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Case Comment: A K Roy v Union of India

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INTRODUCTION

This case note examines the ordinance-making powers granted to the Governor under the Indian Constitution, particularly by The writ petition challenging the National Security Act of 1980. The case arose when A.K. Roy, a Marxist member of Parliament, was detained under the National Security Ordinance of 1980. The core focus of this analysis is to explore the extent and nature of the President's ordinance-making authority, questioning whether it is legislative or executive And whether an ordinance can be classified as a law.¹ By analyzing various articles of the Indian Constitution, including Articles 123,² 13,³ 367,⁴ 21,⁵ 213,⁶ and 85,⁷ The Supreme Court determined that ordinances hold the same weight as parliamentary laws and must conform to constitutional limitations, including protecting fundamental rights.

¹ *A K Roy v Union of India* (1982) SC 710

² Constitution of India 1950, art 123

³ Constitution of India 1950, art 13

⁴ Constitution of India 1950, art 367

⁵ Constitution of India 1950, art 21

⁶ Constitution of India 1950, art 213

⁷ Constitution of India 1950, art 85

The note references landmark cases such as *R.C. Cooper v Union of India*⁸ and *Krishna Kumar Singh v State of Bihar*⁹ To emphasise the necessity of urgent circumstances to justify the issuance of ordinances. It also underscores Parliament's intent to regulate the executive's ordinance-making power, particularly following the removal of clause (4) from Article 123.¹⁰ Furthermore, the case critiques the potential for misuse of the ordinance-making power and advocates for the importance of upholding the separation of powers.

FACTS

The case involves a group of writ petitions filed under Article 32 of the Indian Constitution,¹¹ Challenging the validity of the National Security Act of 1980. A Marxist member of parliament, A.K. Roy, was detained under the National Security Ordinance of 1980, which was later repealed and replaced by the National Security Act 1980 because it was engaging in activities detrimental to public order. It was argued that since the ordinance-making power of the president could undermine the system of parliamentary democracy, it is essential to determine the scope of this authority.¹²

ISSUES

1. What is the extent of the Ordinance-making power of the president and its limitations?
2. Ordinance making power either legislative or executive?
3. Whether an ordinance is a law or not?
4. What are the restrictions for the promulgation of the ordinance?

RULES

Article 123: President Powers to promulgate ordinances during recess of parliament.¹³

⁸ *Rustom Cavasjee Cooper v Union Of India* (1970) SC 564

⁹ *Krishna Kumar Singh v State of Bihar* (2017) 3 SCC 1

¹⁰ Constitution of India 1950, art 123

¹¹ Constitution of India 1950, art 32

¹² *A K Roy v Union of India* (1982) SC 710

¹³ Constitution of India 1950, art 123

Article 13: Laws inconsistent with or in derogation of the fundamental rights.¹⁴

Article 367: Interpretation.¹⁵

Article 21: Protection of life and personal liberty.¹⁶

Article 213: Power of Governor to promulgate Ordinances during recess of Legislature.¹⁷

Article 85: Sessions of Parliament, prorogation and dissolution.¹⁸

ANALYSIS

The arguments of the petitioners that the ordinance is not a law were rejected by interpreting various articles from the Constitution. Chapter 3 of the Indian Constitution with the heading, “Legislative Powers of the President” under which Article 123¹⁹ States the power of the president to promulgate ordinances during recess of parliament. Its clause (2)²⁰ States that ordinances have the same effect as the act made by the parliament. Just because ordinances are enforceable for a temporary period unlike the laws made by the parliament doesn’t satisfy to consider them as not law. Also, Article 13(3) (a)²¹ Mentions that the word “law” includes any ordinance. The interpretation of the constitution in Article 367 (2)²² Clarifies that ordinances made by the president or governor are to be interpreted the same way as laws made by the parliament or state legislatures. Therefore, it is the legislative power of the president and not the executive, rejecting the petitioner’s argument. Ordinance-making power lies only with the legislature. The fact that “law” under Article 21²³ includes legislative acts and not ordinances contradicts Articles 123(2)²⁴ and 367(2)²⁵. Article 13(2)²⁶ prohibits any law from violating fundamental rights under part 3 of the Constitution. If ordinances weren’t considered laws, they wouldn’t be subjected to the same

¹⁴ Constitution of India 1950, art 13

¹⁵ Constitution of India 1950, art 367

¹⁶ Constitution of India 1950, art 21

¹⁷ Constitution of India 1950, art 213

¹⁸ Constitution of India 1950, art 85

¹⁹ Constitution of India 1950, art 123

²⁰ Constitution of India 1950, art 123(2)

²¹ Constitution of India 1950, art (13)(3)(a)

²² Constitution of India 1950, art 367(2)

²³ Constitution of India 1950, art 21

²⁴ Constitution of India 1950, art 123(2)

²⁵ Constitution of India 1950, art 367(2)

²⁶ Constitution of India 1950, art 13 (2)

limitations prescribed under Article 13(2).²⁷ Articles 13(3)²⁸ and 367(2)²⁹ Do not discriminate between laws and hence, an ordinance is a law. Like other laws, it is also bound by constitutional spirit. Now amalgamating all the rationales analyzed above from various articles, the Supreme Court in the case of *Madras Bar Assn v Union of India*, held that ordinances carry the same authority as law enacted by the parliament. The court further stated that such ordinances shall be considered as formal laws carrying with it all its incidents, immunities and limitations under the constitution. They will be Bound by the constitutional spirit and will have to respect the fundamental rights.³⁰

Ordinances can be issued by the President on matters in lists 1 and 3 of Schedule VII or any residuary subject. During an emergency, he can issue ordinances on list 2 matters also. However, a restriction in *R.C. Cooper v Union of India*³¹ Was laid down where it was held that the ordinance should be Issued only in extraordinary situations requiring quick response and not with any mala fide intentions. And no ordinance can violate the fundamental rights.³²

The deleted clause (4) in Article 123³³ originally stated that the President's decision to issue ordinances concerning his understanding of the circumstances is final and conclusive. Its removal indicated that Parliament did not want the executive branch to have unchecked powers to issue ordinances. It reflected The parliament wanted limits and checks on the executive's ordinance-making power and required the executive to prove that unavoidable circumstances justified the ordinance.

However, when this was contended in this case to challenge the validity of the national security ordinance, it was rejected by the court as the ordinance was replaced by an act passed by the parliament. The court stated that once an ordinance becomes an act, this means that the justification for the president's decision to issue the ordinance becomes less significant. But this does not suggest the fact, that the above reasoning as a pre-condition is completely nullified. It is more like discretion in the hands of the president, because of the President's satisfaction, as

²⁷ *Ibid*

²⁸ Constitution of India 1950, art (13)(3)

²⁹ Constitution of India 1950, art 367(2)

³⁰ *Madras Bar Association v Union of India* (2022) 12 SCC 455

³¹ *Rustom Cavasjee Cooper v Union Of India* (1970) SC 564

³² Mahendra Pal Singh, *VN Shukla's Constitution of India* (14th edn, Eastern Book Company 2022)

³³ Constitution of India 1950, art 123

The issue is more of a theoretical question and not a practical legal matter for the court. Therefore, once an ordinance takes the Place of an act, the focus drifts towards the new act instead of the ordinance that got replaced as clarified in *Krishna Kumar Singh v State of Bihar*.³⁴ Finally in the Judgement, the National Security Ordinance was held constitutional and the Ordinance was considered a law.

CONCLUSION

In Contemporary Times A.K Roy's case makes it clear that the ordinance-making power of the executive is exercised responsibly with certain restrictions. It also ensures the importance of protecting fundamental rights and the democratic process. It plays an important role in current times in explaining the relationship between legislature and executive and justifying the ordinance-making power of the executive. Also, it helps the court to analyze the necessity and urgency claimed by the executive when promulgating ordinances.

This case has answered all the questions concerning ordinance-making power and how it is considered as a law. But in my opinion, giving this legislative power to the executive is somewhat disrespectful to the separation of powers between the executive and the legislature. If we are considering that an ordinance is a law then we must also keep fact in mind that to formulate a law certain procedures are to be followed where when a bill is passed by both houses after discussion, only then it becomes an act, and a law is formulated. If we take a glance towards the issuance of ordinances whether by a president under Article 123³⁵ or Governor under Article 213,³⁶ it is very clear that ordinances do not go through any of this process. It is passed at the satisfaction of the president which is not even considered as important to be questioned by the courts and is kept out of the scope of judicial review as held in the case of *Venkata Reddy v State of Andhra Pradesh*.³⁷ It seems to be an unfettered power in the hands of the ruling party. Furthermore, there is a danger in this power as per Article 85³⁸ where the president may prorogue any house of parliament and then legislate ordinances. Even if an ordinance is temporary, it can still be misused by promulgating or re-promulgating. Like in the case of

³⁴ *Krishna Kumar Singh v State of Bihar* (2017) 3 SCC 1

³⁵ Constitution of India 1950, art 123

³⁶ Constitution of India 1950, art 213

³⁷ *T Venkata Reddy v State of A P* (1985) 3 SCC 198

³⁸ Constitution of India 1950, art 85

*Krishna Kumar Singh v State of Bihar*³⁹ where State of Bihar issued an ordinance to take over 429 private Sanskrit without advancing any compensation. This ordinance was constantly reissued until it was ended in April 1992, but the state assembly never turned it into law. Justice Sujata v Manohar held all the ordinances unconstitutional. However, Justice Wadhwa took a different line of view where he only held the re-issued ordinances unconstitutional criticizing the state of Bihar for continuing this illegal practice of re-issuing ordinances even after the Supreme Court in the case of *D.C Wadhwa v State of Bihar*⁴⁰ had disapproved this practice in 1986. Justice Manohar focused on the point that ordinances are not meant to replace regular ordinances. It is only for a situation where urgent action is needed and the legislature is not in session. The Bihar Government did not provide for the existence of such urgent circumstances and failed to submit the reasons for not passing proper legislation for over two years. This case sharply portrayed the misuse of powers granted by Article 213⁴¹ of the constitution to the governor to issue ordinances and this case reflected how it was misused by stating that all the ordinances were passed to bypass the legislative process which was not allowed by the constitution. Justice Manohar set a precedent by ordering all the ordinances and not just the re-issued ordinances as unconstitutional by citing that it was a misuse of ordinance-making power. The Krishna Kumar case showcases a new development where the judge has laid down that the government has to prove that immediate action was needed when the legislature was not in session, implying a new and sudden situation.⁴²

³⁹ *Krishna Kumar Singh v State of Bihar* (2017) 3 SCC 1

⁴⁰ *Dr D C Wadhwa and Ors v State Of Bihar and Ors* (1987) SC 579

⁴¹ Constitution of India 1950, art 213

⁴² A G Noorani, 'Ordinance Raj' (1998) 33(50) Economic and Political Weekly

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