics argue that excessive reliance on ordinances undermines democratic deliberation and weakens the role of Parliament in the legislative process.

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<sup>1</sup>India Const. art. 123.

<sup>2</sup>R.C. Cooper v. Union of India, (1970) 1 SCC 248 (India).

<sup>3</sup>H.M. Seervai, *Constitutional Law of India: A Critical Commentary* 2103–2108 (4th ed. 2013).

<sup>4</sup>Government of India Act, 1935.

<sup>5</sup>Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 142–145 (1966).

<sup>6</sup>M.P. Jain, *Indian Constitutional Law 1865–1870* (8th ed. 2018).

<sup>7</sup>Upendra Baxi, *The Constitutional Quicksands of Ordinance Power*, 3 J. Indian L. Inst. 151 (1961).

The judiciary has played an important role in interpreting the constitutional limits of ordinance-making power. The Supreme Court of India has clarified that although the President's satisfaction in promulgating an ordinance carries constitutional weight, it is not completely immune from judicial review. In landmark decisions such as *D.C. Wadhwa v. State of Bihar*<sup>8</sup>, the Court strongly criticized the practice of repeatedly re-promulgating ordinances without placing them before the legislature. Similarly, in *Krishna Kumar Singh v. State of Bihar*<sup>9</sup>, the Court emphasized that ordinance-making power is an exceptional legislative tool that must not be used as a substitute for regular legislation.

Against this background, the ordinance-making power presents an important constitutional dilemma. On the one hand, it serves as a necessary instrument that allows the government to respond swiftly to urgent circumstances. On the other hand, if used excessively or strategically, it may erode the principle of separation of powers and diminish parliamentary accountability<sup>10</sup>. Therefore, a careful constitutional analysis of this power is essential to understand its scope, limitations, and implications for democratic governance.

This article examines the constitutional foundations, judicial interpretation, and practical application of the presidential ordinance-making power in India. By analyzing constitutional provisions, judicial decisions, and contemporary practices, it seeks to evaluate whether the use of ordinances remains consistent with the principles of parliamentary democracy and constitutional governance.

## **1.2 Historical Background of Ordinance-making Power**

The ordinance-making power in India has a significant historical foundation that predates the adoption of the modern constitutional framework. The concept of executive legislation through ordinances emerged during the colonial period when the British administration sought mechanisms to address urgent legislative needs without waiting for the regular legislative process<sup>11</sup>. This historical development greatly influenced the inclusion of ordinance powers in the Constitution of India<sup>12</sup>.

The earliest roots of ordinance-making authority can be traced to British colonial

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<sup>8</sup>*D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).

<sup>9</sup>*Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).

<sup>10</sup>Durga Das Basu, *Commentary on the Constitution of India* 654–660 (8th ed. 2015).

<sup>11</sup>M.P. Jain, *Indian Constitutional Law 1862–1865* (8th ed. 2018).

<sup>12</sup>India Const. art. 123.

governance, particularly under the Government of India Act 1935<sup>13</sup>. This Act granted the Governor-general of India the authority to promulgate ordinances when the Federal Legislature was not in session and immediate legislative action was necessary<sup>14</sup>. These ordinances had the same force and effect as an Act of the legislature, though they were temporary in nature. The rationale behind this provision was largely administrative convenience and the need to respond quickly to emergencies, especially in a vast colony where legislative processes could be slow and cumbersome.

Under colonial administration, however, the ordinance power was often criticized for concentrating excessive authority in the executive branch. Since the British colonial government was not fully accountable to representative institutions in India, ordinances sometimes became instruments for enforcing policies without adequate legislative scrutiny. This experience created concerns among Indian political leaders about the potential misuse of executive legislative powers<sup>15</sup>.

When the process of constitution-making began after independence, members of the Constituent Assembly of India carefully debated whether such powers should continue in a democratic framework. Some members argued that ordinance powers were inconsistent with the ideals of parliamentary democracy because they allowed the executive to temporarily bypass the legislature. Others believed that the power was necessary to ensure continuity of governance in situations where urgent legislative action was required while Parliament was not in session<sup>16</sup>.

One of the principal defenders of the provision was B. R. Ambedkar, who emphasized that the ordinance-making power was not an independent authority of the President but a conditional power exercised on the advice of the Council of Ministers. He clarified that the ordinance was only a temporary law and must be placed before Parliament for approval once it reconvened. This safeguard ensured that the ultimate legislative authority remained with the Parliament.

Consequently, the Constitution incorporated the ordinance-making power under Article 123 of the Constitution of India<sup>17</sup>, empowering the President of India to promulgate ordinances when both Houses of Parliament are not in session and immediate action is necessary. The Constitution also introduced procedural

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<sup>13</sup>Government of India Act, 1953.

<sup>14</sup>Id.

<sup>15</sup>S.P. Sathé, *Ordinance Making Power of the Executive in India*, 18 J. Indian L. Inst. 423, 425 (1976).

<sup>16</sup>Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 142–144 (1966).

<sup>17</sup>India Const. art. 123.

limitations. An ordinance must be laid before Parliament when it reassembles and will cease to operate after six weeks unless approved by the legislature.

The historical background thus reveals that ordinance-making power was retained not as a tool of executive dominance but as an emergency legislative mechanism intended to meet exceptional circumstances. The framers of the Constitution attempted to balance administrative efficiency with democratic accountability by ensuring that ordinances remain temporary and subject to parliamentary control.

However, the practical operation of this power in independent India has occasionally revived concerns similar to those raised during the colonial period. Governments have sometimes relied heavily on ordinances to implement policy decisions, leading to debates about whether the executive is using this mechanism beyond its intended scope. These concerns highlight the continuing relevance of understanding the historical origins of ordinance-making powers in order to evaluate their proper place within India's constitutional structure.

### **1.3 Constitutional Framework under Article 123**

The ordinance-making power of the executive is an important constitutional mechanism designed to ensure continuity of governance during periods when the legislature is not in session. In India, this power is vested in the President of India under Article 123 of the Constitution of India<sup>18</sup>. The provision authorizes the President to promulgate ordinances that have the same force and effect as laws enacted by Parliament<sup>19</sup>. However, this authority is not absolute and is subject to specific constitutional limitations intended to preserve the supremacy of the legislature in the law-making process<sup>20</sup>.

Article 123 provides that the President may promulgate an ordinance only when both Houses of Parliament are not in session and circumstances exist that requires immediate legislative action<sup>21</sup>. The objective behind this provision is to address urgent situations where waiting for the normal legislative process may result in administrative difficulties or delay necessary reforms. Thus, the ordinance-making power functions as a temporary legislative mechanism designed to meet exceptional circumstances rather than serve as a substitute for parliamentary legislation.

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<sup>18</sup>India Const. art. 123.

<sup>19</sup>R.C. Cooper v. Union of India, (1970) 1 SCC 248 (India).

<sup>20</sup>M.P. Jain, *Indian Constitutional Law 1865–1868* (8th ed. 2018).

<sup>21</sup>India Const. art. 123(1).

Although the ordinance is formally issued by the President, in practice the power is exercised on the advice of the Council of Ministers headed by the Prime Minister. This arrangement is consistent with the parliamentary form of government adopted by the where the President functions as the constitutional head of the state while the real Constitution of India, executive authority rests with the elected government<sup>22</sup>. The requirement that the President act on ministerial advice is established under Article 74 of the Constitution of India, which mandates that the President shall act in accordance with the advice of the Council of Ministers<sup>23</sup>. Therefore, the ordinance-making power essentially represents an executive decision taken collectively by the government rather than a personal discretion of the President.

An ordinance promulgated under Article 123 carries the same legal force as an Act of Parliament. It can create rights, impose obligations, amend existing statutes, or even repeal legislation. However, this power is subject to certain constitutional safeguards. One of the most important limitations is that an ordinance must be laid before both Houses of Parliament when they reconvene. If the ordinance is not approved by Parliament within six weeks from the date of reassembly, it automatically ceases to operate. This requirement ensures that the legislature retains ultimate control over the law-making process and that ordinances remain temporary measures<sup>24</sup>.

Another important limitation relates to the scope of the ordinance-making power. The President cannot promulgate an ordinance that the Parliament itself would not have the authority to enact under the Constitution. In other words, the ordinance power is coextensive with the legislative competence of Parliament. Additionally, ordinances are also subject to the fundamental rights guaranteed under the Constitution. If an ordinance violates constitutional provisions or fundamental rights, it can be challenged before the judiciary and declared unconstitutional.

The ordinance-making power also interacts with the principle of separation of powers within the constitutional framework. While the executive is permitted to perform a temporary legislative function, this authority is carefully balanced by parliamentary oversight and judicial review. The judiciary has clarified that the satisfaction of the President in promulgating an ordinance cannot be entirely immune from judicial scrutiny. Courts may examine whether the constitutional

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<sup>22</sup>H.M. Seervai, *Constitutional Law of India: A Critical Commentary* 2103–2106 (4th ed. 2013).

<sup>23</sup>India Const. art. 74.

<sup>24</sup>A.K. Roy v. Union of India, (1982) 1 SCC 271 (India).

requirements for issuing an ordinance have been fulfilled.

Another feature of the constitutional framework is the temporary nature of ordinances. Unlike ordinary legislation, which remains in force until repealed or amended, an ordinance is inherently provisional. Its validity depends on parliamentary approval, and it ceases to operate if the legislature disapproves it or fails to pass a corresponding law within the prescribed period. This temporary character reinforces the principle that ordinances are exceptional instruments intended only for urgent situations.

Overall, the constitutional framework governing presidential ordinance-making power reflects a delicate balance between executive necessity and legislative supremacy. While the provision enables the government to respond swiftly to urgent circumstances, it simultaneously ensures democratic accountability through parliamentary control and judicial oversight. The effectiveness of this balance ultimately depends on the responsible exercise of the power by the executive and vigilant supervision by constitutional institutions.

## **1.4 Judicial Interpretation and Constitutional Safeguards**

The ordinance-making power of the executive has been the subject of extensive judicial scrutiny in India. Although the Article 123 of the Constitution of India grants the President of India the authority to promulgate ordinances when Parliament is not in session, the exercise of this power has raised constitutional concerns regarding the limits of executive authority. The judiciary, particularly the Supreme Court of India, has played a crucial role in clarifying the scope, nature, and limitations of this power<sup>25</sup>. Through several landmark judgments, the Court has attempted to balance the necessity of executive lawmaking with the principles of parliamentary democracy and constitutional accountability.

One of the early cases that examined the nature of ordinances was *R.C. Cooper v. Union of India* (1970)<sup>26</sup>. In this case, the Supreme Court considered the validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, which nationalized several banks in India. The Court held that an ordinance promulgated under Article 123 has the same force and effect as an Act of Parliament. Consequently, it is subject to the same constitutional limitations

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<sup>25</sup>M.P. Jain, *Indian Constitutional Law 1868–1872* (8th ed. 2018).

<sup>26</sup>*R.C. Cooper v. Union of India*, (1970) 1 SCC 248 (India).

as ordinary legislation, including compliance with fundamental rights<sup>27</sup>. The judgment established that ordinances are not merely executive orders but legislative measures with full legal authority during their operation.

Another important case addressing the scope of ordinance-making power is *A.K. Roy v. Union of India* (1982)<sup>28</sup>. In this case, the Supreme Court examined the National Security Ordinance issued by the government. One of the key questions before the Court was whether the “satisfaction” of the President in promulgating an ordinance could be subject to judicial review. The Court observed that although the President’s satisfaction is based on the advice of the Council of Ministers, it cannot be regarded as completely beyond judicial scrutiny. If the exercise of ordinance power is shown to be mala fide or based on irrelevant considerations, the judiciary may intervene. However, the Court also emphasized that the scope of judicial review in such matters is limited because the determination of urgency is primarily a matter for the executive.

The misuse of ordinance power became a major constitutional issue in *D.C. Wadhwa v. State of Bihar* (1987)<sup>29</sup>. In this case, the petitioner challenged the repeated re-promulgation of ordinances by the government of Bihar. The state government had issued numerous ordinances and repeatedly re-promulgated them without placing them before the legislature for approval. This practice effectively allowed the executive to maintain laws in force for extended periods without legislative sanction.

The Supreme Court strongly condemned this practice and held that re-promulgation of ordinances without placing them before the legislature was a fraud on the Constitution. The Court emphasized that the ordinance-making power is intended to meet extraordinary situations and cannot be used as a substitute for the regular legislative process. The judgment highlighted that frequent re-promulgation undermines the authority of the legislature and violates the democratic principle of accountability. Although the Court did not invalidate all previously issued ordinances, it made it clear that such practices were constitutionally unacceptable.

A more comprehensive interpretation of ordinance powers emerged in *Krishna Kumar Singh v. State of Bihar* (2017)<sup>30</sup>. This case arose from the same pattern of

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<sup>27</sup>H.M. Seervai, *Constitutional Law of India: A Critical Commentary* 2105–2107 (4th ed. 2013).

<sup>28</sup>*A.K. Roy v. Union of India*, (1982) 1 SCC 271 (India).

<sup>29</sup>*D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).

<sup>30</sup>*Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).

repeated ordinance re-promulgation in Bihar. A seven-judge bench of the Supreme Court examined several critical issues, including the limits of the ordinance-making power, the validity of re-promulgated ordinances, and the legal consequences when an ordinance lapses.

The Court reaffirmed that the power to promulgate ordinances is an exceptional legislative power that must be exercised only in circumstances requiring immediate action. It further held that the President's or Governor's satisfaction is not immune from judicial review. Courts may examine whether the constitutional requirements for issuing an ordinance were satisfied and whether the executive acted in good faith.

One of the most significant aspects of the judgment was the Court's view on the practice of re-promulgation. The Court held that repeated re-promulgation of ordinances without placing them before the legislature constitutes an abuse of constitutional power. Such actions undermine the legislative process and violate the basic principles of parliamentary democracy. The Court also clarified that once an ordinance lapses, the rights and obligations created under it may not automatically survive unless validated by legislation.

The decision in *Krishna Kumar Singh* strengthened the constitutional limitations on executive lawmaking and reinforced the role of the legislature as the primary law-making body. It emphasized that ordinances cannot be used as a routine legislative mechanism and must remain confined to genuine emergencies.

Judicial interpretation has therefore played a vital role in shaping the constitutional understanding of ordinance powers in India. Through various judgments, the Supreme Court has clarified that ordinances possess the same legal status as parliamentary legislation but remain subject to constitutional limitations. The Court has also recognized that while the executive requires flexibility to respond to urgent situations, this power cannot be exercised in a manner that undermines democratic governance<sup>31</sup>.

Furthermore, the judiciary has reaffirmed the importance of parliamentary oversight in the ordinance-making process. By insisting that ordinances be placed before the legislature and by discouraging repeated re-promulgation, the courts have sought to preserve the balance between executive efficiency and legislative supremacy.

In conclusion, judicial interpretation has established important safeguards

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<sup>31</sup>Durga Das Basu, *Commentary on the Constitution of India* 658–662 (8th ed. 2015).

against the misuse of ordinance powers. While the Constitution permits executive lawmaking in exceptional circumstances, the courts have consistently emphasized that such powers must be exercised with constitutional responsibility. The evolving jurisprudence of the Supreme Court demonstrates a commitment to ensuring that the ordinance-making power remains consistent with the principles of democratic accountability, separation of powers, and the rule of law.

## **1.5 Ordinance-making in Practice: Trends and Concerns**

In practice, the use of ordinance-making power has often deviated from its intended purpose. While ordinances have been employed in genuinely urgent situations, they have also been used as instruments of policy implementation, sometimes in circumstances where legislative debate could have been undertaken. This trend raises concerns about the potential misuse of executive authority.

The ordinance-making power under Article 123 of the Constitution of India was intended to function as an extraordinary legislative mechanism that enables the executive to respond swiftly to urgent circumstances when Parliament is not in session. In practice, however, the use of ordinances has generated considerable debate regarding their frequency, political motivations, and impact on parliamentary democracy. Over the decades, several governments have relied on ordinances as a policy tool, leading to concerns that the executive may be bypassing the legislative process<sup>32</sup>.

Historically, ordinances have been used to address situations requiring immediate legislative intervention. Governments have occasionally justified the promulgation of ordinances on the ground that pressing economic, social, or administrative reforms could not wait until Parliament reconvened. In such cases, ordinances have served as an effective instrument for ensuring continuity in governance. Nevertheless, the repeated use of this mechanism has raised questions about whether the executive is adhering to the constitutional spirit of limited and exceptional use.

One of the most widely debated examples in recent years was the Land Acquisition Ordinance 2014, promulgated by the government to amend the existing land acquisition law<sup>33</sup>. The ordinance aimed to modify certain provisions of the

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<sup>32</sup>S.P. Sathe, *Ordinance Making Power of the Executive in India*, 18 J. Indian L. Inst. 423, 425–27 (1976).

<sup>33</sup>Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance, 2014.

earlier legislation relating to consent requirements and social impact assessments for land acquisition. While the government argued that the changes were necessary to accelerate infrastructure and development projects, critics contended that the ordinance was issued to avoid parliamentary debate and opposition scrutiny. The controversy intensified when the ordinance was re-promulgated multiple times due to the inability of the government to secure legislative approval in Parliament.

Another notable example is the Muslim Women (Protection of Rights on Marriage) Ordinance 2018, commonly associated with the issue of instant triple talaq<sup>34</sup>. The ordinance criminalized the practice of instant divorce among Muslim men and aimed to protect the rights of Muslim women. The government justified the ordinance by emphasizing the urgency of safeguarding women's rights following the judicial condemnation of the practice. However, critics argued that the ordinance route was unnecessary because the matter could have been addressed through regular legislative procedures in Parliament. The debate surrounding this ordinance highlighted the tension between the need for swift action and the importance of legislative deliberation.

Another dimension of controversy arises from the timing of ordinances. Governments have sometimes promulgated ordinances immediately after Parliament adjourns, raising concerns that the executive may be strategically avoiding parliamentary scrutiny. Such practices have prompted constitutional scholars to argue that the ordinance power should be used only when genuine emergencies exist rather than as a routine legislative strategy.

Empirical studies of ordinance usage in India indicate that their frequency has varied significantly across different political periods<sup>35</sup>. Some governments have issued a relatively small number of ordinances, while others have relied on them extensively to implement policy initiatives. This pattern suggests that the use of ordinances is often influenced by political circumstances, including the strength of the ruling party in Parliament and the level of opposition resistance to proposed legislation.

The role of judicial oversight has also shaped the practical use of ordinance powers. The Supreme Court of India has repeatedly emphasized that ordinances should not be used as substitutes for regular legislation. In *D.C. Wadhwa v. State of Bihar*, the Court criticized the practice of repeatedly re-promulgating ordinances without presenting them before the legislature. Later, in *Krishna*

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<sup>34</sup>Muslim Women (Protection of Rights on Marriage) Ordinance, 2018.

<sup>35</sup>Subhash C. Kashyap, *Our Constitution 200–202* (2014).

Kumar Singh v. State of Bihar, the Court reaffirmed that such practices undermine the constitutional scheme and weaken the role of the legislature. These judicial interventions have contributed to strengthening constitutional accountability in the exercise of ordinance powers.

Despite these safeguards, controversies surrounding ordinance-making continue to arise. Critics argue that excessive reliance on ordinances erodes the principle of parliamentary democracy by concentrating legislative authority in the executive branch. Since ordinances take effect immediately upon promulgation, they can significantly influence public policy even before Parliament has the opportunity to debate them.

Supporters of the ordinance mechanism, however, contend that it remains an essential tool for governance in a complex and rapidly changing society. They argue that emergencies, economic reforms, and unforeseen situations may require swift legal intervention that cannot always wait for the legislative process.

In practice, therefore, the ordinance-making power operates within a delicate balance between administrative necessity and democratic accountability. While it provides the executive with flexibility to address urgent issues, its frequent or strategic use raises concerns about the potential erosion of legislative authority. Ensuring that ordinances remain limited to genuine emergencies is crucial for maintaining the integrity of the constitutional framework and preserving the fundamental principles of parliamentary governance in India.

Moreover, the increasing reliance on ordinances has implications for democratic governance. By enabling laws to come into force without prior discussion, ordinances weaken the role of Parliament as the primary forum for lawmaking. This concentration of power in the executive risks eroding institutional checks and balances, thereby affecting the overall health of the constitutional system.

At the same time, it must be acknowledged that ordinances can serve a legitimate purpose in addressing urgent situations. The challenge lies in ensuring that their use remains confined to such circumstances and does not evolve into a routine legislative strategy.

## **1.6 Comparative Constitutional Perspectives**

The ordinance-making power in India reflects a broader constitutional practice in which the executive is granted limited authority to enact temporary legislation in exceptional circumstances. Although the structure and scope of such powers vary

across constitutional systems, many democratic countries recognize the need for executive action during emergencies or when the legislature is unable to convene immediately. Examining these comparative frameworks helps in understanding the unique features and limitations of the Indian ordinance system under Article 123 of the Constitution of India.

In India, the power to promulgate ordinances is formally vested in the President of India, who exercises it when both Houses of Parliament are not in session and circumstances require immediate legislative action. Although the ordinance has the same force and effect as a law enacted by Parliament, it remains temporary and must be approved by the legislature within a prescribed period. This structure reflects the constitutional commitment to parliamentary supremacy while allowing the executive to respond to urgent situations<sup>36</sup>.

A comparable mechanism can be found in France, where the Constitution allows the government to adopt legislative measures through ordinances with parliamentary authorization. Under the Constitution of France, the executive may request permission from Parliament to issue ordinances for a limited period in order to implement specific legislative programs<sup>37</sup>. Unlike the Indian model, where ordinances are issued without prior legislative approval, the French system requires prior authorization from Parliament before the executive can exercise such powers. This requirement strengthens legislative oversight and ensures that executive lawmaking occurs within clearly defined limits.

Another example can be observed in the United States, where the President does not possess a direct ordinance-making power similar to that found in India. Instead, the President issues Executive Orders to direct the functioning of the federal administration<sup>38</sup>. While executive orders can significantly influence public policy, they do not have the same status as statutes enacted by Congress. Executive orders must operate within the framework of existing legislation and the Constitution, and they are subject to judicial review if they exceed constitutional authority<sup>39</sup>. This model reflects a stricter separation of powers, where the executive cannot independently create laws in the absence of legislative approval.

The comparison highlights important differences in how constitutional systems

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<sup>36</sup>V.N. Shukla, *Constitution of India 941–943* (Mahendra Pal Singh ed., 13th ed. 2017).

<sup>37</sup>Fr. Const. art. 38 (Fr.).

<sup>38</sup>Peter L. Strauss, *The President and Choices Not to Enforce*, 63 *LAW & CONTEMP. PROBS.* 107, 110–12 (2000).

<sup>39</sup>*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

balance executive efficiency and legislative authority. The Indian ordinance mechanism allows the executive to enact temporary legislation without prior parliamentary approval, which enables swift responses to urgent issues. However, the requirement that ordinances be placed before Parliament and approved within a specified period serves as a safeguard to maintain legislative control.

Judicial interpretation has further strengthened these safeguards. The Supreme Court of India has clarified that ordinance powers cannot be used as substitutes for regular legislation. In cases such as *D.C. Wadhwa v. State of Bihar*<sup>40</sup> and *Krishna Kumar Singh v. State of Bihar*<sup>41</sup>, the Court emphasized that the repeated re-promulgation of ordinances undermines democratic governance and violates the constitutional scheme.

Overall, comparative constitutional perspectives demonstrate that while many democracies provide mechanisms for executive action during emergencies, these powers are generally accompanied by strong institutional safeguards. The Indian model reflects a balance between executive flexibility and parliamentary accountability. However, the effectiveness of this balance depends on responsible use by the executive and vigilant oversight by both the legislature and the judiciary<sup>42</sup>.

A comparative analysis of constitutional systems reveals that while many democracies provide mechanisms for executive action during emergencies, the scope and structure of such powers vary significantly. In some systems, executive lawmaking is subject to prior legislative authorization, thereby ensuring stronger parliamentary control. In others, executive measures are limited in scope and cannot substitute formal legislation.

The Indian model is distinctive in that it allows the executive to enact temporary legislation without prior approval, subject to subsequent parliamentary validation. This design provides flexibility but also creates the potential for misuse. The absence of prior legislative authorization places greater reliance on post-facto accountability mechanisms, including parliamentary scrutiny and judicial review.

This comparison highlights the need for robust safeguards to ensure that executive lawmaking does not undermine democratic principles. While flexibility is essential for effective governance, it must be balanced with accountability to prevent the concentration of power

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<sup>40</sup>*D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).

<sup>41</sup>*Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).

<sup>42</sup>Subhash C. Kashyap, *Our Constitution* 201–203 (2014).

## **1.7 Critical Constitutional Concerns**

The ordinance-making power under Article 123 of the Constitution of India<sup>43</sup> has been an important yet controversial feature of India's constitutional framework. While the provision was introduced to address urgent situations requiring immediate legislative action, its practical use has raised several constitutional concerns relating to democratic governance, separation of powers, and parliamentary accountability. A critical evaluation of this power reveals both its necessity and its potential for misuse.

One of the primary constitutional concerns relates to the possible erosion of the principle of separation of powers. In a parliamentary democracy, the primary responsibility for making laws lies with the legislature. However, the ordinance-making power temporarily transfers this legislative function to the executive branch. Although the ordinance is formally promulgated by the President of India, it is exercised on the advice of the Council of Ministers. As a result, the executive effectively assumes a legislative role during periods when Parliament is not in session. Critics argue that frequent reliance on ordinances may disturb the constitutional balance between the executive and legislative branches.

Another significant concern is the potential weakening of parliamentary debate and deliberation. The legislative process in Parliament allows for discussion, scrutiny, and participation by both the ruling party and the opposition. This process ensures transparency and accountability in lawmaking. When ordinances are used as a substitute for regular legislation, they may bypass this democratic process. Important policies may come into force without the benefit of detailed parliamentary examination. This undermines the deliberative character of democratic lawmaking and reduces opportunities for public and political debate.

The practice of repeated re-promulgation of ordinances has also attracted strong criticism. Re-promulgation occurs when an ordinance is issued again after it has lapsed without being converted into an Act of Parliament. This practice allows the executive to keep a law in force for extended periods without legislative approval. The Supreme Court of India strongly criticized this practice in *D.C. Wadhwa v. State of Bihar*<sup>44</sup>, holding that repeated re-promulgation amounts to a fraud on the Constitution because it bypasses the authority of the legislature. Later, in *Krishna*

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<sup>43</sup>India Const. art. 123.

<sup>44</sup>*D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).

Kumar Singh v. State of Bihar<sup>45</sup>, the Court reaffirmed that the ordinance-making power is an exceptional power that must not be used to circumvent the legislative process.

Another constitutional concern involves the subjective nature of the “satisfaction” required for issuing an ordinance. Article 123 states that the President may promulgate an ordinance when circumstances exist that require immediate action. However, determining whether such circumstances exist often depends on the judgment of the executive. Although the judiciary can review the exercise of this power in cases of mala fide intention or constitutional violation, courts generally exercise restraint in questioning executive satisfaction. This limited scope of judicial review may allow governments to justify ordinances on broad or vague grounds of urgency.

Furthermore, frequent use of ordinances may create the perception that the executive prefers governing through temporary legislation rather than engaging in the democratic legislative process. Such practices may weaken institutional respect for Parliament and reduce the effectiveness of legislative oversight.

Despite these concerns, it must also be recognized that ordinance powers serve an important constitutional purpose. In certain situations, such as economic crises, national emergencies, or urgent policy needs, waiting for the next parliamentary session may cause significant delay. The ordinance mechanism therefore provides necessary flexibility to ensure continuity in governance.

In conclusion, the ordinance-making power represents a delicate balance between executive efficiency and democratic accountability. While the Constitution permits this extraordinary power to address urgent circumstances, its excessive or strategic use may undermine the principles of parliamentary democracy. Ensuring responsible use of the ordinance power, combined with vigilant judicial and legislative oversight, is essential to preserving the constitutional framework and maintaining the integrity of democratic governance in India.

## **1.8 Reform Proposals and Safeguards**

Addressing the challenges associated with ordinance-making power requires a combination of institutional reforms and constitutional discipline. Strengthening parliamentary oversight is essential to ensure that ordinances are subjected to

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<sup>45</sup>Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1 (India).

rigorous scrutiny upon reassembly of Parliament. This could involve more structured debates and detailed examination of the necessity and implications of each ordinance.

The ordinance-making power under Article 123 of the Constitution of India plays an important role in enabling the executive to respond quickly to urgent situations when Parliament is not in session. However, concerns about the misuse or overuse of this power have prompted discussions regarding the need for stronger constitutional safeguards and institutional reforms. Such reforms are essential to ensure that the ordinance mechanism remains consistent with the principles of parliamentary democracy and constitutional accountability.

One important reform proposal is the introduction of stricter parliamentary scrutiny of ordinances. Once an ordinance is promulgated by the President of India, it should be mandatorily examined by specialized parliamentary committees before being debated in the legislature. This would enable a detailed analysis of the necessity and implications of the ordinance and ensure that the executive justifies the urgency of its action. Strengthening the role of parliamentary committees can enhance transparency and accountability in the lawmaking process.

Another safeguard involves limiting the practice of re-promulgation. The Supreme Court of India has already criticized this practice in landmark judgments such as *D.C. Wadhwa v. State of Bihar*<sup>46</sup> and *Krishna Kumar Singh v. State of Bihar*<sup>47</sup>, where it held that repeated re-promulgation of ordinances undermines the authority of the legislature. A constitutional or statutory provision could explicitly restrict re-promulgation unless exceptional circumstances are clearly demonstrated.

Additionally, clearer guidelines may be developed to define the requirement of “immediate action” mentioned in Article 123. Establishing objective criteria for determining urgency would help prevent arbitrary use of ordinance powers. Requiring the executive to provide a written statement explaining the necessity of the ordinance could further strengthen accountability.

Finally, increased judicial vigilance and public transparency can serve as important safeguards. Judicial review ensures that ordinances remain within constitutional limits, while public scrutiny encourages responsible governance.

Limiting the practice of re-promulgation is another critical reform. Clear legal provisions prohibiting repeated issuance of ordinances without legislative approval would help prevent abuse of power. Additionally, greater transparency in the exercise of ordinance powers, including the requirement of detailed justifications,

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<sup>46</sup>*D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).

<sup>47</sup>*Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).

would enhance accountability.

Judicial vigilance also plays a crucial role in maintaining constitutional balance. By enforcing limits on executive authority, courts can ensure that ordinance-making remains within its intended scope. Ultimately, the effectiveness of these safeguards depends on the commitment of all constitutional actors to uphold democratic principles.

## **Conclusion**

The ordinance-making power under Article 123 of the Constitution of India stands as one of the most intriguing and debated features of the country's constitutional design. Conceived as a pragmatic response to the practical difficulties of governance in a vast and complex democracy, it reflects the framers' recognition that extraordinary situations may demand immediate legislative intervention even in the absence of a functioning Parliament. At its core, this power represents a constitutional compromise, one that seeks to reconcile the need for administrative efficiency with the foundational principles of democratic accountability and legislative supremacy.

However, the continued evolution of this power in practice reveals a persistent tension between its intended purpose and its actual use. While the Constitution clearly envisages ordinances as temporary and exceptional measures, the frequency and manner in which they have been employed raise important concerns about the shifting balance of power between the executive and the legislature. When the executive resorts to ordinance-making not out of genuine necessity but as a matter of convenience or political strategy, it risks transforming an emergency provision into a routine legislative device. Such a transformation undermines the very rationale for which the power was originally incorporated into the constitutional framework.

A central concern emerging from this analysis is the potential erosion of parliamentary democracy. The legislative process is not merely a procedural formality but a substantive mechanism that ensures deliberation, debate, and representation. It provides a platform where diverse viewpoints are expressed, policies are scrutinized, and governmental actions are held accountable. Ordinances, by their very nature, bypass this deliberative process at the initial stage, allowing laws to come into force without prior discussion or opposition engagement. While this may be justified in situations of urgency, its repeated use diminishes the role of Parliament as the primary lawmaking institution and weakens the democratic ethos that underpins the Constitution.

Equally significant is the impact of ordinance-making on the principle of separation of powers. The Indian Constitution, while not adhering to a rigid separation, nonetheless envisages a functional distinction between the roles of the legislature and the executive. Ordinance-making temporarily blurs this distinction by enabling the executive to assume legislative functions. Although this overlap is constitutionally sanctioned, its legitimacy depends on its limited and cautious use. When exercised excessively, it disrupts the institutional balance and concentrates lawmaking authority in the executive, thereby raising concerns about accountability and the potential for abuse of power.

The role of the judiciary in this context has been both corrective and clarificatory. Through its jurisprudence, the courts have consistently emphasized that ordinance-making power is not absolute and must be exercised within constitutional boundaries. Judicial pronouncements have reinforced the temporary nature of ordinances, condemned the practice of re-promulgation, and affirmed the principle that executive satisfaction is subject to limited review. These interventions have been instrumental in preserving the integrity of the constitutional scheme. Nevertheless, the judiciary's role remains inherently reactive, addressing misuse only after it has occurred. This underscores the need for proactive institutional safeguards and greater constitutional discipline on the part of the executive.

Another important dimension of the ordinance-making power is the ambiguity surrounding the requirement of "immediate action." The Constitution does not define what constitutes sufficient urgency, leaving considerable discretion in the hands of the executive. While such flexibility may be necessary to address unforeseen circumstances, it also opens the door to subjective interpretation and potential misuse. In the absence of clearly defined standards, the determination of urgency often becomes a matter of political judgment rather than objective necessity. This highlights the importance of evolving conventions, norms, and possibly even legislative guidelines to ensure that the power is exercised in a principled and transparent manner.

Comparative constitutional analysis further reinforces the need for caution in the use of ordinance powers. In many democratic systems, executive lawmaking is either more limited in scope or subject to prior legislative authorization. The Indian model, by contrast, grants significant autonomy to the executive, relying primarily on post-facto parliamentary approval and judicial review as safeguards. While this design provides flexibility, it also places a greater burden on constitutional actors to exercise restraint and uphold democratic values. The effectiveness of the system,

therefore, depends not only on formal rules but also on the strength of institutional practices and political culture.

In light of these considerations, it becomes evident that the future of ordinance-making power in India depends on striking a careful balance between necessity and restraint. Reforms aimed at strengthening parliamentary oversight, restricting re-promulgation, and enhancing transparency can play a crucial role in addressing existing concerns. Equally important is the development of a constitutional culture that prioritizes deliberation over expediency and accountability over convenience. The executive must recognize that the legitimacy of its actions derives not merely from constitutional authorization but from adherence to the spirit of democratic governance.

Ultimately, the ordinance-making power must be understood not as an alternative to the legislative process but as a narrowly tailored exception to it. Its continued relevance lies in its ability to address genuine emergencies without compromising the foundational principles of the Constitution. Preserving this delicate balance is essential for maintaining public confidence in constitutional institutions and ensuring that the exercise of state power remains subject to democratic control.

In conclusion, the ordinance-making power embodies both the strengths and vulnerabilities of India's constitutional framework. It reflects a system capable of responding swiftly to urgent needs, yet one that must remain vigilant against the concentration of power and the erosion of democratic norms. The challenge, therefore, is not to eliminate this power but to ensure that it is exercised with responsibility, transparency, and fidelity to constitutional values. Only through such an approach can the ordinance mechanism continue to serve its intended purpose while safeguarding the integrity of India's parliamentary democracy and the rule of law.

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# Parliamentary Privileges in India: Scope, Misuse, and Constitutional Constraints in a Democratic Framework

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## Abstract

Parliamentary privileges constitute a vital element of legislative autonomy, ensuring that elected representatives can perform their functions without external interference. In India, these privileges are primarily embodied in Articles 105 and 194 of the Constitution, granting immunity in matters of speech, voting, and internal proceedings. However, the absence of codification and the expansive discretionary nature of these privileges have generated enduring constitutional concerns, particularly regarding their potential misuse and their interaction with fundamental rights. This paper critically examines the scope and evolution of parliamentary privileges in India, tracing their historical origins and constitutional justification. It analyses key judicial decisions to demonstrate the gradual assertion of judicial review as a mechanism to curb legislative excesses. The study further explores instances where privilege powers have been invoked in ways that undermine transparency, democratic accountability, and freedom of expression. It argues that parliamentary privilege must operate within the framework of constitutional supremacy and cannot remain insulated from judicial scrutiny. The paper concludes by advocating for clearer legal standards and a balanced approach that preserves legislative independence while preventing abuse.

**Keywords:** *Parliamentary privilege, legislative autonomy, judicial review, constitutional supremacy, fundamental rights, codification.*

## **2.1 Introduction**

Parliamentary privileges form an essential component of legislative autonomy, intended to secure the independence and effective functioning of Parliament. In the Indian constitutional framework, these protections are not merely traditional honours but functional necessities that allow legislators to perform their duties without fear of external pressure or judicial interference. By providing a protective umbrella over the legislative process, these immunities ensure that the collective voice of the House remains autonomous<sup>48</sup>. Enshrined primarily under Articles 105 and 194 of the Indian Constitution, these privileges grant Members of Parliament immunity in respect of freedom of speech and certain procedural protections. However, the absence of codification and the broad discretionary nature of these privileges have generated persistent constitutional concerns, particularly regarding their potential misuse and conflict with fundamental rights. This lack of a defined legal boundary often leads to a tug-of-war between legislative power and the constitutional guarantees provided to citizens.

Parliamentary privileges are special rights and immunities granted to the legislature and its members to ensure the independent and efficient functioning of parliamentary institutions. However, the absence of codified laws governing parliamentary privileges has created ambiguity regarding their scope and limits. This lack of clarity has sometimes resulted in the exercise of privileges in ways that may conflict with fundamental rights, democratic accountability, and the rule of law. The objective of these protections is not to confer personal benefits on legislators but to ensure that the legislative institution can function effectively as an organ of democratic governance<sup>49</sup>. This research examines the constitutional basis, scope, and misuse of parliamentary privileges while analysing the role of judicial review in maintaining constitutional balance.

The constitutional foundation of parliamentary privileges in India is primarily located in Articles 105 and 194<sup>50</sup>, which confer certain immunities upon Members of Parliament and State Legislatures respectively. These include freedom of speech within the House, immunity from legal proceedings for statements made during debates, and the authority of each House to regulate its own internal affairs. However, these provisions do not exhaustively define the scope of privileges, leaving

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<sup>48</sup>India Const. art. 105; India Const. art. 194

<sup>49</sup>D.D. Basu, *Introduction to the Constitution of India* 229 (22d ed. 2015).

<sup>50</sup>See India Const.

significant room for interpretation and evolution through parliamentary practice and judicial decisions.

This lack of codification has given rise to persistent constitutional tensions. On one hand, privileges are necessary to preserve legislative autonomy; on the other, their broad and undefined nature creates the possibility of misuse, particularly when they conflict with fundamental rights such as freedom of speech and personal liberty. This paper seeks to examine whether the current framework of parliamentary privileges in India strikes an appropriate balance between legislative independence and constitutional accountability. It argues that while privileges are indispensable, they must be exercised within clearly defined constitutional limits to prevent arbitrariness and uphold the rule of law.

## **2.2 Historical Evolution of Parliamentary Privileges**

The concept of parliamentary privilege has its historical roots in the constitutional struggles between the English Parliament and the Crown. During the medieval and early modern periods, members of Parliament frequently faced intimidation, arrest, or punishment from the monarch for statements made during parliamentary proceedings. In response to these threats, Parliament gradually asserted certain immunities to safeguard its independence and to ensure that legislative deliberations could occur without external interference<sup>51</sup>. These early assertions of privilege were not initially codified but developed through custom, precedent, and constitutional practice. One of the most significant milestones in the development of parliamentary privilege in England was the enactment of the Bill of Rights 1689. This statute formally recognized the principle that freedom of speech and debates in Parliament ought not to be questioned in any court or place outside Parliament<sup>52</sup>. The provision established the foundation for legislative immunity and became a central pillar of parliamentary democracy. The purpose of this privilege was to protect members from legal consequences arising from their speeches and votes within Parliament, thereby ensuring uninhibited debate on matters of public importance. Over time, the British Parliament developed a comprehensive body of privileges, including freedom of speech, freedom from arrest in certain civil cases, the power to regulate internal proceedings, and the authority to punish for contempt or breach

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<sup>51</sup>M.P. Jain, *Indian Constitutional Law* 417 (8th ed. 2018).

<sup>52</sup>Bill of Rights 1689, 1 W. & M., c. 2 (Eng.)

of privilege.<sup>53</sup> These privileges were regarded as essential for preserving the dignity, authority, and autonomy of the legislature. The principles governing these privileges were largely derived from parliamentary conventions and authoritative texts such as *Erskine May's Treatise on Parliamentary Practice*, which remains one of the most influential sources on parliamentary procedure and privilege.

The concept of parliamentary privileges in India is heavily influenced by the British Westminster model. Historically, these privileges emerged in England as a means for the House of Commons to protect its members from the arbitrary powers of the Crown and the interference of the common law courts<sup>54</sup>. This evolution from a struggle for survival to a recognized set of legal immunities provided the foundational template for democratic legislatures globally. In the Indian context, the paper traces these historical origins to understand how they were adapted to fit a written constitution.

In India, parliamentary privileges were introduced during the colonial period through legislative institutions established by the British administration. The Government of India Act, 1919<sup>55</sup> marked an initial step by expanding legislative participation, although privileges remained limited and subject to executive control. A more significant development occurred with the Government of India Act, 1935<sup>56</sup>, which recognized certain privileges of legislative bodies, thereby laying the groundwork for their incorporation into the Constitution of independent India.

The framers of the Indian Constitution adopted this framework, drawing heavily from the British model while embedding it within a written constitutional structure. However, unlike the United Kingdom, India chose not to codify these privileges comprehensively, thereby inheriting both the flexibility and ambiguity of the British system.

## **2.3 Constitutional Framework of Parliamentary Privileges in India**

Parliamentary privileges in India derive their authority from constitutional provisions rather than mere convention. Articles 105 and 194 confer powers, privileges,

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<sup>53</sup>Subhash C. Kashyap, *Parliamentary Procedure: Law, Privileges, Practice and Precedents* 296 (2d ed. 2006).

<sup>54</sup>See Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (24th ed. 2011).

<sup>55</sup>Refer Govt of India Act, 1919

<sup>56</sup>See Govt of India Act, 1935

and immunities upon Parliament and State Legislatures respectively. These provisions ensure that legislative bodies can function independently without interference from the executive or judiciary.

The concept of parliamentary privileges was introduced into India during the colonial period under British rule. Legislative institutions created by the British government gradually incorporated certain elements of parliamentary procedure, including limited privileges for members. However, these privileges were initially restricted and subject to the authority of the colonial executive. The Government of India Act 1919 marked an important stage in the development of legislative institutions in India. This Act introduced a system of limited parliamentary governance and expanded the role of legislative councils, although the powers and privileges of members remained narrowly defined<sup>57</sup>. The colonial administration retained substantial control over legislative proceedings, and members did not enjoy the full range of privileges recognized in the British Parliament. A more significant development occurred with the enactment of the Government of India Act 1935. This legislation expanded the legislative framework and introduced provisions relating to the privileges of members of the Federal Legislature and provincial legislatures<sup>58</sup>. Although these provisions acknowledged certain privileges, they did not provide a comprehensive framework comparable to that of the British Parliament. Nonetheless, the Act laid the groundwork for the later incorporation of parliamentary privileges into the constitutional structure of independent India.

### **2.3.1 Constitutional Rationale and Framework**

the primary objective of incorporating these privileges into the Indian Constitution was to secure the independence and effective functioning of Parliament. The framers believed that for the legislature to perform its constitutional role, its members required a sphere of autonomy free from external pressure. This rationale is enshrined primarily under Articles 105 and 194 of the Indian Constitution, which serve as the legal pillars for legislative immunity<sup>59</sup>. These articles grant Members of Parliament and State Legislatures immunity in respect of freedom of speech and certain procedural protections to ensure they can represent their constituents without fear of legal reprisal.

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<sup>57</sup>Government of India Act 1919, 9 & 10 Geo. 5 c. 101 (U.K.)

<sup>58</sup>Government of India Act 1935, 25 & 26 Geo. 5 c. 42 (U.K.).

<sup>59</sup>India Const. art. 105; India Const. art. 194.

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