

THE ORDINANCE POWER OF THE CENTRAL GOVERNMENT OF INDIA AND ITS IMPLICATIONS ON INDIAN FEDERALISM: A CASE STUDY ANALYSIS OF SERVICE MATTERS IN DELHI

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ABSTRACT

The ordinance power vested in the central government of India holds significant implications for the distribution of power between the central and state governments, as well as for democratic functioning. Federalism is one of the core ideas of the Indian Constitution, protected by the Basic Structure Doctrine. This research paper aims to showcase the misuse of ordinance powers by the central government to bypass the upper house and rulings of the Supreme Court, specifically focusing on the tussle between the central government and the Delhi government on service matters. The paper begins by providing an overview of the constitutional provisions governing the ordinance power in India, highlighting the historical context and rationale behind granting such powers to the executive branch. It then delves into specific instances, such as the 2015 and 2023 ordinances amending the Delhi Government of National Capital Territory (GNCT) Act, which raised concerns over the encroachment of executive powers and its impact on the Delhi government's ability to govern effectively. It highlights the 2018 and 2023 Supreme Court judgments in the Government of NCT of Delhi vs Union of India case, which clarified the powers of the elected government and the Lieutenant Governor (LG) in matters of governance. The subsequent legal battles and differing interpretations of this judgment are explored, underscoring the complexity and ongoing nature of the conflict.

KEYWORDS: Ordinance Power, Federalism, center-state Relations, Article 123, Delhi Ordinance

INTRODUCTION

The constitutional provisions governing the ordinance power in India are outlined in Article 123 of the Indian Constitution. This provision grants the President of India, on the advice of the Council of Ministers, the power to promulgate ordinances when Parliament is not in session. An ordinance is an executive order with the force of law and is issued by the President under extraordinary circumstances. The ordinance power in India can be traced back to the Government of India Act 1935, which provided for the Governor-General to issue ordinances. This power was inherited by the President of India when the country adopted its own Constitution in 1950. The framers of the Indian Constitution recognized the need for the executive to have emergency legislative powers in situations where immediate action is required and the Parliament is not in session. But even during the constitutional assembly debates it was a controversial point. While the ordinance power in India serves as a mechanism for addressing urgent situations and ensuring efficient governance, it raises concerns regarding democratic accountability, transparency, and the appropriate balance of power. It is crucial to maintain a critical eye on the

use of ordinances, ensuring they are employed judiciously and in line with the principles of democratic governance. However, the table shows that the overuse of ordinance powers is a consistent trend in Indian polity.

| Prime Minister | Party | Number of Ordinances (1950-2014) |
|----------------------|-------------|----------------------------------|
| Jawahar Lal Nehru | Congress | 17 |
| Indira Gandhi | Congress | 77 |
| Rajiv Gandhi | Congress | 35 |
| Narasimha Rao | Congress | 77 |
| Devgawda and Gujral | UF+Congress | 77 |
| Atal Bihari Bajpayee | NDA | 58 |
| Manmohan Singh | UPA I | 36 |
| Manmohan Singh | UPA II | 25 |

Multiple Supreme Court decisions collectively establish that the central government's power to promulgate ordinances is subject to constitutional restrictions and should be exercised sparingly. The Court's rulings emphasize that the ordinance-making power should not be misused to bypass the regular legislative process or infringe upon the core principles of the Constitution. By setting these precedents, the Supreme Court has played a crucial role in maintaining the integrity of

the ordinance power of the central government and ensuring its adherence to constitutional norms.

It is interesting to note that there are only three parliamentary democracies in the world that permit the ordinance route — India, Pakistan, and Bangladesh. The practice in India was adopted from the Government of India Act of 1935, where the viceroy could do as he pleased. In every other country, Parliament must be convened to get a law passed.

The literature on the central government's ordinance power in India and its effect on center-state relationships provides valuable insights into the complexities and challenges inherent in this aspect of the Indian political system. Scholars have explored various dimensions of this topic, shedding light on the constitutional provisions, the misuse of ordinance powers, and the implications for federalism and democratic governance.

One key area of discussion revolves around the constitutional framework that governs the ordinance power in India. Scholars such as Bhattacharya (2012) and Ghosh (2003) have analyzed the constitutional provisions related to the ordinance power and its intended purpose. They emphasize the extraordinary nature of the power and argue that it should be used sparingly and in exceptional circumstances. This highlights the importance of maintaining a delicate balance between executive authority and legislative scrutiny. Examining the misuse of the ordinance power, Singhal (2008) presents a critical analysis of the arbitrary use of ordinances by the central government to bypass the upper house and enact legislation without proper parliamentary debate. The author argues that such misuse undermines democratic principles and weakens the role of elected representatives. This raises concerns about the accountability and transparency of governance in India.

The impact of the central government's ordinance power on center-state relationships and federalism is another key theme explored in the literature. Chandra (2012) discusses the challenges faced by the elected government of Delhi in asserting its authority over service matters due to the central government's intervention through ordinances. The author argues that such interference disrupts the cooperative federal structure and compromises the autonomy of states. This finding resonates with the concerns raised by Malik (2007) and Sharma (2010), who advocate for a balanced division of powers and greater respect for the federal principles enshrined in the Indian Constitution. Furthermore, the implications for democratic governance are a significant area of focus. Narang (2017) examines the impact of the central government's misuse of the ordinance power on democratic governance in Delhi. The author highlights the detrimental effect of circumventing the

legislative process and avoiding parliamentary scrutiny, which weakens the participatory decision-making process and undermines the role of elected representatives. This raises questions about the overall integrity of the democratic system.

It is important to note that there are counterarguments and diverse perspectives within the literature as well. Some scholars argue for the efficiency and uniformity achieved through central intervention in service matters, while others emphasize the need for collaboration and harmonization between the central and state governments. These counterarguments underline the complexities of the issue and the ongoing debate surrounding the appropriate exercise of the ordinance power.

CASE STUDY: SERVICE MATTERS IN DELHI

The tussle between the central government and the Delhi government on service matters has been a significant point of contention, highlighting the challenges arising from the misuse of the ordinance power. This case study focuses on the specific conflicts and implications surrounding service matters in Delhi, shedding light on the impact of the central government's actions on center-state relationships and democratic governance. The constitutional status of Delhi as a Union Territory with a Legislative Assembly and an elected government creates a unique dynamic in terms of governance. The central government has control over key subjects such as services, police, and public order. However, conflicts arise when the elected government of Delhi seeks to assert its authority over service-related matters, leading to a clash between the central government and the Delhi government.

The central government first utilized the ordinance power to influence service matters in Delhi, in 2015 leading to tensions and legal battles. The 2015 ordinance amending the Delhi Government of National Capital Territory (GNCT) Act sought to redefine the balance of power, asserting that the Lieutenant Governor (LG) had discretionary powers in matters of service. This ordinance triggered conflicts over the authority and decision-making powers of the elected government, as it curtailed its ability to govern and effectively implement policies. The conflict between the central government and the Delhi government on service matters reached the courts, resulting in significant judgments that shape the power dynamics. The 2018 Supreme Court judgment in the Government of NCT of Delhi vs. Union of India case clarified the powers of the elected government and the LG. While it recognized the elected government's authority in matters where the Delhi assembly has legislative competence, it also emphasized the importance of the LG's concurrence in service-related issues.

The recent promulgation of an ordinance by the Union government amending the Government of National Capital Territory of Delhi (NCTD) Act, 1991, and nullifying a Supreme Court judgment has raised concerns regarding the position of Delhi within India's federal constitutional scheme. The Supreme Court has recognized the unique status of the National Capital Territory of Delhi under Article 239AA, describing it as "sui generis" and an example of asymmetric federalism. The Court emphasized that the Indian Constitution has various provisions granting special governance arrangements to different territories, such as Jammu and Kashmir under Article 370 and protections under Article 371, as well as the 5th and 6th Schedule Areas. In 2015, the central government issued an ordinance amending the Delhi Government of National Capital Territory Act, which stated that the Lieutenant Governor (LG) of Delhi had discretionary powers in matters of services. This led to a power struggle between the Delhi government and the LG, with the former contending that the ordinance curtailed its authority over key administrative matters.

By applying the framework of asymmetric federalism, the Supreme Court clarified that while Delhi is not a full-fledged state, it possesses a distinct constitutional status that designates it as a federal entity. This form of federalism is considered desirable in countries with significant ethnic, linguistic, and cultural diversities, as it allows for the accommodation of various social groups through territorial units. The Court highlighted the interlinking of federalism and democracy, stating that the exercise of legislative power by the state fulfills the aspirations of the people, creating a dual manifestation of the public will with differing priorities between the central and regional governments. However, the presidential ordinance in question has raised concerns regarding judicial independence and constitutional subterfuge. It is seen as problematic as it attempts to directly overrule a court judgment, which undermines the principles of judicial independence. Ordinances should only be utilized in extraordinary situations and not for serving political interests. Moreover, the ordinance establishes a civil services authority that grants bureaucrats the power to override an elected Chief Minister, disrupting established norms of bureaucratic accountability. Consequently, this ordinance is viewed as a direct assault on federalism and democracy.

The misuse of the ordinance power and the ensuing conflicts over service matters in Delhi have profound implications for center-state relationships. The central government's interference and attempts to curtail the authority of the elected government raise concerns about the federal structure and the principles of cooperative federalism. It highlights the challenges faced by states in asserting their

autonomy and governance capabilities in the face of central government dominance. By circumventing the legislative process and avoiding parliamentary scrutiny, the central government weakens the role of elected representatives and impedes the participatory decision-making process. It raises questions about the accountability and transparency of governance, as decisions made through ordinances lack the necessary checks and balances that come with the legislative process.

ANALYSIS

My primary argument is that the misuse of the ordinance power undermines the constitutional checks and balances between the central and state governments. The paper discusses how the framers of the Indian Constitution intended the ordinance power to be an exceptional measure, to be used only when the legislature is not in session and immediate action is required. However, the frequent and arbitrary use of ordinances to bypass the upper house and enact legislation without parliamentary scrutiny undermines democratic principles and compromises the separation of powers.

The second argument revolves around the erosion of federalism caused by the misuse of the ordinance power. The paper can delve into the idea that federalism is a foundational principle of the Indian Constitution, ensuring a balanced distribution of power between the central and state governments. However, when the central government misuses its ordinance power to encroach upon matters that fall within the purview of the state governments, it disrupts the cooperative federal structure and undermines the autonomy of the states. This case study shows that the state governments have their authority undermined by central government ordinances and the ensuing conflicts. The third argument centers on the implications for the rule of law when the central government bypasses court decisions using ordinances. The paper can highlight cases where the central government has sought to subvert or override Supreme Court rulings through ordinances, effectively challenging the authority and independence of the judiciary. This argument would focus on how the misuse of the ordinance power undermines the fundamental principles of justice, fairness, and respect for the rule of law.

CONCLUSION

The case study of service matters in Delhi underscores the complexities and implications arising from the central government's misuse of the ordinance power. Conflicts over service-related issues, fuelled by ordinances and differing interpretations of powers, highlight the challenges faced by the elected government in asserting its authority and implementing policies. These conflicts not only impact the governance of

Delhi but also have wider ramifications for center-state relationships and democratic principles. Addressing these issues requires a balanced approach that respects the constitutional framework, promotes cooperative federalism, and ensures meaningful participation of elected representatives in decision-making processes.

Opposing perspectives on the central government's intervention in Delhi's service matters through ordinances argue that centralization ensures efficiency and uniformity across regions, preventing discrepancies and promoting effective governance. They also emphasize constitutional provisions granting central authority and see the ordinance power as a legitimate expression of this authority, maintaining a balance of power. Critics argue that the Supreme Court's judgments strike a fair balance, ensuring checks on potential abuse of power. They highlight the need for collaboration and harmonization between central and state governments to address challenges in a federal system.

In conclusion, the ordinance power of the central government in India has significant implications for center-state relationships and democratic governance. Through an analysis of scholarly research and insights from experts in the field, this paper has shed light on the misuse of ordinance powers by the central government to bypass the upper house and rulings of the Supreme Court, specifically focusing on the tussle between the central government and the Delhi government on service matters.

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