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PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES

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The Transplant Effect: Early Origins of Ordinances in England and India

The executive power in the state must have certain powers to act in cases for which legislation has not provided, and modern legislation has not got beyond the expedient of investing the executive with the authority to meet such critical occasions. The crown is able on several matters to legislate by orders in council at the present day, but by a deputed not a prerogative power; but there are conceivable occasions on which, during an interval of parliament, the ministers of the crown might be called upon to act provisionally with such authority as would require an act of indemnity to justify it.

William Stubbs, *The Constitutional History of England* Vol. II, 615 (Clarendon Press, Oxford, 1896).

A. 'ORDINANCE': MAKING SENSE OF SEMANTICS

An ordinance, the *Oxford Dictionary* says, is a 'by-law'.¹ The *Cambridge Advanced Learner's Dictionary* defines it similarly as 'a law or rule made by a government or authority'.² *Macmillan's*, however, defines it as 'an official order by a government, king [or] queen'.³ These disparate meanings are brought together in *Longman's*, which says that an ordinance may be both 'a law, usually of a city or town, that forbids or restricts an activity' and 'an order given by a ruler or governing organisation'.⁴ Although subtly different, these meanings share an 'inferior' quality.

¹ *New Oxford Dictionary of English* 1306 (Oxford University Press, New York, 2001).

² *Cambridge Advanced Learner's Dictionary* 1003 (3rd ed., Cambridge University Press, Cambridge, 2008).

³ *Macmillan English Dictionary* 1055 (2nd ed., A and C Black Publishers, Oxford, 2007). (emphasis added)

⁴ *Longman Dictionary of Contemporary English* 1160 (4th ed., Pearson Education, Essex, 2003).

An ordinance, in these versions, is something *less* than an Act: Whereas an Act originates in parliament, an ordinance comes from a government department or municipal body. In that sense, an ordinance does not have 'vertical' equivalence. But it is also less than an Act in another sense; in these meanings, an ordinance does not have 'horizontal' equivalence. Unlike an Act, an ordinance cannot abridge rights, create major offences or impose substantial taxes or penalties; it can only do limited things. *Longman's* example of 'a city ordinance that says parks must be closed at 11 p.m.' is a good illustration of its limited scope.⁵ Therefore, lexically speaking, an ordinance is law of an inferior kind; it lacks both vertical and horizontal equivalence.

Now consider some *legal* definitions. The *Oxford Dictionary of Law*, for example, explains an ordinance as 'one of the forms taken by legislation under the royal prerogative'.⁶ *Osborne's Concise Law Dictionary* elaborates on this by stating that an ordinance used to be an Act of parliament that 'lacked the consent of one of the three elements: crown, lords, and commons'.⁷ Two U.S. law dictionaries, however, define the term differently. *Black's Law Dictionary* defines it 'as an authoritative law or decree; esp., a municipal regulation'.⁸ The scope of such regulations, it adds, is limited to whatever 'the state government allows to be regulated at the local level'.⁹ *West's Encyclopedia* reiterates this view. According to it, an ordinance is 'a law, statute, or regulation enacted by a municipal corporation . . . [for] maintaining public safety, health, morals, and general welfare . . . [including] housing ordinances . . . [and] fire and safety regulations'.¹⁰ Clearly, the legal meanings differ as well. In some versions, an ordinance is almost like an Act and, therefore, has vertical – and possibly horizontal – equivalence. In other versions, it has neither. Like the lexical meanings earlier, an ordinance, in the American reading of the term, is a 'lesser' law.

Both lexically and legally, an ordinance, it seems, means different things. Depending on the source, it may be something like a parliamentary Act or a more limited regulation of the governmental or municipal variety. But this inconsistency is not inadvertent. As I will argue in the

⁵ *Ibid.*

⁶ *Oxford Dictionary of Law* 346 (5th ed., Oxford University Press, Oxford, 2002).

⁷ *Osborne's Concise Law Dictionary* 294 (11th ed., Sweet and Maxwell/Thomson Reuters, London, 2009).

⁸ *Black's Law Dictionary* 1208 (9th ed., West, St. Paul, MN, 2009).

⁹ *Ibid.*

¹⁰ *West's Encyclopedia of American Law* 324 (2nd ed., Thomson/Gale, Detroit, 2005).

next section, the term and its origins, in the common-law context, is rooted in English legal history. Therefore, making sense of it – and the attendant inconsistencies – requires an introductory account of English parliamentary supremacy and the competing conceptions of legislative power that challenged its emergence.

The rest of the chapter will unfold as follows: I shall describe the rise and fall of ordinances in English legal history – including the origin of the term, its influence and the controversies that came along with it. Thereafter, I will turn to ordinances in British India and offer an account of their formal introduction in 1861 and their use (and abuse) until 1947. Lastly, I shall revisit the debates in the Constituent Assembly: Why did the founding authors provide for ordinances in the Constitution? In the lead-up to independence, India's leaders were critical of the administration's repeated use of ordinances. Yet they abandoned those objections when it mattered most and bought into British rationalisations for extraordinary legislation. The question, however, remains: Do we really need ordinances? I shall close with a discussion about the necessity for a provision on ordinances in India.

B. THE EMPERORS' CLOTHES: RISE AND FALL OF ORDINANCES IN MEDIEVAL ENGLAND

The idea of parliamentary sovereignty stands tall in England. It is, as A. V. Dicey famously put it, the idea that parliament 'under the English constitution, [has] the right to make or unmake any law whatever . . . [and] . . . no person or body is recognised . . . as having a right to override or set aside [any such] legislation'.¹¹ Historically, it was not always this way. As with other fundamental concepts in English public law, parliamentary supremacy 'grew' – out of wars and words. Rivalling this idea, up until the seventeenth century, was the monarch's power – at times wide, at other times more qualified – to legislate *independent* of his parliamentary constituents. In this section, I shall provide a brief account of this independent legislative power and how ordinances fit into the scheme of things.

Medieval British kings were always known to consult their advisors in important affairs of the state. But events between 1254 and 1290 set in motion a series of incremental changes that, in hindsight, dramatically

¹¹ A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* 40 (Universal Law Publishing, New Delhi, 2003).

altered the course of the British monarchy.¹² They mostly had to do with wars and revenues. With his treasury depleted by incessant wars, Henry III met with the clergy and knights in 1254 to have them 'approve' a general tax on the people.¹³ By 1295, that ad hoc meeting turned into a national assembly with audiences from all three estates of the realm – clergy, barons and commons¹⁴ – referred to as *parliamenta*. The assembly met frequently and habitually at the king's behest, but made it clear that he no longer had the right to tax his people without common consent.

During the fourteenth century, this new body evolved in several ways. First, it distinguished itself from the already existing council that was made up of the king's professional counsel, prelates and magnates. At some point, the knights and burgesses in the new body began to deliberate together and separate from their social betters – the archbishops, bishops, abbots and nobles who would later constitute the House of Lords. Second, despite sitting separately, both bodies – together known as the 'High Court of Parliament' – deliberated on the same 'petitions' that aggrieved individuals brought before the king. Some of these were considered by the king's council in its judicial setting. Of those that came before parliament, most petitions required statutes to be drawn up, and in 1322, the commons insisted that *their* consent was necessary in the making of new laws.¹⁵ That insistence was not always honoured in practice, but they were aided by the fact that nearly all legislation in the fourteenth century were based on petitions of parliament – something that allowed the commons to have a say in the process.¹⁶ As a result, it helped settle the view that statutes, to be properly made, required the consent of the king, lords and commons. Third, the High Court of Parliament developed a distinct corporate identity with special rights and privileges. Redressing people's grievances was no longer the only task; over time, it turned into a forum where representatives parleyed about 'national

¹² For a quick description of some of the important moments of this period, see George Burton Adams, *The Constitutional History of England 169–190* (H. Holt, New York, 1921).

¹³ *Id.* at 174–176.

¹⁴ For description of the three estates, see F. W. Maitland, *The Constitutional History of England 74–77* (Cambridge University Press, Cambridge, 1908).

¹⁵ Theodore Plucknett, *A Concise History of Common Law* 31–32 (Little, Brown and Co., Boston, 1956).

¹⁶ For the evolution of the form and substance of these 'petitions', see William Stubbs, *The Constitutional History of England* Vol. II, 598–610 (Clarendon Press, Oxford, 1896).

affairs'.¹⁷ More importantly, it gained undisputed control over revenue matters and increasingly grew assertive – and at times antagonistic – to the king and his council. Even though parliamentary supremacy was still a long way away, parliament was no longer to be trifled with. It was a national forum of 'the people' and, therefore, had pronounced say at least on legislative matters.¹⁸

Although parliament grew in stature and legislation became more 'participative', monarchs always claimed – and the law often recognised – 'an uncertain amount' of legislative exception.¹⁹ The precise boundaries of this tableau of legislative exception has never been fully clear, but it is safe to say that it included, amongst others, the *claim* that the king had authority to (1) legislate independently of parliament on occasions, (2) nullify legislation by dispensing with the operation of statutes in individual cases (the 'dispensing power'), (3) suspend their operation altogether (the 'suspending power') and (4) raise money without parliamentary grant.²⁰ Rich and complicated accounts of these independent or 'discretionary' powers may be found elsewhere, but for our discussion, the first one – the king's power to legislate independently – is the most relevant.

That *some* laws did not require the estates' counsel or consent was never in doubt; monarchs made them on their own.²¹ Up until the seventeenth century, Edward I and everyone after him claimed – and many exercised – a measure of independent legislative power. Kings, in exercise of this power, could at least make 'ordinances', if not statutes.²² But how are we to differentiate one from the other? Unfortunately, there are no easy answers; the nature, scope and extent of ordinances has been mired in controversy. As Professor F. W. Maitland, an English historian who taught at Cambridge University from 1885 to 1906, put it, distinguishing the province of statutes from the province of ordinances has been a 'fruitful source of difficulty'.²³

An Oxford University professor William Stubbs thought of a statute as something permanent and of great importance: 'The statute is a law

¹⁷ Sir William Holdsworth, *A History of English Law* Vol. II, 429 (Methuen and Co., London, 1936).

¹⁸ It may be noted that in A. F. Pollard's account, the commons' evolution into a separate House with distinct rights and privileges occurred much later. See A. F. Pollard, *The Evolution of Parliament* 258–277 (Longmans Green and Co., London, 1929).

¹⁹ *Supra* n. 14 at 187.

²⁰ Sir William Anson, *The Law and Custom of the Constitution* Vol. I, 340 (Clarendon Press, Oxford, 1886).

²¹ *Supra* n. 18 at 262.

²² *Supra* n. 16 at 92.

²³ *Ibid.*

or an amendment of law, enacted by the king in parliament, and enrolled in the statute roll, not to be altered, repealed, or suspected with the authority of parliament, and valid in all particulars until it has been so revoked'.²⁴ But an ordinance, he felt, was a 'rather tentative act which, if it be insufficient to achieve its objective or if it operates mischievously may be easily recalled, and, if it be successful, may be a subsequent act made by statute'.²⁵ Maitland agreed. He thought of a statute as a 'solemn affair' – one that altered the law of the land in an important and a permanent way and, therefore, needed the consent of prelates and barons.²⁶ An ordinance, on the other hand, was like a piece of 'temporary legislation' and mostly used to introduce regulations that did not affect the nation at large.²⁷ Professor William Holdsworth (who taught at Oxford from 1922 to 1944) held a similar view. According to him, an enactment that made 'a permanent and deliberate change in the law' was a statute, but anything that 'was intended to be somewhat in the nature of a temporary provision of a more or less experimental nature' was more like an ordinance.²⁸ Whether temporary or not, all of them agreed that ordinances added to the law of the land.

The emphasis on 'permanence', however, does not settle the matter. As Stubbs and Maitland readily conceded, their distinctions were inadequate because statutes and ordinances came much closer in practice. Stubbs knew that his distinction could not accurately account for laws that were *regarded* as statutes, but were enacted as ordinances. The Magna Carta, for example, was an ordinance, but became 'one of the fundamental laws of the realm almost immediately after its promulgation'.²⁹ Similarly, the two pillars of real property law – the *Quia Emptores* and the *De Donis Conditionalities* – were made without the assent of any representatives, but are still regarded as statutes.³⁰ And then there are several examples from the fourteenth century that altogether undercut the idea that ordinances were temporary, limited in scope and not of national relevance.³¹

As Maitland predicted, properly distinguishing statutes from ordinances is a challenging endeavour. Several factors are at play, but three interrelated ones are especially worth mentioning. First, consider their common origins. Both statutes and ordinances were based on petitions submitted to the king for redress. The official response to such grievances often came from similar people working in different capacities. The king,

²⁴ *Supra* n. 16 at 611.

²⁶ *Supra* n. 14 at 92.

²⁸ *Supra* n. 17 at 438.

³⁰ *Supra* n. 14 at 187.

²⁵ *Ibid.*

²⁷ *Ibid.*

²⁹ *Supra* n. 16 at 612.

³¹ *Supra* n. 16 at 428, 613–614.

in the fourteenth century, still 'regarded himself as the sovereign lawgiver as well as the sovereign administrator'.³² He, therefore, performed a dual function. His magnates, or a large proportion of them, also had dual capacities; they were simultaneously members of the royal council and parliament. As a result, 'although the form of statute differed from that of ordinance, the two were now and then issued by the same powers and occupied the same ground'.³³ Second, consider their chaotic history. At certain times, the law and practice of the king's ordaining power widely diverged. By 1295, as mentioned previously, it was a law of the land that the monarch could no longer tax his people without common consent. Nevertheless, 'in 1359 the king and council obtained from the merchants . . . a grant of 6d. on the pound on exports and imports'.³⁴ Again, 'in 1360, before a parliament was held, the king ordered a fifteenth and tenth which had been granted by the commons in five provincial assemblies, to be collected'.³⁵ These actions called into question the commons' ability to enforce its legislative will and highlighted the king's ability to make laws by other means. Finally, there is the problem of blurred boundaries. The line between what the king could do without a parliament and what he could do only with the aid of parliament was only drawn gradually, and it fluctuated from time to time.³⁶ Ordinances, generally speaking, were (legislative) products of the king's executive power – a nuance that sharpened over time. Until then, the king's ordaining power was put to varied use, including in ways intended to defeat the operation of laws that limited the monarch's power.³⁷ The charter granted by Edward I to the foreign merchants, for example, was an ordinance meant to evade the intention of the *Confirmatio Cartarum*.³⁸ However, these circumventions declined as parliament grew more assertive and its hold over statutes improved. In 1389, for example, commons made a direct plea that the chancellor and council should not make ordinances contrary to common law, statute or the ancient law of the land, especially after the close of parliament.³⁹ When Richard II resisted the demands, in a sign of the times to come, he was promptly deposed.

These tussles between the king and his council on one hand and the parliament on the other hand meant that statutes and ordinances grew side by side, but often in conflict with one another. It was only with the gradual separation of the 'crown in council' from the 'crown in

³² *Id.* at 613.

³⁴ *Id.* at 424.

³⁶ *Supra* n. 14 at 196.

³⁸ *Id.* at 614.

³³ *Ibid.*

³⁵ *Ibid.*

³⁷ *Supra* n. 16 at 614.

³⁹ *Supra* n. 14 at 188.

parliament' that some of the disagreements surrounding the nature and scope of ordinances were resolved.⁴⁰ It became clear over time that the king, for example, could not revoke or alter statutes through ordinances, and when he did so, it was generally regarded as an abuse. Similarly, he could not tax his people or impose other pecuniary responsibilities through those instruments.⁴¹ Also, there were growing doubts about the legality of nullifying the effect of statutes through ordinances. But short of these, there was still an uncertain reservoir of legislative power that the king could tap into – the limits of which, even at the close of the Middle Ages, were rather unclear.⁴²

After a period of relative quiet, ordinances made a return in the sixteenth century under the Tudors.⁴³ Now called proclamations – not ordinances, the Tudor kings put them to vigorous use, thereby exploiting the earlier lack of clarity.⁴⁴ It culminated in Henry VIII's Statute of Proclamations in 1539⁴⁵ which, curiously enough, only remained in force for approximately eight years before being repealed in 1547.⁴⁶ Despite its limited tenure, the purpose of the statute has since been intensely disputed.⁴⁷ Amongst other things, it provided that:

[T]he King...with the advice of his council,...*or with the advice of the more part of them*, may set forth at all times by *authority of this act* his proclamations, under such penalties and pains and of such sort as...shall seem necessary and requisite; and that those same shall be obeyed, observed, and kept as though they were made by act of parliament [emphasis in original].

However, it also added that

the King's people...should not have any of their inheritances, lawful possessions, offices, liberties, privileges, franchises, goods or chattels taken from them or any of them, nor by virtue of the same act suffer any pains of death other than shall be hereafter in this act declared, nor that by any proclamation to be made by virtue of this act, any acts, common laws...nor any lawful customs...shall be infringed, broken or subverted.

⁴⁰ *Supra* n. 17 at 307–310.

⁴¹ *Supra* n. 14 at 187.

⁴² *Supra* n. 17 at 220.

⁴³ See Robert Heinz, *The Proclamations of the Tudor Kings* (Cambridge University Press, Cambridge, 1976).

⁴⁴ *Id.* at 65–84.

⁴⁵ Ch. 8, 31 Henry VIII. The official title of the Statute of Proclamations was, 'An Acte That Proclamations Made By The King Shall Be Obeyed'.

⁴⁶ § 5, Ch. 12, 1 Edward VI.

⁴⁷ *Supra* n. 43 at 153–165.

What all this meant has never been fully settled. By and large, three views have battled for acceptance. Bishop Stubbs, William Blackstone, A. V. Dicey, William Anson and Frederic Maitland advanced what is now the 'older' view. They saw in the machinations of Henry VIII an effort to supplant statutes with royal fiats, thereby undermining parliament's authoritative say in the legislative process. Stubbs, for instance, thought of the 1539 statute as the *Lex Regia* of English history. To him, 'it amounted to a virtual resignation of the essential character of parliament as a legislative body'.⁴⁸ Similarly, Blackstone noticed in the statute a calculated attempt 'to introduce the most despotic tyranny', which, if not for its early repeal, would have 'proved fatal' to English liberties.⁴⁹ Dicey, too, offered a similar reading; the moment marked, for him, the 'highest point of legal authority ever reached by the Crown' and with a capacity to produce 'revolutionary' results.⁵⁰ Maitland later affirmed this view, adding that the statute's repeal in 1547 confirmed inter alia 'the doctrine that the king is not supreme, king and parliament are supreme [and that] statute is distinctly above ordinance or proclamation . . . [which is a kind of] subordinate legislative power'.⁵¹

Then there is the 'revised' view – one that prefers a less alarmist reading of the statute and its intent. Edward Adair, Theodore Plucknett, Albert Pollard, Geoffrey Elton and Rudolph Heinz were its main proponents. Their positions are subtly different from one another, but they share the basic theme that the older view had misread the statute's importance. Of them, Adair took the most sceptical position. 'Neither the enactment of the statute of proclamations nor its repeal altered the nature or force of royal proclamations in the slightest degree [and] the sovereign before 1539 or after 1547 considered himself just as much at liberty to issue proclamations and punish offenders against them as he did between those two dates'.⁵² This, he added, was 'the only possibly conclusion'.⁵³ Although largely sympathetic to this line of thinking, others were more restrained. Plucknett, for example, conceded that the statute had some importance, but argued against the claim 'that the King hoped . . . to establish an absolutism or to supersede legitimate activities of Parliament'.⁵⁴

⁴⁸ *Supra* n. 16 at 614.

⁴⁹ Sir William Blackstone and Thomas Cooley, *Commentaries on the Law of England* Bk. 1, Ch. 7, 271 (Callahan and Cockcroft, Chicago, 1871).

⁵⁰ *Supra* n. 11 at 51.

⁵¹ *Supra* n. 14 at 253.

⁵² E. R. Adair, 'The Statute of Proclamations', 32(125) *English Historical Review* 34–46, 45 (1917).

⁵³ *Ibid.*

⁵⁴ *Supra* n. 15 at 45–46.

Similarly, based on contemporary accounts, Pollard claimed that Henry VIII 'did not regard the statute as enabling him to dispense with the assistance of parliament in legislation'.⁵⁵ It was, according to him, simply meant to re-emphasise the idea that 'within their proper and recognised sphere proclamations were to have the binding force of law'.⁵⁶ And Heinz, in an important study in 1976, took the view that 'although [the statute] did not have a major impact on the role, authority or respect for proclamations, it did change the method of enforcement both by setting up a special court and by making available the system of enforcement used in penal statutes'.⁵⁷ The statute, in other words, sharpened the enforcement of proclamations, rather than their standing.

Finally, there is what we might refer to as the 'agnostic' view – one that is hesitant to take sides in this debate, especially because much of the contemporary accounts necessary for an accurate assessment have been lost to history. We do not know what Henry VIII thought of his statute. Neither do we know how far the lords and commons amended its language. And we do not fully understand why it was repealed. Conrad Russell put it best:

The 1539 Act is an attempt at definition: it recounts that some people have not been obeying proclamations to the dishonour of the King, 'who may ill bear it' and gives the government statutory authority to punish breaches of proclamations. We know that the act was substantially amended during its passage, but we do not know how. Whether this act is simply designed to clear up ambiguities, or whether it embodies the same principles of delegated legislation, giving statutory authority to council regulations... whether it is concerned with enforcement, or whether it is a serious attempt to give the King a legislative power without Parliament, we cannot say. The act only remained in force till 1547 and its effects are obscure.⁵⁸

Whatever the salience of the 1539 statute – and we need not pass judgment on this controversy – its repeal did not mark the end of proclamations. On the contrary, they were freely enacted; the Tudor queens persisted with them.⁵⁹ The matter eventually came to a judicial head, and in 1610, Chief

⁵⁵ *Supra* n. 18 at 266.

⁵⁶ *Supra* n. 18 at 267.

⁵⁷ R. W. Heinz, *The Proclamations of the Tudor Kings* 199 (Cambridge University Press, Cambridge, 1976). See also G. R. Elton, *England under the Tudors* 168–175 (Methuen and Co., London, 1955).

⁵⁸ Conrad Russell, *The Crisis of Parliament: English History 1509–1660* 119–120 (Oxford University Press, Oxford, 1971).

⁵⁹ *Supra* n. 14 at 256–257.

Justice Edward Coke of the Common Pleas was summoned to render this opinion on the legality and scope of proclamations.⁶⁰ In a decision of far-reaching importance, Sir Edward Coke laid down the following:

1. The King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament.
2. The King hath no prerogative, but that which the law of the land allows him.
3. But the King for prevention of offences may by proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law, etc.
4. If the offence be not punishable in the Star-Chamber (i.e. the court of law that sat at the royal Palace of Westminster), the prohibition of it by proclamation cannot make it so.

In theory, although not necessarily in practice, the opinion settled issues of jurisdictional inconsistencies. The decision limited the monarch's independent legislative power. He or she could not make new laws or create new offences; these matters were left exclusively to parliament. Proclamations or ordinances, it became clear, were not equivalent to Acts. They could not do everything Acts could. Ordinances, in other words, did not have horizontal equivalence. In their standing, too, ordinances were less than Acts of parliament. They became more akin to by-laws than ordinary legislation, and in that sense did not have vertical equivalence, too. Although the decision brought conceptual clarity, regal practice varied.⁶¹ Monarchs continued making ordinances (of the unlawful kind) and enforced them, too. Only with the establishment of parliamentary supremacy towards the end of the seventeenth century did the law and practice of ordinances finally become consistent; from then on, it would always be a subordinate legislative power.

Because of this meandering history, ordinances, it is safe to say, *never* had one generally agreed meaning. They meant different things at different times. When concepts of 'counsel' and 'consent' were in their early stages, ordinances and statutes were analytically indistinguishable from one another. But as 'popular' participation strengthened and later became essential, statutes surged in their effectiveness and legitimacy. And despite notable initiatives to revive their force, ordinances eventually receded.

⁶⁰ (1611) 12 Co Rep 74.

⁶¹ *Supra* n. 20 at 343–346.

By the close of the seventeenth century, statutes represented parliament's ultimate authority to enact legislation whereas ordinances, generally speaking, came to represent the executive's more limited authority to make narrow and specific regulations.

Now that we have an introductory account of the rise and fall of ordinances as a distinct legislative category in the United Kingdom, I shall turn to its history in British India. In particular, I will pursue two lines of enquiry. First, what were the principal legislative moments that naturalised ordinances into India? Second, what does the practice of ordinances in British India tell us about its later incorporation in the Constitution?

C. THE GOVERNOR-GENERAL'S LEGISLATIVE POWER IN BRITISH INDIA

The very first English Royal Charter granted to the 'Governor and Company of Merchants of London trading with the East Indies' in 1600 introduced the 'ordinance' vocabulary to India. The charter conferred on the company, amongst others, the power 'to make, ordain, and constitute such and so many reasonable laws, constitutions, orders, and *ordinances* . . . [that] shall seem necessary and convenient for the good of the said Company'.⁶² Although the term was repeated in succeeding charters and Acts of parliament, the fusion of executive and legislative powers made their references relatively unproblematic.⁶³ That changed with the introduction of the Indian Councils Act, 1861 (1861 Act) – and the subsequent rudimentary separation of powers brought about by the colonial administration.

Under the new arrangement, the power of making laws and regulations was vested in the 'Governor-General in Council' – a body consisting of six to twelve non-official members, apart from the ordinary and extraordinary members belonging to the Governor General's Executive Council.⁶⁴ The council's legislative powers were greatly limited; in some respects, the governor-general's prior sanction was required.⁶⁵ Then there were

⁶² C. L. Anand, *Constitutional Law and History of Government of India* 117 (Universal, New Delhi, 2008). (emphasis added)

⁶³ For a quick overview of the evolution of legislative powers, see *id.* at 117–139; A. B. Keith, *A Constitutional History of India 1600–1935* 171–180 (Barnes and Noble, New York, 1969).

⁶⁴ § 10, 1861 Act.

⁶⁵ § 19, 1861 Act.

matters on which the council was entirely prohibited from legislating.⁶⁶ Subject to these limitations, the council became British India's primary legislative body.⁶⁷

Even this limited primacy was further compromised. The 1861 Act, in certain circumstances, vested original legislative power on the governor-general, independent of the council:

Notwithstanding anything in this Act contained, it shall be lawful for the Governor-General, in cases of emergency, to make and promulgate, from time to time, ordinances for the peace and good government of the said territories or of any part thereof, . . . and every such ordinance shall have like force of law or regulation made by the Governor-General in Council, as by this Act provided, for the space of not more than six months from its promulgation, unless the disallowance of such ordinance by Her Majesty . . . or unless such ordinance shall be controlled or superseded by some law or regulation made by the Governor-General in Council.⁶⁸

Note that this power was limited to situations of emergency only – especially of the kind relating to ‘peace and good government’. Ordinances enjoyed the ‘force of law’ – a status equivalent to legislation enacted by the Governor-General in Council. But they were limited in time and subject to control or supersession by the Council. In other words, the provision, on its face, had both vertical and horizontal equivalence. While introducing the bill in the House of Commons, Sir Charles Woods spelt out his impatience with deliberative niceties and explained the need for such a law: ‘Questions might arise’, he said, ‘about the Arms Act, or the press, as to which it would be very injudicious that delay should occur; and we, therefore, propose to empower the Governor-General on his own authority to pass an ordinance having the force of law’.⁶⁹ If Woods was correct, the provision was principally motivated by concerns about maintaining control over *British* interests in India. Nonetheless, almost ninety years later, aided by linguistic mutations and self-serving justifications, it would become Article 123 in India's Constitution.

⁶⁶ § 22, 1861 Act.

⁶⁷ *Supra* n. 20 *ibid.*

⁶⁸ § 23, 1861 Act.

⁶⁹ Sir Charles Woods's speech on the Indian Councils Bill, 1861 H.C. (6 June 1861) extracted in Anil Chandra Banerjee, *Indian Constitutional Documents 1757–1939* Vol. II, 52–64 (A. Mukherjee and Co., Calcutta, 1948).

1. Early Practices: From Exception to Rule

The 1861 Act remained in effect until 1915. In those fifty-five years, the governor-general's power to promulgate ordinances was sparsely used – no more than nineteen ordinances were promulgated in all.⁷⁰ Of these, seven were promulgated between 1861 and 1912. The remaining twelve were brought into effect in 1914–1915. True to Woods's intention, the nineteen ordinances were promulgated mostly to protect British colonial interests rather than undermine the council.

The very first ordinance is a classic example. The American Civil War had begun. Queen Victoria, on the advice of Prime Minister Lord Palmerston, declared a policy of British neutrality in May 1861. It served as a kind of recognition of Southern belligerency, and gave their ships the same rights and privileges afforded to U.S. ships in foreign ports. The Confederate States of America, however, wanted complete diplomatic recognition. Accordingly, two of its envoys, James Mason and John Slidell, set sail for Europe on a British mail packet – the *Trent* – to press the case for the Confederates. But days into their journey, Charles Wilkes, a Union captain commanding the *San Jacinto*, intercepted the ship and arrested the envoys. The arrests of the Confederate 'contrabands', as Wilkes referred to them, set off a diplomatic row. In the United Kingdom, it was widely reported as a hostile act. Removing subjects from a vessel in the service of Her Majesty, it was claimed, was in violation of maritime law. The British retaliated. Foreign Secretary Lord Russell ordered a ban on saltpetre exports, including from India – the principle source of Union gunpowder at the time.⁷¹

On 27 December 1861, Viscount Canning, India's then governor-general, memorialised the foreign secretary's order into statute, promulgating the Export of Saltpetre Ordinance, 1861.⁷² The ordinance

⁷⁰ A. P. Pandey, 'Hundred Years of Ordinances in India: 1861–1961', 10 *Journal of Indian Law Institute* 259, 263–264 (1968).

⁷¹ On the 'Trent Affair', as it is commonly known, see David Donald, Jean Baker *et al.*, *The Civil War and Reconstruction* 314–316 (W. W. Norton and Co., New York, 2001). The incident brought the United States and Britain to the brink of war. Eventually, however, calmer heads prevailed after U.S. diplomats conceded that Wilkes had erred in arresting the prisoners. See also Gordon H. Warren, *Fountain of Discontent: The Trent Affair and Freedom of the Seas* (Northeastern University Press, Boston, 1981).

⁷² The four ordinances promulgated between 1861 and 1876 were not separately numbered; nor did they have the 'feel' of Acts. The early ordinances read more like executive orders than proper legislation. The practice of numbering ordinances in a manner similar to Acts began only in the twentieth century. Starting with the Regulation of Meetings

TABLE 1.1. *Year-wise breakdown
of ordinances for the 1861–1915
period*

Year	Ordinances
1861	01
1862	01
1869	02
1876	01
1907	01
1912	01
1914	09
1915	03

prohibited the export of saltpetre from any port of Her Majesty's territories in India 'except in a British vessel bound either to the port of London or to the port of Liverpool'.⁷³ The ban did not apply to exports for which permits had already been granted, but the ordinance made it unlawful for officers of the customs to grant new passes or permits.⁷⁴ No expiration period was mentioned; the ban was to remain in place until the council decided otherwise. A week later, the ordinance was replaced with a new one – the Export of Saltpetre Ordinance, 1862. It retained the earlier ban, but authorised saltpetre exports to all ports in the UK, not just London and Liverpool.⁷⁵ The restriction was eventually revoked on 28 February 1862.⁷⁶

Thus began the legacy of ordinances in India. It took an international incident on the high seas to precipitate the first one, and in the early years, they were few and far between. Until 1914, there were only six more ordinances, including those regarding 'dramatic performances',⁷⁷

Ordinance, 1907 (1 of 1907), they were formally recorded as Acts, and their language was modified to make them sound more like ordinary legislation.

⁷³ § 1, Export of Saltpetre Ordinance, 1861. ('Until the Governor-General, in Council, shall otherwise order, it shall not be lawful for any person to export saltpetre from any port of Her Majesty's territories in India, except in a British vessel bound either to the port of London or to the port of Liverpool'.)

⁷⁴ *Id.* at § 3.

⁷⁵ § 1, Export of Saltpetre Ordinance, 1862. ('Until the Governor-General, in Council, shall otherwise order, it shall not be lawful to export saltpetre from any part of Her Majesty's territories, except in a British vessel bound to a port of the United Kingdom'.)

⁷⁶ Notification No. 1098, dated 28 February 1862.

⁷⁷ The Dramatic Performances Ordinance, 1876.

‘regulation of meetings’⁷⁸ and ‘cotton gambling’.⁷⁹ But as many as twelve were brought into effect in 1914–1915 in the context of World War I. Partly inspired by fears that ‘enemies within’ may collude with foreign benefactors to plot against the British government, several ordinances imposed restrictions on activities of foreigners in India. Examples include the Foreigners Ordinance, 1914;⁸⁰ the Ingress into India Ordinance, 1914;⁸¹ the Commercial Intercourse with Enemies Ordinance, 1914⁸² and the Foreigners (Amendment) Ordinance, 1914.⁸³ Even though the 1861 Act limited ordinances to six months, the tenures for these new ordinances were extended for the entire duration of World War I through the Emergency Legislation Continuance Act, 1915; they were deemed to ‘have been enacted by the Governor-General in Council’.⁸⁴ Because of this, all nine ordinances promulgated in 1914 lasted more than seven years. Of the remaining ten promulgated between 1861 and 1915, none lasted more than six months – the maximum tenure prescribed under the 1861 Act.

In 1915, the 1861 Act was repealed and replaced with the Government of India Act, 1915 (the 1915 Act).⁸⁵ This latter Act marked the beginning of a more heightened use of ordinances. As a law designed to consolidate enactments relating to the Government of India, the 1915 Act, in its amended version, established for the first time an ‘Indian Legislature’ – comprised of the governor-general and the two chambers: the Council of State and the Legislative Assembly.⁸⁶ And yet the Act, in s. 72, retained almost in its entirety the governor-general’s legislative power under the 1861 Act:

The Governor-General may, in cases of emergency, make and promulgate ordinances, for that peace and good government of British India or any part thereof, and any ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Governor-General in Legislative Council, but the power of

⁷⁸ The Regulation of Meetings Ordinance, 1907.

⁷⁹ The Bengal Cotton Gambling Ordinance, 1912.

⁸⁰ Ordinance III of 1914.

⁸¹ Ordinance V of 1914.

⁸² Ordinance VI of 1914.

⁸³ Ordinance VII of 1914.

⁸⁴ I of 1915.

⁸⁵ Ch. 61, 5 and 6 Geo. 5.

⁸⁶ § 63, Government of India Act, 1919. (9 and 10 Geo. 5, Ch 101) (‘Subject to the provisions of this Act, the Indian legislature shall consist of the Governor and the two chambers, the Council of State and the Legislative Assembly. Except as otherwise provided by or under this Act, a Bill shall not be deemed to have been passed by the Indian legislature unless it has been agreed to by both chambers, either without amendment or with such amendments only as may be agreed to by both chambers’).

TABLE 1.2. *Year-wise breakdown of ordinances for the 1916–1935 period*

Year	Ordinances
1916	08
1917	04
1918	03
1919	97
1920	04
1921	05
1922	03
1924	01
1925	01
1929	01
1930	11
1931	15
1932	12
1935	03

making ordinances under this section is subject to the like restrictions as the power of the Governor-General in Legislative Council to make laws; and any ordinance made under this section is subject to the like disallowance as an Act passed by the Governor-General in Legislative Council and may be controlled and superseded by any such Act.

The 1915 Act remained in effect for about twenty-one years. In all, seventy-eight ordinances were promulgated between 1916 and 1935 – four times more than the nineteen ordinances promulgated under the 1861 Act. Of these seventy-eight ordinances, thirty-five were promulgated in the ten years between 1916 and 1925; there were no ordinances in 1923. The remaining forty-three were promulgated between 1926 and 1935. But there were no ordinances in 1926, 1927, 1928, 1933 and 1934. Effectively, the forty-three ordinances during the latter period were promulgated over a period of five years. With the exception of one – the Registration Ordinance, 1917, all ordinances were repealed or replaced by another act or ordinance, or expired at the end of six months.

Almost all seventy-eight ordinances had one of two origins. Some had to do with wartime regulations or the conclusion of the war. Obvious examples include controls on currency, gold and silver;⁸⁷ restrictions on

⁸⁷ The Indian Paper Currency (Amendment) Ordinance, 1916 (I of 1916); the Gold (Import) Ordinance, 1917 (III of 1917); the Silver (Import) Ordinance, 1917 (IV of

export and import;⁸⁸ ban on trade with ‘enemies’⁸⁹ and the recognition of treaties concluding the war.⁹⁰ The remaining ordinances had to do with suppressing – what was to the British – ‘revolutionary activities’ and the maintenance of law and order. When Mohandas Gandhi emerged on the nationalist stage in the late 1910s, his style of civil disobedience inspired millions to join the anti-colonial struggle. A large number of ordinances were promulgated to contain the resulting civil unrest, especially in the context of the Non-Cooperation Movement and the Civil Disobedience Movement. They included the imposition of martial law for prolonged periods,⁹¹ restrictions on press activity⁹² and limits on freedom of association.⁹³ There were also ordinances designed to try alleged revolutionary activists in special courts, especially from Bengal and Punjab. Amongst the most prominent were the Bengal Criminal Law (Amendment) Ordinance, 1924⁹⁴ and the Lahore Conspiracy Case Ordinance, 1930 – under which Bhagat Singh, Shivaram Rajguru and Sukhdev Thapar, along with twenty-one others, were infamously tried and sentenced to death.⁹⁵

By the time the Government of India Act, 1935⁹⁶ (1935 Act) replaced the 1915 Act, ordinances had a prominent presence in British India’s regulatory landscape. Their prominence presaged several trends in the later years, and four in particular are worth pointing out. First, ordinances were not exceptions anymore. They became, in many respects, the primary mechanism through which to enact legislation.

1917); the Gold Coinage Ordinance, 1918 (II of 1918); the Gold Ordinance, 1920 (III of 1920).

⁸⁸ The Import and Export of Goods Ordinance, 1916 (IV of 1916).

⁸⁹ The Enemy Trading Ordinance, 1916 (V of 1916).

⁹⁰ The Treaty of Peace Ordinance, 1920 (I of 1920); the Treaty of Peace (Austria) Ordinance, 1920 (IV of 1920); the Treaty of Peace (Hungary) Ordinance, 1921 (1 of 1921).

⁹¹ The Martial Law Ordinance, 1919 (I–IV of 1919); the Martial Law Ordinance, 1921 (II of 1921); the Public Safety Ordinance, 1929 (I of 1929); the Martial Law Ordinance, 1930 (VIII of 1930). For commentary, see Ujjwal Kumar Singh, ‘Penal Strategies and Political Resistance in Colonial and Independent India’ in Kalpana Kannabiran and Ranbir Singh (eds.), *Challenging the Rule(s) of Law: Colonialism, Criminology and Human Rights in India* 227, 233–237 (Sage, New Delhi, 2008).

⁹² The Indian Press Ordinance, 1930 (II of 1930); the Unauthorised News Sheets and Newspapers Ordinance, 1930 (VII of 1930); the Indian Press and Unauthorised News Sheets and Newspapers Ordinance, 1930 (X of 1930).

⁹³ The Unlawful Association Ordinance, 1930 (IX of 1930).

⁹⁴ Ordinance I of 1930. See also the Bengal Criminal Law (Amendment) Ordinance, 1930 (I of 1930).

⁹⁵ Ordinance III of 1930. For an account of the trial, see A. G. Noorani, *The Trial of Bhagat Singh: Politics of Justice* (Oxford University Press, New Delhi, 2004).

⁹⁶ Ch. 2, 26 Geo. 5 and 1 Edw. 8.

Second, the practice of promulgating a 'series' began during this period. Take, for example, the raising of currency reserves through the repeated use of ordinances. On 16 January 1915, the Indian Paper Currency (Amendment) Ordinance, 1915 was promulgated into law as a wartime measure to increase currency reserves. Another amended version came into effect in January 1916 with the stated objective of granting power 'to increase the sterling investment of paper currency reserve... [from a] legal maximum of Rs. 4 crores to a maximum of Rs. 10 crores'.⁹⁷ The ordinance was amended and brought into effect in November of that year, and later again in December.⁹⁸ There was another ordinance in 1917,⁹⁹ and two more in 1918.¹⁰⁰ This was one of the earliest efforts to regulate a particular matter through a series of ordinances over a limited period of time. The practice quickly took hold, and was repeated on numerous occasions.¹⁰¹

Third, for the first time, the power to promulgate ordinances was invoked as a *parallel* legislative arrangement. The Public Safety Ordinance, 1929 is a classic example.¹⁰² In September 1928, a Public Safety Bill authorising 'the removal from British India... of certain persons engaged in subversive propaganda' was introduced in the Legislative Assembly.¹⁰³ After long consideration, the assembly rejected it. In January 1929, Lord Irwin's government introduced a new version in the assembly and when the bill came up for consideration, Vithabhai Patel, president of the Legislative Assembly, objected to it. He suggested alternatives that were not acceptable to the administration.¹⁰⁴ Nevertheless convinced that a similar legislation was necessary to ensure 'good government', Lord Irwin promulgated the ordinance that incorporated the provisions earlier

⁹⁷ Anon, 'Paper Currency Act: Proposed Amendment' *Times of India*, 11 January 1916. A crore is the equivalent of 10 million rupees.

⁹⁸ Anon, 'Paper Currency Reserves Increased by 12 Crores' *Times of India*, 15 November 1916; Anon, 'India and the War: Paper Currency Reserve' *Times of India*, 15 December 1916.

⁹⁹ The Indian Paper Currency (Amendment) Ordinance, 1917 (II of 1917).

¹⁰⁰ The Indian Paper Currency Ordinance, 1918 (I of 1918); the Indian Paper Currency (Amendment) Ordinance, 1918 (III of 1918).

¹⁰¹ For the series of martial law ordinances, see *supra* n. 91 *ibid*.

¹⁰² Ordinance 1 of 1929.

¹⁰³ Anon, 'Public Safety Ordinance: Preventive Purpose' *The Straits Times*, 1 May 1929.

¹⁰⁴ The president's ruling refusing to proceed with the bill almost created a constitutional crisis. Lord Irwin decided to address both chambers of the legislature to express his outrage against an attack on the Central Assembly and to explain his promulgation of an ordinance. See Anon, 'Viceroy to Issue Ordinance: Address to Legislature' *Times of India*, 13 April 1929.

rejected by the assembly. The law set a new precedent, making ordinances an executive alternative to parliamentary legislation. Clearly aware of his extraordinary innovation, the governor-general invoked the support of the 'vast majority of India's people' in promulgating it. In a statement attached to the ordinance, he explained the 'serious character of [his] personal decision', claiming that he had no doubt that his action would command 'the approval of that vast majority of India's people who have faith in India's future and whose first desire is to see their country prosperous, contented and secure'.¹⁰⁵

Fourth, stricter understandings of 'emergency' gave way to more convenient meanings. Administrative inconvenience, for example, now counted as an 'emergency'. The circumstances leading to the promulgation of the Lahore Ordinance mentioned earlier is a good example. The trial of the assistant superintendent of police, John Saunders, and head constable, Chanan Singh, began in Lahore on 11 July 1929. It proceeded slowly; Bhagat Singh and several of his colleagues resorted to a hunger strike and that led to repeated adjournments. 'Disorderly conduct' in the courtroom and demonstrations by the public outside led to some more adjournments. By March 1930, only 234 of the 600 potential witnesses had been produced in the court. With the trial likely to drag on indefinitely, Lord Irwin exercised his legislative powers to promulgate the Lahore Ordinance, arguing that 'disorderly conduct and revolutionary demonstrations, [had] tended to bring the administration of justice into contempt, [making] it impossible to count upon obtaining a conclusion by the normal methods of procedure within any calculable period'.¹⁰⁶ And because public policy, as he understood it, required that the grave charges be 'thoroughly scrutinised and finally adjudicated upon with the least possible delay', he set up a tribunal of three judges, investing them 'with powers to deal with wilful obstruction'.¹⁰⁷

Notice the administrative character of the events mentioned here; they involved nothing more than challenges in enforcing ordinary law and

¹⁰⁵ Anon, 'Viceroy's Action: Public Safety Ordinance' *Times of India*, 15 April 1929.

¹⁰⁶ Statement of Lord Irwin appended to the Lahore Conspiracy Case Ordinance, 1 May 1930, Shimla.

¹⁰⁷ *Ibid.* Amongst the most egregious in the ordinance were the special powers of the tribunal and the special rules of evidence. The tribunal was vested with powers to take measures necessary 'to secure the orderly conduct of the trial', including the power to dispense with the attendance of accused persons and proceed with the trial in their absence. In addition, contrary to the provisions in the Indian Evidence Act, 1872, statements recorded by a magistrate were made admissible in evidence, and judgment of the tribunal in pursuance of such evidence was declared 'final and conclusive'.

procedure. But in describing them as an ‘emergency’ requiring special legislation, Lord Irwin brought the power to promulgate ordinances ever closer to the legislature’s power to enact primary legislation. When contested, the Privy Council returned a verdict inscribing the governor-general’s view into law. In *Bhagat Singh and Others v. The King-Emperor*,¹⁰⁸ Viscount Dunedin concluded that a state of emergency ‘is something that [did] not permit of any exact definition’. As a state of matter calling for drastic action, ‘emergency’ had to be judged by someone. That someone, he wrote, could be ‘the Governor-General, and he alone’.¹⁰⁹ In other words, emergency was whatever the Governor-General felt it was; nothing else mattered.

Taken together, these developments made ordinances the new normal in India, both in numbers and status. Numerically, they were vastly common – much more than in the earlier period. It was ‘normal’ in its status, too. By 1935, there were effectively two legislative authorities. The Imperial Legislature obviously had legislative powers. But seventy-five years after it was first introduced to protect British interests in emergency times, the governor-general’s power to promulgate ordinances incrementally morphed into a parallel legislative power. All this was contrary to the historical developments in the UK; as we saw earlier, the monarch’s personal power to legislate waned and eventually ceased to exist. But things unfolded differently in India. When the 1935 Act was enacted into law, it greatly expanded the governor-general’s *independent* legislative powers. The new normal was now also official. The next section will review the developments under the 1935 Act, assessing how ordinances – now catholic and convenient – became irrevocably ‘Indian’.

2. Past Its Autocratic Origins: The Making of ‘Indian’ Ordinances

Under the 1935 Act, the governor-general was authorised to ‘enact’ three kinds of ordinances. The Act in s. 42 introduced what may be regarded as ‘substitutive’ legislative powers: ‘If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to

¹⁰⁸ (1931) 55 Ind. App. 169.

¹⁰⁹ *Id.* at 172. This exclusionary rule quickly became standard reasoning. See, e.g., *King-Emperor v. Benoari Lal Sharma And Others* (1945) 72 Ind. App. 57; *Hubli Electricity Co. Ltd. v. Province of Bombay* L.R. (1948) 76 Ind. App. 57; *Lakhi Narayan Das v. The Province of Bihar* [1949] F.C.R. 693.

require'.¹¹⁰ The governor-general, in such cases, was required to act in accordance with the advice of his Council of Ministers only if the legislature was not in session. Ordinances so promulgated, as before, were limited to a period of six months.¹¹¹

In contrast, s. 43 provided for ordinances in their classic sense; that is, in situations where 'immediate action' was needed for the purpose of satisfactorily discharging *his* functions under the Act. Despite introducing a largely cabinet form of government, the governor-general, under the 1935 Act, retained independent responsibility on certain matters including defence, ecclesiastical affairs, external affairs and in relation to matters concerning tribal areas.¹¹² Additionally, he also had special responsibility, amongst others, of preventing 'any grave menace to the peace or tranquillity of India', of safeguarding 'the financial stability and credit of the Federal Government; . . . [and] the legitimate interests of minorities', and protecting 'the rights and dignity of the Ruler'.¹¹³ Initially valid for six months, such ordinances could be extended for a further period not exceeding six months.¹¹⁴ Importantly, neither the cabinet nor the federal legislature had control over such ordinances: the only requirement was to have the law laid before both houses in Westminster.¹¹⁵

Finally, s. 44 introduced a new type of legislation called the 'Governor-General's Act' – a truly independent and parallel source of legislative power. As with s. 43, the power in s. 44 concerned the satisfactory discharge of his discretionary functions. But unlike s. 43, s. 44 was not conditioned on the necessity for any 'immediate action'. The governor-general could 'legislate' his Act anytime he wanted, but after explaining 'to both Chambers of the Legislature . . . the circumstances which in his opinion [rendered] legislation essential'.¹¹⁶ Also, unlike s. 43, such an Act

¹¹⁰ § 42, the Government of India Act, 1935. ¹¹¹ *Id.* at § 42(2)(a).

¹¹² *Id.* at § 11(1).

¹¹³ *Id.* at § 12(1).

¹¹⁴ *Id.* at § 43(2) ('An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may be a subsequent ordinance be extended for a further period not exceeding six months').

¹¹⁵ *Id.* at § 43(3) ('An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance – (a) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General; (b) may be withdrawn at any time by the Governor-General; and (c) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament').

¹¹⁶ *Id.* at § 43(1).

was *permanent*; it was in no way different from ordinary Acts. Clearly, the Governor-General's Act was the most egregious of the three. In true authoritarian style, it vested original legislative authority in a single (and unrepresentative) office. Whereas ordinances under s. 42 depended on the council of ministers' collective satisfaction and were subject to some legislative control post-enactment, those under s. 43 were limited in point of time. None of these applied to Governor-General's Acts; they were neither dependent on ministerial satisfaction nor limited in point of time.

This three-tiered categorisation of ordinances under the 1935 Act was a direct result of the experiences under the 1915 Act. The provisions formalised into law several trends mentioned earlier, especially the practice of treating ordinances as a parallel legislative power. Also, by conferring permanence on the Governor-General's Acts, concerns about the limited tenure of emergency legislation were taken care of. But these expanded powers never came into effect: the Congress Party rejected the 1935 reforms. Accordingly, the power to promulgate ordinances even after 1935 continued as provided in the 1915 Act, s. 72. That provision was incorporated into the Ninth Schedule of the 1935 Act and remained in force as a 'transitional provision'.¹¹⁷

Between August 1939 and January 1950, 394 ordinances were promulgated. Of these, 295 were promulgated in the eight years between 1939 and 1947. The remaining ninety-nine came into effect after independence, but prior to the inauguration of the Constitution in 1950. Overall, the circumstances leading to a majority of these ordinances were much as before. World War II had just begun and Gandhi was making plans for his Quit India Movement, one he officially launched in 1942. The normal legislative process had almost ceased to function, and ordinances, not surprisingly, took over. With one key change, the earlier trends continued in this period – and with greater vigour.

The change had to do with the tenure of ordinances. In 1940, with World War II as the background, the British parliament enacted the India and Burma (Emergency Provisions) Act, 1940 entirely removing the six-month limit on ordinances promulgated during the period of

¹¹⁷ *Id.* at § 317(1) ('The provisions of the Government of India Act set out, with amendments consequential on the provisions of this Act, in the Ninth Schedule to this Act [being certain of the provisions of that Act relating to the Governor-General, the Commander-in-Chief, the Governor-General's Executive Council and the Indian. Legislature and provisions supplemental to those provisions] shall, subject to those amendments, continue to have effect notwithstanding the repeal of that Act by this Act').

TABLE 1.3. *Year-wise breakdown of ordinances for the 1939–1950 period**

Year	Ordinances
1939	09
1940	14
1941	13
1942	68
1943	45
1944	56
1945	48
1946	28
1947 [†]	32
1948	38
1949	33
1950 [*]	11

* Until 25 January 1950.

† From 15 August 1947, ordinances were promulgated under the India (Provisional Constitution) Order, 1947.

emergency.¹¹⁸ The Act was passed on 27 June 1940 and the state of emergency remained in effect until 1 April 1946. As a result, ordinances promulgated during this period became *indefinitely* valid, unless amended or repealed. About 248 ordinances, including some repeal ordinances, were promulgated during this period of emergency.¹¹⁹ These ordinances were overwhelmingly – although not exclusively – about the Indian defence forces,¹²⁰ regulation of war activities,¹²¹ controls on currency¹²² and

¹¹⁸ Ch. 33, 3 and 4 Geo. 6.

¹¹⁹ For a summary of these ordinances, see Hans Raj, *Executive Legislation in Colonial India 1939–1947* (Anamika Prakashan, New Delhi, 1989).

¹²⁰ See, e.g., the Indian Air Force Volunteer Reserve (Discipline) Ordinance, 1939 (VII of 1939); the Civic Guards Ordinance, 1940 (VIII of 1940); the Women's Auxiliary Corps Ordinance, 1942 (XIII of 1942); the Indian Royal Navy (Powers of Command) Ordinance, 1943 (XVII of 1943); the Military Safety (Power of Detention) Ordinance, 1944 (IV of 1944).

¹²¹ See, e.g., the War Risks (Goods) Insurance Ordinance, 1940 (IX of 1940); the War Injuries Ordinance, 1941 (VII of 1941); Essential Service (Maintenance) Ordinance, 1941 (XI of 1941).

¹²² See, e.g., the Currency Ordinance, 1940 (IV of 1940); the Burma Notes Ordinance, 1942 (XXVIII of 1942); the Banking Notes (Declaration of Holdings) Ordinance, 1946 (II of 1946); the High Denomination Bank Notes (Demonitisation) Ordinance, 1946 (III of 1946).

tax measures.¹²³ Because the six-month limit was done away with, their tenure varied widely. A large number of ordinances only remained in force for a maximum of three years, but at least twenty-nine lasted up to five years, fifteen lasted up to six years, two lasted up to seven years and another five lasted up to eight years. In 1946, a major repeal ordinance did away with as many as 113 ordinances, while another twelve were repealed in 1947.¹²⁴ The remaining 123 ordinances promulgated during the emergency continued in the law books despite the conclusion of the war.

A new era began with the enactment of the Indian Independence Act, 1947 (1947 Act) and the creation of two Dominions – India and Pakistan.¹²⁵ There was, however, nothing new about the provision on ordinances; it continued just as before. The 1947 Act authorised the governor-general to modify and adapt parts of the 1935 Act, and accordingly the India (Provisional Constitution) Order, 1947 was promulgated. As part of this adaptation, the power to promulgate ordinance was retained, but made conditional on the advice of the cabinet. The governor-general, in other words, was not to promulgate them on his own.¹²⁶ This retention was not an imposition; the national leadership opted for it. Accordingly, all ordinances promulgated during the proclamation of emergency and not repealed – some 123 of them – were naturalised into the new legal system.

This was a stunning reversal. Throughout the 1930s, Jawaharlal Nehru – as a free citizen and also while in prison – had scorned the British for their use of ordinances. For him, ordinances and the suppression of civil liberties went together and, therefore, were incompatible with democratic ideals.¹²⁷ In a letter to an Englishman in 1936, Nehru objected to the idea of a ‘constitutional road’ in India’s struggle against the British. ‘I can understand constitutional activities where there is a democratic constitution’, he wrote, ‘but where there is no such thing, constitutional methods have no meaning’.¹²⁸ The term, Nehru felt, meant lawful, and

¹²³ See, e.g., the Excess Profit Tax Ordinance, 1943 (XVI of 1943); the Indian Income Tax (Amendment) Ordinance, 1945 (X of 1945).

¹²⁴ The Repealing Ordinance, 1946 (1 of 1946).

¹²⁵ Ch. 30, 10 and 11 Geo. 6.

¹²⁶ § 9(1), the Government of India Act, 1935 (as adapted in 1947) (‘There shall be a council of ministers, not exceeding ten in number, to aid and advise the Governor-General in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion’).

¹²⁷ Jawaharlal Nehru, *Towards Freedom* 157 (Jones Day, New York, 1940).

¹²⁸ Jawaharlal Nehru, *India and the World* 180 (George, Allen and Unwin, London, 1936).

that simply meant 'in accordance with the wishes of an autocratic executive which [could] make laws and issue decrees and ordinances regardless of public opinion'.¹²⁹ Later that year, in his Presidential Address to the Congress Party he spoke of the 'humiliation of ordinances' and the peoples' 'enforced submission' to them. 'A charter of slavery is no law for the slave', he told his audience, 'and though we may perforce submit for a while to it and to the humiliation of ordinances and the like, inherent in that enforced submission is the right and the desire to rebel against it and to end it'.¹³⁰ Clearly, Nehru had no liking for ordinances. Their use, to him, was despotism by a different name.

But that was then. In 1947, he was the prime minister and ordinances flourished under him. Ninety-nine of them were promulgated into law between August 1947 and January 1950. A large number of these ninety-nine ordinances were partition measures. Amongst them were ordinances concerning property-related matters,¹³¹ refugees,¹³² prisoners,¹³³ public order¹³⁴ and the defence forces.¹³⁵

Then there were ordinances designed to coagulate – and secure – the new state, or resolve administrative rising from accession or otherwise.¹³⁶ The Securities (Hyderabad) Ordinance, 1948 (1948 Ordinance) is a good example.¹³⁷ It was June 1948. Hyderabad's Nizam was resisting accession talks with India. Lord Mountbatten proposed the 'Heads of Agreements' – one that guaranteed Nizam his executive powers while giving New Delhi control over military and foreign affairs of the state. New Delhi, obviously, was on board, but Hyderabad spurned the offer. At this point, wary of Nizam's plans, Nehru promulgated the 1948 Ordinance, prohibiting the transfer of government securities 'which may be detrimental to the interests of India'. Under the ordinance, government securities held

¹²⁹ *Id.* at 181.

¹³⁰ *Id.* at 86–87.

¹³¹ See, e.g., the Delhi Evacuee Property (Supplementary) Ordinance, 1947 (XXIII of 1947).

¹³² See, e.g., the Delhi Refugees Registration Ordinance, 1947 (XXIV of 1947); the Influx from West Pakistan (Control) Ordinance, 1948 (XVII of 1948); the Displaced Person (Institution of Suits) Ordinance, 1948 (XVIII of 1948).

¹³³ See, e.g., the Exchange of Prisoners Ordinance, 1948 (VI of 1948); the Transfer of Detained Persons Ordinance, 1949 (XVI of 1949).

¹³⁴ See, e.g., the Bombay Public Security Measures Act (Delhi Amendment) Ordinance, 1948 (XIV of 1948); the Public Safety Ordinance, 1948 (XXIV of 1948).

¹³⁵ See, e.g., the Pakistan Military Personnel Amnesty Ordinance, 1948 (I of 1948); the Indian Army (Amendment) Ordinance, 1948 (XIX of 1948); the Armed Forces (Miscellaneous Provisions) Ordinance, 1950 (VIII of 1950).

¹³⁶ See, e.g., the Mangrol and Manavader (Administration of Property) Ordinance (22 of 1948); the Merchant Shipping (Acceding States) Ordinance (28 of 1948).

¹³⁷ Ordinance XVI of 1948.

by or on behalf of the Hyderabad government and the Hyderabad State Bank could not be transferred without the approval of the central government. In a communiqué attached to the ordinance, the cabinet explained that ‘the Hyderabad Government had decided to transfer Government of India securities worth Rs. 20 crores to the Pakistan Government’.¹³⁸ This was in violation of the earlier ‘Standstill Agreement’ that prohibited initiating contacts with foreign states. Additionally, there was evidence, the government claimed, that ‘all available resources of the Hyderabad Government [were] being utilized for the purchase of warlike materials, which must inevitably lead to conflict’.¹³⁹ The conflict eventually came, but at India’s behest. By September that year, Nizam’s forces surrendered and Hyderabad was integrated into India. Incidentally, the ordinance never became law; it expired on 1 January 1949.

Of the ninety-nine ordinances, fifty-two were enacted into legislation and made permanent, forty-five – including Nizam’s ordinance – expired and the remaining two were repealed by ordinances. At least twenty-one of these were still in effect as of 26 January 1950. These were in addition to the scores of ‘permanent’ ordinances under the 1935 Act that continued in effect despite the cessation of emergency. And both sets of ordinances entered India’s new constitutional order when Article 372 retained ‘all the laws in force in the territory of India immediately before the commencement of this Constitution’ until altered or repealed or amended. As a result, the Coinage Ordinance, 1940, for example, promulgated nearly seventy years ago, still remains in force – a fact that was only recently brought to light.¹⁴⁰ In 2009, the Parliamentary Standing Committee on Finance stumbled upon the ordinance while examining the Coinage Bill, 2009, aimed at replacing four existing laws on metal coins and tokens. When the committee, headed by former Finance Minister of India, Yashwant Sinha, queried about its strange longevity, it was informed by the Ministry of Law and Justice that the ordinance has not yet been repealed and, therefore, remains in effect.¹⁴¹

¹³⁸ Anon, ‘Transfer of India Securities held by the Nizam banned’ *Times of India*, 2 July 1948.

¹³⁹ *Ibid.* For an account of the circumstances leading to the accession, see Lucien Benichou, *From Autocracy to Integration: Political Developments in Hyderabad State 1938–1948* 176–196 (Orient Longman, Chennai, 2000).

¹⁴⁰ IV of 1940.

¹⁴¹ Anon, ‘Ordinance on Near-Extinct Rs.1 Note Survives Seven Decades’ *Deccan Herald*, 12 September 2010, available at: <http://www.deccanherald.com/content/95919/ordinance-near-extinct-rs1-note.html> (accessed 31 August 2011).

This act of constitutional importation was an important break. Ninety years after they were first introduced to protect imperial interests, ordinances became quintessentially 'Indian' in 1950. The founding authors gave British India ordinances that continued authority in the new republican order. But they went further, writing Article 123 into the Constitution – one that authorised new ordinances when the president felt necessary. With that, the parallel histories of ordinances in the UK and India were nearly complete. By 1950, Britain had all but ridden herself of the monarch's medieval powers, particularly the independent power to legislate.¹⁴² India, on the other hand, chose to memorialise them into its body politic. India's new cabinet was both modern and medieval; their powers rivalled the most autocratic of British monarchs. In another sixty years (between 1950 and 2009), this independent power to legislate would be put to vigorous use so as to nearly supplant the ordinary legislative process.

But before we turn to the post-independent years, one other question remains: Why did the Constituent Assembly provide for ordinances in the new Constitution? The founding authors wrote on a relatively clean slate. And yet, they chose a borrowed script. In the next section, I will reconstruct the debates in the Constituent Assembly, assessing the extent to which their inclusion in the Constitution was opposed, if at all.

D. LIMITED OPPOSITION: ORDINANCES IN THE CONSTITUENT ASSEMBLY

On 30 April 1947, the Constituent Assembly appointed the Union Constitution Committee to report on the 'main principles' of the Union Constitution. Constitutional Adviser B. N. Rau was tasked with collecting the members' views on the matter. Based on replies to a questionnaire he circulated to all members, Rau prepared an independent memorandum – one that became the basis for all further discussions regarding the Union Constitution. It was in this document that he raised the possibility that India's Constitution may contain a provision for ordinances. 'If at any time, when the Union Parliament is not in session, the President is satisfied that circumstances exist which render it necessary for him to take

¹⁴² Maurice Amos, *The English Constitution* 122 (Longmans, Green and Co., London, 1930). Writing in 1930, he said, 'The Crown has, of course, lost for almost all purposes what was formerly an important prerogative, namely, that of legislation by means of proclamation or ordinance issued by the King in Council'.

immediate action, he may promulgate such Ordinances as the circumstances appear him to require'.¹⁴³ Keeping in line with previous versions, his proposal granted ordinances the 'same force and effect' as Acts of parliament. But in a departure from earlier versions, he suggested that they remain in force for a 'period not more than six weeks from the reassembly of Parliament'.¹⁴⁴

Clearly aware that his suggestions could raise a storm, Rau appended a pre-emptive note, explaining – or rather justifying – its inclusion. Although ordinances are 'the subject of great criticism under the present Constitution', he pointed out that circumstances may exist 'where the immediate promulgation of a law is absolutely necessary and there is no time in which to summon the Union Parliament'.¹⁴⁵ Ironically, he resorted to an imperial example to make his point. 'Lord Reading found it necessary to make an Ordinance abolishing the cotton excise duty when such action was immediately and imperatively required in the interests of the country'.¹⁴⁶ This was a good example of selective emphasis. For every Cotton Excise Ordinance Rau could point to, there were dozens that Indians had bitterly agitated against. But as if to allay suspicions of similar misuse, he boldly declared that Indians had nothing to fear from future presidents: 'The President who is elected by the two Houses of Parliament and who has normally to act on the advice of Ministers responsible to Parliament is not likely at all to abuse any Ordinance-making power with which he may be vested. Hence the proposed provision'.¹⁴⁷ A few members echoed similar views; to them, an extraordinary legislative arrangement was necessary.¹⁴⁸ And apparently without discussion or dissent, Rau's proposal on ordinances and his note was included in the Committee's official report. On 4 July 1947, Nehru in his capacity as the chairman of the Union Constitution Committee submitted the report to the Constituent Assembly – the body with the ultimate authority to accept or reject the ordinance proposal.

On 23 May 1949, the provision came up for debate in the assembly. The discussion, it must be pointed out, was limited to the nature and scope of ordinances; members hardly spoke against the very *idea* of ordinances.

¹⁴³ B. N. Rau, 'Memorandum on the Union Constitution' in B. Shiva Rao (ed.), *The Framing of India's Constitution* Vol. II, 485 (Universal Law Publishing, New Delhi, 2006).

¹⁴⁴ *Id.* at 485–486.

¹⁴⁵ *Id.* at 486.

¹⁴⁶ *Ibid.* See Cotton Excise Duty (Suspension) Ordinance, 1925 (I of 1925).

¹⁴⁷ *Ibid.*

¹⁴⁸ N. Gopalswami Ayyangar and Alladi Krishnaswami Ayyar, 'Memorandum on the Principles of the Union Constitution' in B. Shiva Rao (ed.), *The Framing of India's Constitution* Vol. II, 540–551, 546 (Universal Law Publishing, New Delhi, 2006).

Professor K. T. Shah, a representative from Bihar, was the most articulate voice against ordinances. 'However, we may clothe it, however it may be necessary, however much it may be justified', an ordinance, he said, was 'a negation of the rule of law'.¹⁴⁹ And yet, he acknowledged that it might be unavoidable under certain circumstances. Therefore, all he wanted was to make clear that an ordinance could not 'last a minute longer than such extraordinary circumstances would require'.¹⁵⁰ This grudging, if limited, approval of ordinances, it should be mentioned, was a world away from Nehru's rhetoric about the 'humiliation' and 'illegalities' in the name of ordinances. Their old views jettisoned, the national leadership, at the moment of founding, warmed up to them. Apparently, ordinances were not that humiliating after all.

Much of the focus, as I mentioned earlier, was not on if, but the *extent* to which ordinances were needed. Some members pressed for substantive limits on ordinances; they were opposed to the idea of ordinances restricting people's fundamental freedoms. B. Pocker Sahib, a representative from Madras, wanted a proviso to the draft article stating that 'such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law'.¹⁵¹ The growing trend of enforcing Public Safety Acts through ordinances, he thought, was a troubling precedent. And because it was important to him that 'the fundamental right of the citizen to be tried by a court of law' was not lost, he advocated for a provision that would make it illegal to deprive citizens of their liberty through ordinances.¹⁵²

P. S. Deshmukh and Dr B. R. Ambedkar spoke against the proposal. In their view, the draft article, as it stood, accounted for Sahib's concerns. The article included the following clause: 'If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void'.¹⁵³ Acts and ordinances, in other words, had identical legislative width; ordinances could not achieve anything that was prohibited for Acts. This provision, both Deshmukh and Ambedkar thought, resolved the matter. I will argue that they were mistaken: The provision they pointed to could not have accounted for Sahib's objection.

Consider, for a moment, his proposed amendment: 'Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law'.¹⁵⁴

¹⁴⁹ Constituent Assembly Debates (CAD), Bk. 3. No. VIII, 208 (23 May 1949).

¹⁵⁰ *Id.* at 208.

¹⁵¹ *Id.* at 203.

¹⁵² *Ibid.*

¹⁵³ *Id.* at 211.

¹⁵⁴ *Id.* at 203.

Note that persons in India may be deprived of their right to personal liberty either upon conviction by a court of law, or under a law on preventive detention without trial or conviction.¹⁵⁵ Viewed in this light, did the draft article account for Sahib's concerns? The simple answer is that it did not. Laws on preventive detention are constitutional. Parliament has authority to enact such legislation and presidents, therefore, are permitted to promulgate ordinances authorizing preventive detention. If promulgated, an ordinance may deprive a person of his or her personal liberty without trial by a court of law. Sahib was opposed to this possibility. Therefore, in rejecting the amendment, the Constituent Assembly really rejected the idea of *substantive* limits on ordinances – a rejection, as we shall see later, matters for interpretative purposes.

Also, there were concerns about the duration of ordinances. H. V. Kamath, for example, felt that 'six weeks from the date of reassembly of Parliament' was too long.¹⁵⁶ Worried that a president inclined to dictatorship might take undue advantage of the tenure, he proposed that every ordinance be 'laid before both Houses of Parliament within four weeks of its promulgation'.¹⁵⁷ H. N. Kunzru wanted something similar – a tenure not exceeding four weeks.¹⁵⁸ But K. T. Shah would not tolerate even that. According to him, ordinances had to end *immediately* on reassembly of parliament: 'Every such Ordinance shall be laid before both Houses of Parliament immediately after each House assembles, unless approved by either House of Parliament by specific Resolution, shall cease to operate forthwith'.¹⁵⁹

Dr Ambedkar, once again, rejected the proposals. The extended tenure, he thought, was justified. He defended it by comparing the draft article with the provisions for ordinances in the 1935 Act. According to him, the draft provision, unlike s. 43 and s. 44 in the 1935 Act, did not provide the executive with any parallel or independent power of legislation.¹⁶⁰ The extraordinary power was limited only to cases of legislative

¹⁵⁵ Constitution of India, Article 22(4) ('No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless – (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7)').

¹⁵⁶ *Supra* n. 149 at 205.

¹⁵⁷ *Id.* at 204.

¹⁵⁸ *Id.* at 206.

¹⁵⁹ *Id.* at 208.

¹⁶⁰ *Id.* at 213.

emergency, and that, too, when either house of parliament was not in session. On this, he was correct. But Dr Ambedkar avoided mention of the fact that the draft also expanded on the existing provision on ordinances in some respects. First, the provision on ordinances in the 1935 Act was limited only to matters concerning 'peace and good government'. However, the draft provision was substantively agnostic; the president could promulgate 'any' ordinance. Second, the 1935 provision was categorically limited to six months. The draft provision, however, avoided direct mention of tenure; it simply provided that ordinances would remain in effect until the expiry of six weeks from the reassembly of parliament. This choice of drafting strategy, I will later argue in Chapter 3, has profound implications for the tenure of ordinances – under certain circumstances, they may last for periods *far* beyond six months. Kamath clearly understood the consequences and he vented his frustrations at Ambedkar, saying that 'in framing this article, we have gone one better than the British regime, and it is a most atrocious position'.¹⁶¹ Despite these complaints, the provision, as originally drafted, was voted into the Constitution.¹⁶²

The draft article, initially conceptualised by Rau and later supported by Dr Ambedkar, became Article 123 in the new Constitution, thereby authorising the president to promulgate ordinances if he is 'satisfied that circumstances exist which render it necessary for him to take immediate action', provided both houses are not in session.¹⁶³ Importantly, in writing the provision, the founding authors gave ordinances both vertical and horizontal equivalence – or so it seems.¹⁶⁴ Vertical equivalence was granted in Article 123(2): 'An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament'. It is because of this provision that presidential ordinances in India are not by-laws, decrees, orders or regulations; they are the equivalent of Acts. Article 123(3) granted horizontal equivalence: 'If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void'. In other words, ordinances and Acts have similar legislative width; the former can do everything that the latter has jurisdiction to do.

¹⁶¹ *Id.* at 216.

¹⁶² *Id.* at 217.

¹⁶³ On 14 June 1949, the assembly voted to give governors similar powers to promulgate ordinances at the state level. It became Article 213 in the Constitution of India. Except for issues relating to overlapping legislative competence, Article 213 is identical to Article 123.

¹⁶⁴ I say 'so it seems' because in Chapters 3–5, I argue that despite words to the contrary, ordinances and acts do not have the same scope and effect.

The Constituent Assembly's debate on ordinances – or lack of it – was strikingly at odds with the leadership's earlier attitude. That should not come as a surprise. Although important, the Assembly's vote on the provision for ordinances, in many ways, was little more than a formal act – the outcome was never in doubt. By 23 May 1949 – the date on which ordinances were debated and voted upon – Nehru's cabinet had already promulgated as many as sixty-three ordinances in independent India. The allure of extraordinary powers was too strong, and once put into practice, there was clearly no going back. In less than two years, Nehru and his colleagues folded their practical and philosophical objections. What was earlier authoritarian, undemocratic and humiliating, they now believed, was necessary. And the Constituent Assembly agreed.

But does India *really* need ordinances? That is the one remaining question I turn to in the final section of this chapter.

E. THE CASE AGAINST ORDINANCES: WHY DR AMBEDKAR AND H. M. SEERVAI ARE WRONG

Similar to Rau in his earlier memorandum, Dr Ambedkar thought of ordinances as 'necessary'. 'It is not difficult to imagine cases', he told the Constituent Assembly, 'where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise'.¹⁶⁵ And in such situations, there could be no fundamental objection to the idea of arming the president with powers to make a new law.

But empirically speaking, Ambedkar's claim does not hold up. While some neighbouring jurisdictions have adopted the concept of legislative emergency in non-emergency times, others have functioned (rather well) without such powers. Influenced by the British Indian experience, Pakistan,¹⁶⁶ Bangladesh¹⁶⁷ and Nepal,¹⁶⁸ for example, have incorporated

¹⁶⁵ *Supra* n. 149 at 214.

¹⁶⁶ Constitution of The Islamic Republic of Pakistan, Article 89(1) ('The President, may, except when the National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require').

¹⁶⁷ Constitution of The People's Republic of Bangladesh, Article 93(1) ('At any time when [Parliament stands dissolved or is not in session], if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament').

¹⁶⁸ Interim Constitution of Nepal, Article 88(1) ('If at any time, except when the Legislative – Parliament is in session, the Government of Nepal is satisfied that circumstances

similar ordinance-related provisions in their respective constitutions. But other jurisdictions including Sri Lanka,¹⁶⁹ Malaysia¹⁷⁰ and Singapore,¹⁷¹ for example, provide for ordinances only during ‘emergencies’ and are, therefore, conceptually closer to the ‘Emergency Provisions’ in India’s Constitution.¹⁷² This is also true of commonwealth jurisdictions outside of Asia. Australia, Canada and the United Kingdom, for example, confer varying degrees of legislative authority on the executive.¹⁷³ The powers, however, are predicated on *specific* cases of emergency. In the United Kingdom, a senior Minister may make regulations¹⁷⁴ under the Civil Contingencies Act, 2005, if it is urgently ‘necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency’.¹⁷⁵ Emergency under the Act means ‘an event or situation which threatens serious damage to human welfare... [or]... threatens serious damage to the environment... or (c) war, or terrorism, which threatens serious damage to the security of the United Kingdom’.¹⁷⁶ And unlike ordinances in India, such regulations have a maximum tenure of thirty days.¹⁷⁷

exist which render it necessary to take immediate action, without prejudicing the provisions set forth in this Constitution, the government of Nepal may promulgate any Ordinance as deemed necessary’).

¹⁶⁹ Constitution of The Democratic Socialist Republic of Sri Lanka, Article 155(1) (The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament’). Public Security Ordinance (XXV of 1947) (‘An Ordinance to provide for the enactment of emergency Regulations or the adoption of other measures in the interests of the public security and the preservation of public order and for the maintenance of supplies and services essential to the life of the community’).

¹⁷⁰ Federal Constitution of Malaysia, Article 151(2B) (‘If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require’).

¹⁷¹ Constitution of Singapore, Article 150 (2) (‘If a Proclamation of Emergency is issued when Parliament is not sitting, the President shall summon Parliament as soon as practicable, and may, until Parliament is sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required’).

¹⁷² Constitution of India, Part XVIII (‘Emergency Provisions’).

¹⁷³ See Ch. 36, Civil Contingencies Act, 2004 (UK); Ch. 22, Emergencies Act, 1985 (4th Supp.) (Canada). For commentary on the Civil Contingencies Act, see Clive Walker and James Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (Oxford University Press, Oxford, 2006). Emergency legislation in Australia varies in the provinces. See, e.g., Victoria State Emergency Act, 2005 (Act 51 of 2005).

¹⁷⁴ § 20(2), Civil Contingencies Act, 2004. ¹⁷⁵ *Id.* at § 21.

¹⁷⁶ *Id.* at § 19. ¹⁷⁷ *Id.* at § 21.

What these examples show is that a general provision for ordinances – especially of the Indian type meant to address issues of regular governance – is by no means necessary. To be sure, emergency provisions, including provisions for legislation, are necessary and India, like other jurisdictions, specifically provides for them. But the power to promulgate ordinances, such as the one in Article 123, is something else – it is the executive's power to enact legislation in *non*-emergency times. And contrary to Ambedkar's claim of necessity, a large number of legal systems have done without it.

Presumably, H. M. Seervai anticipated this sort of an objection. Therefore, he defended ordinances through the lens of judicial review, arguing that the provision has 'secured considerable flexibility both to the Union and to the State to enact laws to meet emergent situations as also to meet circumstances created by laws being declared void by courts of law'.¹⁷⁸ The Bombay High Court's decision in *United Motors India Ltd. v. State of Bombay*, he thought, was a good example.¹⁷⁹ In that case, the court voided the Bombay Sales Tax Act, 1952 on the ground that the definition of 'sale' was beyond the state legislature's competence.¹⁸⁰ Because the definition permeated the whole Act, it was 'impossible to sever any specific provision of the Act so as to save the rest'.¹⁸¹ As a result, the entire Act was voided. In such circumstances, without a provision for ordinances, Seervai thought that 'gravest public inconvenience would be caused if . . . no machinery existed whereby a valid law could be promptly promulgated to take the place of the law declared void'.¹⁸² Seervai seems to think that judicial review and ordinances go together; if one exists, the other is necessary. That is to say that the internal working of the Constitution (through the application of judicial review) might itself generate moments of legislative urgency. This claim is clearly distinct from Ambedkar's insistence on administrative – or 'external' – necessity as the basis for ordinances. But on closer look, several difficulties emerge.

First, empirically speaking, the argument is over-inclusive: judicial review and ordinances need not go together. The United States is the best example of this. Whereas the U.S. Supreme Court has the power to invalidate legislation, and often does so, the president does not have a corresponding power to independently 'enact' a law. American

¹⁷⁸ H. M. Seervai, *Constitutional Law of India* 19 (N.M. Tripathi, Bombay, 1968).

¹⁷⁹ (1953) 55 Bom LR 246.

¹⁸⁰ *Id.* at para 25.

¹⁸¹ *Id.* at para 25.

¹⁸² *Ibid.* (references omitted).

presidents do have the power to issue ‘signing statements’, but they are not the equivalent of congressional legislation.¹⁸³ Appended to legislation, such statements perform a limited task; they may be used to comment on the law generally, describe the bill, explain its purpose, guide executive-branch officials in implementing the law, guide the judiciary in interpreting the law’s provisions, or on occasions, raise constitutional objections to the provisions of the law. None of this, however, is the equivalent of enacting a piece of legislation.

Second, his argument is under-inclusive. Legislative emergencies of the kind Seervai anticipates may arise even in situations that do *not* involve matters relating to judicial review of legislation. Take, for example, a recent controversy regarding bail and pretrial detention in the UK. Ordinarily, the police could detain a person of interest for up to twenty-four hours for questioning. This period may be extended up to ninety-six hours if a judge so agrees. For nearly twenty-five years, the Police and Criminal Evidence Act, 1984¹⁸⁴ (1984 Act) was interpreted to allow for a convenient use of the ninety-six hours. It was common practice for the police to interrogate people, release them on bail, and weeks or months later bring them back for questioning, subject to a maximum total of ninety-six hours in police custody. But all that changed after *Q v. Salford Magistrates’ Court and Paul Hookway* when the Salford District Judge refused to issue a warrant authorising the police to detain him for a second round of questioning.¹⁸⁵ Hookway was suspected of murder, and first arrested on 5 November 2010. He was released on bail after twenty-eight hours. In April 2011, the police applied for a warrant seeking to extend his period of detention to ninety-six hours. It was refused. Contrary to police practice of more than twenty-five years, the Salford District Judge broke new ground in suggesting that the ninety-six-hour window was not a standalone period, but ran continuously from the moment a person is first arrested. Because that period had run out in Hookway’s case months before, the warrant was refused.

¹⁸³ On signing statements, see Curtis A. Bradley and Eric A. Posner, ‘Presidential Signing Statements and Executive Power’, 23(3) *Constitutional Commentary* 307 (Winter 2006); T. J. Halstead, Congressional Research Service Report for Congress, Presidential Signing Statements: Constitutional and Institutional Implications (2007), available at: <http://www.fas.org/sgp/crs/natsec/RL33667.pdf> (accessed 31 August 2011). For a contrary view see generally William Howell, *Power without Persuasion: The Politics of Direct Presidential Action* (Princeton University Press, Princeton, 2003).

¹⁸⁴ Ch. 60, 1984 Act.

¹⁸⁵ [2011] EWHC 1578 (Admin).

To the law enforcement authorities, the decision was ‘close to a disaster’.¹⁸⁶ It brought into question the fate of nearly 80,000 suspects in England and Wales who were then on police bail.¹⁸⁷ Reacting to the decision, West Yorkshire Chief Constable, Sir Norman Bettison, warned about the prospect of having to release thousands of serious criminals without charge. ‘We are running around like headless chickens wondering what this means to the nature of justice’, he complained. ‘It’s a mess’.¹⁸⁸ Essex Chief Constable Jim Barker-McCardle expressed similar concerns saying that the ruling would have a ‘profound impact’ on the way police investigate crime.¹⁸⁹ By any measure, this was a crisis of a kind that required a new piece of legislation or amendments to an existing one.¹⁹⁰ But the origins of the controversy lay in the court’s power to *interpret* – not *invalidate* – legislation. What this shows is that even without the application of judicial review of legislation, situations may arise where new laws are urgently needed.

When put together, these examples demonstrate that judicial review and ordinances have nothing to do with one another. Legal systems that have judicial review function perfectly well without any provision for ordinances. Conversely, legislative emergencies of the kind Seervai is concerned about may arise even in situations that have nothing to do with judicial review of legislation. But there is a third problem, too – one that is more of the syllogistic kind. If judicial review and the possibility of voiding legislation underpin the case for ordinances, syllogistically speaking, a similar arrangement is also required for constitutional amendments. The Supreme Court in *Kesavananda Bharati v. State of Kerala*¹⁹¹ introduced the ‘basic structure’ doctrine, thereby claiming authority to invalidate constitutional amendments.¹⁹² As a result, concerns Seervai

¹⁸⁶ Alan Travis, ‘Court Ruling ‘A Disaster’, Say Police’ *The Guardian*, 29 June 2011, available at: <http://www.guardian.co.uk/politics/2011/jun/29/bail-ruling-theresa-may-considers-emergency-legislation> (accessed August 31, 2011).

¹⁸⁷ Alan Travis, ‘Court Ruling Leaves Police Powerless To Enforce Bail Conditions’ *The Guardian*, 1 July 2011, available at: <http://www.guardian.co.uk/uk/2011/jul/01/police-powerless-enforce-bail-conditions?intcmp=239> (accessed 31 August 2011).

¹⁸⁸ *Supra* n. 186 *ibid*.

¹⁸⁹ Anon, ‘Bail Suspects Could be Released after Court Ruling’ *BBC News*, 29 June 2011, available at: <http://www.bbc.co.uk/news/uk-13957873> (accessed August 31, 2011).

¹⁹⁰ Alan Travis, ‘Emergency Law to Overturn Court Ruling on Police Bail’ *The Guardian*, 30 June 2011, available at: <http://www.guardian.co.uk/uk/2011/jun/30/emergency-law-bail-ruling?intcmp=239> (accessed 31 August 2011).

¹⁹¹ (1973) 4 SCC 225.

¹⁹² On Basic Structure Doctrine, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (Oxford University Press, New Delhi, 2010).

earlier identified with legislation could be made to apply to constitutional amendments as well. But as far as I can tell, neither he nor has anybody else ever argued, and rightly so, that it is necessary or desirable that presidents be provided with the 'flexibility' to promulgate constitutional amendments in cases of emergency. And if ordinances are not needed with respect to constitutional amendments, then there is no reason to believe that they are any more important with respect to legislation.

Neither claims about necessity nor arguments from judicial review, it seems, is adequate to account for ordinances in the Constitution. What then explains the Constituent Assembly's less-than-probing attitude towards them? Earlier, I argued that the vote was a mere formality – by the time the matter came up for debate in May 1949, Nehru's cabinet was far too invested in the use of extraordinary legislative powers. But that analysis must be supplemented by an additional observation.

Debates in the Constituent Assembly make it fairly clear that the leading voices against ordinances, or at least against extended tenure for ordinances, tended to view future political leadership with suspicion. Once again, H. V. Kamath is instructive: 'Suppose the President summons Parliament say, after one year – Dr Ambedkar says 'no' by a gesture – perhaps he is constitutionally minded and he does not aspire to dictatorial powers if he be elected President – certainly a man different from him take unfair advantage of this article and refrain from summoning parliament within a reasonable period'.¹⁹³ K. T. Shah echoed similar worries. 'It is true that though the nominal authority which makes the Ordinance, is that of the President, he would be acting only on the advice of the Prime Minister'.¹⁹⁴ Therefore, rather than 'leave it to the exigencies or to the possibilities of party politics', he wanted a specific duration beyond which ordinances could not remain in effect.¹⁹⁵ But Dr Ambedkar would have none of this. With his charitable view of future political leadership and parliamentary functioning, there was no cause for alarm. 'I do not know what exactly may happen, but my point is this that the fear', he said in reply, 'is really unfounded'.¹⁹⁶ Especially, 'having regard to the necessity of the Government of the day to maintain the confidence of Parliament I do not think that any . . . dilatory process will be permitted by the Executive of the day as to permit an ordinance promulgated . . . to remain in operation for a period unduly long', he

¹⁹³ *Supra* n. 149 at 205.

¹⁹⁵ *Id.* at 209.

¹⁹⁴ *Id.* at 209.

¹⁹⁶ *Id.* at 215.

added.¹⁹⁷ His charity prevailed, and Article 123 was voted into the Constitution.

That was in 1949. More than sixty years have elapsed. We now have sufficient evidence on which to assess the executive's ordinance-related record in independent India. Were Kamath, Kunzru and Shah blinded by their distrust of future cabinets? Or was Dr Ambedkar unduly taken in by the promise of accountable and responsible cabinets in new India? In Chapter 2, I shall turn to the federal cabinet's record on ordinances – assessing how, when and why they have been put to use between 1952 and 2009.

¹⁹⁷ *Ibid.* (emphasis added). See also Amal Ray, 'From a Constitutional to an Authoritarian System of Government: Interactions Between Politics and the Constitution in India', 25(3) *Journal of Commonwealth and Comparative Politics* 275–291 (1987).