

## STANDING IN SUPREME COURT: CHALLENGING THE ORDINANCE PROMULGATION POWER OF THE PRESIDENT

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### A. ABSTRACT

*“Arbitrary power is like most other things which are very hard, very liable to be broken<sup>1</sup>”. If the powers vested with the ‘Constitutional Head of the State’ are left unchecked then it may foment arbitrary use of such powers prejudicing public interest. In India, the de jure constitutional head of the State is the ‘President’ who is vested with the power to promulgate ordinances on the advice of the Council of Ministers when the Parliament is not in session under Article 123 of the Indian Constitution. To oust the plausibility of its abuse by the Council of Ministers it is crucial to ensure the availability of effective constitutional remedies for challenging arbitrary exercise of such extraordinary power. Where on the one hand Article 32 of the Indian Constitution bestows an unstinted right of challenging any unconstitutional ordinance, on the other hand Article 361 immunises the President from legal action without upholding the State’s liability in this regard. In such a perplexing situation instituting a civil suit against the State is arduous. Elucidating this legal problem, the research paper aims at probing the effectiveness of the legal recourse available against the arbitrary exercise of the ordinance promulgating power of the President while elucidating the pre-requisites for a successful legal action.*

### B. KEY WORDS

*Article 13, Article 32, Article 123, Article 361, Constitution of India, President, Ordinance Promulgation Power, Repromulgation of Ordinance, Constitutional Remedy, Immunity to President, Supreme Court of India.*

### C. RESEARCH QUESTIONS

The research paper aims at divulging the opinions of the researcher on the following research questions,

1. What is the scope of the Ordinance Promulgation Power of the President under Article 123 of the Indian Constitution?

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2. Whether the Ordinance Promulgation Power is subject to “*judicial review*” under Article 13 of the Indian Constitution?
3. Whether the ordinance promulgation power of the President is challengeable in the Supreme Court on ground of its ‘arbitrary’ or ‘unreasonable’ or ‘*malafide*’ exercise? If yes, then what are the procedural pre-requisites to institute “appropriate proceedings” against the ordinance?
4. Whether the immunity conferred to the President by Article 361 of the Indian Constitution bars the aggrieved from challenging the constitutionality of the Ordinance?
5. Whether the repromulgation of an ordinance be considered as a “constitutional fraud” in absence of the “extraordinary circumstances” prevalent at the time of its promulgation?

#### **D. HYPOTHESIS**

The researcher has formulated the following hypothesis which is tested in the research paper further:

1. That the Ordinance Promulgation power of the President is subject to judicial review under Article 13 of the Indian Constitution.
2. That the ordinance promulgation power of the President is challengeable in the Supreme Court on the ground of its ‘arbitrary’ or ‘unreasonable’ or ‘*mala fide*’ exercise.
3. That the immunity conferred to the President by Article 361 of the Indian Constitution does not bar the aggrieved from challenging the constitutionality of the Ordinance.
4. That the repromulgation of an ordinance be considered as a “constitutional fraud” in absence of the “extraordinary circumstances” prevalent at the time of its promulgation.

#### **E. RESEARCH METHODOLOGY**

The researcher has adopted Doctrinal Research Methodology. The researcher has made excessive use of primary and secondary data available on the Internet in form of articles, blogs, news articles and other sundry miscellaneous sources including books, commentaries, legal research databases which are duly accredited with appropriate citations hereunder.

## F. INTRODUCTION

The Indian Constitution enshrines that the “*executive power of the Union shall be vested in the President*”<sup>2</sup>. The President is thus known as the “Executive Head of India”. In India, the “executive power” is not merely limited to the execution of the legislations enacted by the Parliament but with the manifold expansion of the functions of the State, all residuary functions have practically passed into the hands of the Executive.<sup>3</sup> The Supreme Court has explained the ambit of the “executive power” in the case of *Ram Jawaya v. State of Punjab*<sup>4</sup> as quoted below;

*“The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State.”*<sup>5</sup>

However, it must be noted that the executive power of the President is not abstract and is subject to constitutional limitations:

- 1) *Firstly*, the executive powers shall be exercised *intra vires* the constitutional authority<sup>6</sup> lest it may provoke institution of “*impeachment*” proceedings against the President under Article 61 of the Indian Constitution<sup>7</sup>; and
- 2) *Secondly*, the executive powers shall be exercised by the President in accordance with the advice of the Council of Ministers headed by the Prime Minister<sup>8</sup>.

The Executive Power of the President also includes the power to legislate by ordinances when the Parliament is not in session but the power can be exercised only if the circumstances so requires and the need for an “*immediate action*” is *per se* expedient.<sup>9</sup> Although this provision seems reasonable this exceptional authority to the President is susceptible to abuse by the Councils of Ministers to impose their will on the people by

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<sup>2</sup> INDIA CONST. Art 53, cl. 1.

<sup>3</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 196 (LexisNexis Butterworths Wadhwa Nagpur, 2015).

<sup>4</sup> *Ram Jawaya v. State of Punjab*, (1955) 2 SCR 225.

<sup>5</sup> *Id.*

<sup>6</sup> INDIA CONST. Art 53, cl. 1.

<sup>7</sup> INDIA CONST. Art 61, cl. 1.

<sup>8</sup> INDIA CONST. Art 74, cl. 1.

<sup>9</sup> INDIA CONST. Art 123, cl. 1.

desisting due diligence of the legislation by the Parliament.<sup>10</sup> It is, therefore, crucial to analyze the judicial precedents in this regard to span the probability of such abuse and the constitutional remedies available against it.

## G. ORDINANCE PROMULGATION POWER OF THE PRESIDENT

Article 123(1) of the Indian Constitution states that;

*“If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.”*

It is also well settled that for an Ordinance to be valid there are seven pre-requisites:

- 1) *Firstly*, both or either of the Houses of Parliament should not be in session. Where it is not possible to have a parliamentary enactment on the subject immediately then the President can promulgate an Ordinance.
- 2) *Secondly*, the President is satisfied that there are such ‘*extraordinary circumstances*’ which render it necessary for him to take ‘*immediate action*’. The only test to ascertain whether the circumstances need immediate action is that the situation shall be so serious and imminent that the delay involved in summoning the legislation and getting the measure passed in the ordinary course of legislation cannot be tolerated<sup>11</sup>;
- 3) *Thirdly*, the ordinance making power of the President is coextensive with the legislative power of the Parliament thus the Ordinance so promulgated shall not legislate provisions which parliament is not competent to enact under the Seventh Schedule of the Constitution read with Article 245 and 246 of the Indian Constitution<sup>12</sup>;
- 4) *Fourthly*, the Apex Court in the case of **Cooper v. Union of India**<sup>13</sup> held that the President shall not be *mala fide* in the exercise of his powers<sup>14</sup>. The Judgement further held that,

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<sup>10</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 207 (LexisNexis Butterworths Wadhwa Nagpur, 2015).

<sup>11</sup> *Id.*

<sup>12</sup> INDIA CONST. Art 123, cl. 3.

<sup>13</sup> Cooper v. Union of India, AIR 1970 SC 564 .

<sup>14</sup> *Id.*; A.K Roy v. Union of India, AIR 1982 SC 710.

*“The only way-in which the exercise of power by the President can be challenged, is by establishing bad faith or mala fide and corrupt motive. Bad faith will destroy any action. Such bad faith will be a matter to be established by a party propounding bad faith. He should affirm the state of facts. He is not only to allege the same but also to prove it.”<sup>15</sup>*

- 5) *Fifthly*, the Ordinance was promulgated with the ‘aid and advice’ of the Council of Ministers who represent the ‘will of the people’<sup>16</sup>. Any Ordinance promulgated in the exercise of “individual judgement” of the President is *per se* invalid *ab initio*;
- 6) *Sixthly*, the Ordinance is consistent with the fundamental rights guaranteed under Part III of the Indian Constitution<sup>17</sup>; and
- 7) *Lastly*, the Ordinance must be laid before the Parliament when it reassembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly unless disapproved earlier by the Parliament<sup>18</sup>.

It is explicit that if either of the aforesaid pre-requisites is not fulfilled then it will make sufficient ground for instituting appropriate proceedings challenging the constitutional validity of the Ordinance so promulgated.

#### **H. IMMUNITY TO THE PRESIDENT UNDER ARTICLE 361 IS NOT A BAR**

Article 361(1) of the Indian Constitution indelibly confers immunity to the President from being held accountable for the “*exercise and performance of the powers and duties of his office*”.<sup>19</sup> It can be inferred that no legal proceedings shall stand maintainable against the President *in personam* but it does not restrain any person from instituting “*appropriate proceedings*” against the Government of India as is elucidated further in the provision.

The Apex Court while interpreting the term “*appropriate proceedings*” in the case of **Prem Chand Garg v. Excise Commissioner**<sup>20</sup> held that, “*appropriate proceedings*” are the proceedings instituted in accordance with the “*procedure relating to forum, conditions of lodgement of petitions compliance with all reasonable directions imposed which would*

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<sup>15</sup> Cooper v. Union of India, AIR 1970 SC 564.

<sup>16</sup> INDIA CONST. Art 74.

<sup>17</sup> INDIA CONST. Art 13, cl. 2.

<sup>18</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 206 (LexisNexis Butterworths Wadhwa Nagpur, 2015).

<sup>19</sup> INDIA CONST. Art 361, cl. 1.

<sup>20</sup> Prem Chand Garg v. Excise Commissioner U.P., AIR 1963 SC 996.

*conduce to the smooth conduct of proceedings in this Court” and “should be proceeding which can appropriately lead to an adjudication of the claim made for the enforcement of a fundamental right and can result in effective relief.” Ex facie the immunity under Article 361 is not a bar to an action against an ordinance if it is *ultra vires* the constitutional provisions.*

## **I. WHEN CAN THE ORDINANCE PROMULGATION POWER OF THE PRESIDENT BE CHALLENGED?**

### **1. Mala fide Exercise of the Power not actionable**

The President’s satisfaction that the circumstances require immediate legislation is quintessential for the promulgation of an Ordinance. Although an ordinance is promulgated on ‘aid and advice’ of the cabinet ministers, even then the sole discretion to promulgate lies with the President. The question of law here is whether the ordinance promulgation power of the President be challenged on the ground that it is not exercised in good faith?

The Supreme Court in its earlier decisions had held that the Court cannot enquire into the propriety of President’s satisfaction even where it is alleged that the power was not exercised in *good faith*<sup>21</sup>. Later, in the case of *R.C. Cooper v. Union of India*<sup>22</sup> the bench was of the view that the genuineness of the President’s satisfaction could possibly be challenged in a Court of Law on the ground that it was *mala fide*.<sup>23</sup>

In 1985, while discussing the validity of an Ordinance, the Hon’ble Court in *T. Venkata Reddy v. State of A.P.*<sup>24</sup> held that,

*“The motives of the legislature in passing a statute are beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety expediency and necessity of a legislative act for the determination of the legislative authority and are determination by the courts. An ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing.”*<sup>25</sup>

<sup>21</sup>D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 207 (LexisNexis Butterworths Wadhwa Nagpur, 2015); *State of Punjab v. Staya Pal*, AIR 1969 SC 903 (912).

<sup>22</sup> *Cooper v. Union of India*, AIR 1970 SC 564 (588, 644)

<sup>23</sup> *Id* ; *A.K Roy v. Union of India*, AIR 1982 SC 710.

<sup>24</sup> *T. Venkata Reddy v. State of A.P.*, (1985) 3 S.C.C. 198.

<sup>25</sup> *Id* at ¶ 3.

Thus, it can be inferred from the above quoted judgement that an ordinance is not open to challenge on the ground of non-application of mind or *mala fides*. Furthermore, the existence of necessity for promulgating the ordinance is not justiciable. Also, the validity of an Ordinance cannot be tested on grounds similar to those on which an executive or judicial action is tested.<sup>26</sup>

## **2. Unreasonable Repromulgation of an Ordinance is actionable**

Repromulgation of an Ordinance refers to the process of extending the period of its enforcement. The question of law here is whether repromulgation of an Ordinance is constitutionally valid when Parliament is in session? The Supreme Court while evaluating this question of law in the case of *D.C. Wadhwa v. State of Bihar*<sup>27</sup> held that,

*“The law-making function is entrusted by the Constitution to the Legislature consisting of the representatives of the people and if the Executive were permitted to continue the provisions of an Ordinance in force by adopting the methodology of repromulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-making function of the Legislature... The Government cannot by-pass the legislature and without enacting the provisions of the Ordinance into an Act of the Legislature, repromulgate the Ordinance as soon as the Legislature is prorogued.”*

It is expeditied from the aforesaid authority that the repromulgation of an ordinance is actionable if it is repromulgated when either the circumstances do not render it necessary for its repromulgation or if it is repromulgated repeatedly for ‘abuse of power’.<sup>28</sup> Furthermore, it was also elucidated in the aforesaid case that repromulgation is valid only in two situations where the Government can’t introduce and push through in the Legislation, a bill containing the same provisions as in the Ordinance owing to<sup>29</sup>;

1. excessive legislative business amidst a particular session, or
2. paucity of time for disposal of the Legislature in a particular session, provided that

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<sup>26</sup> *Id*; Gazula Dasaratha Rama Rao v. The State of Andhra Pradesh & Ors., (1961) 2 S.C.R. 931; B.R. Shankaranarayana & Ors. v. The State of Mysore & Ors., A.I.R. 1966 S.C. 1571.

<sup>27</sup> *D.C. Wadhwa v. State of Bihar*, AIR 1987 SC 579.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Where such a situation arises, the repromulgation shall not be “*open to attack*” lest it shall be considered “*colourable exercise of power*” on part of the Executive as it is well settled that, “*a constitutional authority cannot do indirectly what it is not permitted to do directly*”.<sup>30</sup>

The Apex Court while upholding the decision in ***D.C. Wadhwa Case*** (*supra*) in the case of ***Krishna Kumar Singh v. State of Bihar***<sup>31</sup> held that repromulgation of an Ordinance is “*constitutionally impermissible and a fraud on the powers vested in the executive*” as it not only undermines the doctrine of separation of powers but also the democratic spirit of the constitution.<sup>32</sup> The judgement further elucidates that repromulgation of an ordinance is treated as a “*constitutional fraud*” when the circumstances are not identical to those at the time of its promulgation and when it is done for ‘abuse of power’.<sup>33</sup> Thus, if it is apparent from the circumstances that the Ordinance was not only promulgated in *good faith* but also repromulgated because the circumstances remained untainted then the Ordinance is not ‘abuse of power’ but *bonafide* exercise of power.

### **3. Infringement of Fundamental Rights is actionable**

“*Abstract declarations of fundamental rights in the constitution are useless, unless there is means to make them effective*”<sup>34</sup>. Fundamental rights are the very essence of the democratic way of life adopted by the Constitution and it is the duty of this court to uphold these rights.<sup>35</sup> It is also well settled that “*the fundamental rights are part of the basic structure of the constitution. They cannot be contravened or abridged by any statutory or Constitutional provision*” and “*any law that abrogates or abridges such rights would be violative of the doctrine of basic structure*.”<sup>36</sup>

The Apex Court has inherent power under Article 32 of the Indian Constitution to enforce the fundamental rights guaranteed under Part III of the Indian Constitution not merely against the Executive but also against the Legislature for any act or omission which infringes the fundamental rights.<sup>37</sup> The Court has the right to strike any arbitrary action of the State and its

<sup>30</sup> *Id.*

<sup>31</sup> *Krishna Kumar Singh & Anr. v. State of Bihar & Ors.*, 2017 (2) SCJ 136.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 142 (LexisNexis Butterworths Wadhwa Nagpur, 2015).

<sup>35</sup> *Daryao v. State of Uttar Pradesh*, AIR 1961 SC 1457.

<sup>36</sup> *State of West Bengal v. Committee for Protection of Democratic Rights, West Bengal*, AIR 2010 SC 1476(1490).

<sup>37</sup> *Id.*



authorities.<sup>38</sup> The Court can exercise its jurisdiction *suo moto* or on the basis of Public Interest Litigation.<sup>39</sup> It is also a well settled law that the Supreme Court will not interfere with an administrative order where the constitutionality of the statute or the order made there under is not challenged on the ground of contravention of fundamental rights.<sup>40</sup> Thus, if an Ordinance promulgated under Article 123 is inconsistent with the fundamental rights then it is challengeable in the Supreme Court under Article 32.

Article 13 (2) under Part III of the Indian Constitution explicitly states that, “*The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of contravention, be void*” where “*law*” includes “*ordinance*” as well within its meaning<sup>41</sup>. It also provides that an ordinance has the same force and effect as an Act of Parliament. Article 123 (3) further enshrines that, “*If and so far as an Ordinance under this article makes any provision which parliament would not under this constitution be competent to enact shall be void.*” Moreover, it is well settled that even without the specific provision in Article 13, the Court would have the powers to declare any enactment which transgress fundamental rights as invalid.<sup>42</sup> Therefore, the Ordinance being inconsistent with the fundamental rights is challengeable in the Court.

However, it must be noted that the fundamental rights are subject to reasonable restrictions and thus not every Ordinance inconsistent with the fundamental rights is void provided that it suffices the ‘test of reasonability’ which has been formulated by the Apex Court in plethora of decisions including, *inter alia*, the following:

1. Article 14 of the Indian Constitution guarantees the ‘Right to Equality’. It encompasses social and economic justice within its spectrum, and is essence of a political democracy like India and accordingly a basic feature of the Constitution<sup>43</sup> but this verity can also not be refuted it is not absolute<sup>44</sup>. The legislature is not precluded from enacting any *bonafide* legislation<sup>45</sup> to impose restrictions on exercise of Article

<sup>38</sup> R. Gandhi v. Union of India, (1999) 8 S.C.C. 106, ¶ 13

<sup>39</sup> Bodhisattawa Gautam v. Subhara Chakraborty, AIR 1996 SC 922.

<sup>40</sup> N. Masthan Sahib v. Chief Commr., Pondicherry, AIR 1962 SC 797, 804; Fertilizer Corpn. Kamager Union v. Union of India, (1981) 1 S.C.C. 568; DM Wayanad Institute of Medical Sciences v. Union of India Writ Petition (C) NO. 441 OF 2015; Amar Singhji v. State of Rajasthan, AIR 1965 SC 504.

<sup>41</sup> INDIA CONST. art. 13, cl. 3.

<sup>42</sup> Aruna Ramchandra Shanbang v. Union of India, AIR 2011 SC 1290.

<sup>43</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 95 (LexisNexis Butterworths Wadhwa Nagpur, 2015); Dalmia Cement (Bharat) Ltd. v. Union of India, (1996) 10 S.C.C. 104; M. Nagraj v. Union of India, AIR 2007 SC 71.

<sup>44</sup> State of West Bengal v. Anwar Ali Sarkar, (1952) SCR 289.

<sup>45</sup> P. Vajravelu v. Special deputy collector AIR 1965 SC 1017.

14 provided that such restriction must be ‘reasonable’.<sup>46</sup> A classification becomes ‘reasonable’ only when: (1) there is “reasonable justification for a different treatment” or the classification is based on *intelligible differentia*; (2) such *differentia* has *rational nexus* with the objective sought to be achieved<sup>47</sup>; (3) it satisfies the principles of ‘natural justice’<sup>48</sup> ; and (4) it is not ‘arbitrary’<sup>49</sup>. So long the differentiation can withstand the test of Article 14, it cannot be questioned why one subject was included and the other left out and why one was given more benefit than other.<sup>50</sup>

2. Article 21 of the Indian Constitution guarantees ‘Right to Life’. The Constitution of India does not preclude the State from imposing restrictions on Article 21 but only through a ‘procedure established by law’ provided that such law must pass the ‘test of reasonableness’ and must abide to the principles of natural justice.<sup>51</sup> It implies that the ‘law’ must not be ‘unfair’, ‘unreasonable’ and ‘arbitrary’.<sup>52</sup> ‘Reasonable’, in law, *prima facie* means reasonable in regards to the circumstances in which the actor is called upon to act reasonably<sup>53</sup>; it also means ‘rational’, according to the dictate of reason and not excessive or immoderate; which is not *per se* preposterous or absurd, which an informed, intelligent just minded, civilized man could rationally favour; which favours morality and ethics and it depends on the nature of the right claimed, object to be achieved, means employed and limitation imposed<sup>54</sup>. The word ‘reasonable’ implies intelligent care and deliberation, that is, the choice of reason which reason dictates.<sup>55</sup> Whereas, ‘Law Arbitrary’ means “a law not found in the

<sup>46</sup>D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 97 (LexisNexis Butterworths Wadhwa Nagpur, 2015); National Council for Teacher Education v. Shri Shyam Shikha Prakashan Sansthan, (2011) 3 S.C.C. 238 (255).

<sup>47</sup>*Id.*; K. Thimmappa v. Chairman, Central Board of Directors, SBI, AIR 2001 SC 467; Amita v. Union of India, (2005) 13 S.C.C. 721.

<sup>48</sup> Ameeroonissa v. Mehboob, (1953) SCR 404 (414); Pathumma v. State of Kerela, AIR 1978 SC 771; Maneka Gandhi v. Union of India, AIR 1978 SC 597.

<sup>49</sup> E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555; Nakara v. Union of India, AIR 1983 SC 130.

<sup>50</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 96 (LexisNexis Butterworths Wadhwa Nagpur, 2015).; Ombalika Das v. Hulisa Shaw, (2002) 4 S.C.C. 539.

<sup>51</sup> Cf. Maneka v. Union of India, AIR 1978 SC 597 (¶ 54-56).

<sup>52</sup>*Id.*; Sunil v. Delhi Administration, AIR 1978 SC 1675 (¶ 228); Hussainara v. State of Bihar, AIR 1979 SC 1360 (1365); State of Maharashtra v. Champalal, AIR 1981 SC 1675 (1677); Sher Singh v. State of Punjab, AIR 1983 SC 465.

<sup>53</sup> Gujrat Water Supply & Sewage Board v. Unique Erectors (Gujarat) Pvt. Ltd., AIR 1989 SC 973; Rena Drego v. Lalchand Soni, (1998) 3S.C.C. 341.

<sup>54</sup> M/s Kelvin Cinema v. State of Assam, AIR 1996 Gau 103; R.K. Garg v. Union of India, AIR 1981 SC 2138.

<sup>55</sup> Abdul Hakim Qureshi v. State of Bihar, AIR 1961 SC 448.

*nature of things, but imposed by the legislature's mere will; a bill not immutable<sup>56</sup> and "an action of State uninformed by reason is per se arbitrary.<sup>57</sup>"*

3. Article 19(1) of the Indian Constitution guarantees 'Right to Freedom of Speech and Expression'. It is well settled that while examining 'reasonableness' of a statutory provision, whether it violated Article 19 (1), the pre-requisites are<sup>58</sup>: (1) Directive Principles of State Policy under Part IV of the Constitution are exercised, (2) the restrictions must not be arbitrary, (3) the prevailing social values are satisfied by the restriction as were intended, (4) prevailing conditions and circumstances render it necessary, (5) a just balance is struck between the restrictions and social control, and (6) a direct and proximate nexus is established between the restrictions imposed and object sought to be achieved.<sup>59</sup>

#### **4. Procedural Delinquencies amidst Promulgation are actionable**

If either of the procedural requirements prescribed under the Constitution are not sufficed then the Ordinance is challengeable on the ground of constitutional invalidity. The procedural delinquencies which may call for an action include, *inter alia*;

1. When an Ordinance was promulgated by the President on the basis of "individual judgement" instead on aid and advice by the Cabinet Ministers headed by the Prime Minister, this may also call for impeachment proceedings also against the President if such motion is passed by either of the Houses;
2. When an Ordinance was promulgated on a subject which the Parliament is not competent to legislate under Schedule VII of the Constitution;
3. When an Ordinance was promulgated when both the Houses of the Parliament were in session and a legislation was plausible to be legislated on the subject matter;
4. When the Ordinance is enforced even after the legislation is made on the subject consisting of same provisions.

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<sup>56</sup> BLACK'S LAW DICTIONARY, 890 (7<sup>th</sup> ed. 1999)

<sup>57</sup> Amman Sugars Ltd. v. CTO, (2005) 1 S.C.C 625 (634).

<sup>58</sup> D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 115 (LexisNexis Butterworths Wadhwa Nagpur, 2015).

<sup>59</sup> M.R.F. Ltd. v. Inspector Kerela Govt., (1998) 8 S.C.C. 227 (¶ 13); State of Madras v. Row, (1952) SCR 597 (607); Laxmi v. State of U.P., AIR 1981 SC 873.

## J. PROCEDURE FOR CHALLENGING AN ORDINANCE

### 1. Limitation Period

1. Although no legislation of India specifies anything about the limitation period for filing a writ petition under Article 32 of the Indian Constitution Article 137 of Part II of the Third Division of the Schedule of the Limitation Act, 1963 states that the limitation period to file an “*application*” for which no period of limitation is specified in the Act shall be *three years*. Further, Section 2(a)(i) of the Act explicitly states that an “*application*” includes a “*petition*”. However, it is to be noted that this provision is not abstract and the parties may approach the Court even after the lapse of the period as well as was upheld by the Supreme Court in the case of ***Prabhakar v. Joint Director, Sericulture Department***.<sup>60</sup>
2. Doctrine of delay and laches: The Apex Court in the case of ***Tukaram Kana Joshi v. Maharashtra Industrial Development Corporation***<sup>61</sup> held that inordinate delay in seeking the relief and approaching the Court can be ground to refuse entertainment of the petition under Article 32 but the doctrine is not abstract and is subject to the discretion of the Court. If the Court deems that the action is legally sustainable then the delay and laches may be condoned to meet the ends of justice.<sup>62</sup>
3. If the Ordinance in question is not in force at the time of filling of the petition then the action is *per se* not maintainable in the Court.

### 2. Court of Jurisdiction

A petition seeking writ of *mandamus* can be filled under Article 32 of the Indian Constitution before the Supreme Court.

### 3. Parties to the Suit

The Ordinance can be challenged by filling the writ petition seeking response from the ‘Union of India’ as per Article 300 of the Indian Constitution. It is to be noted that the President cannot be a party to the suit as per the provisions under Article 361 as explained before.

<sup>60</sup> *Prabhakar v. Joint Director, Sericulture Department*, 2015 (3) SCC 1.

<sup>61</sup> *Tukaram Kana Joshi v. Maharashtra Industrial Development Corporation*, 2013 (1) SCC 353.

<sup>62</sup> *Id* at ¶ 12 & 13.

#### 4. Maintainability Pre-requisites

1. Locus Standi: The Petitioners must have *locus standi* which refers to the right to institute an action. The Apex Court being the protector of the fundamental rights cannot refuse to entertain applications seeking protection of fundamental rights merely on technical grounds.<sup>63</sup> The Apex Court has observed in its previous decisions that when a Public Interest Litigation is instituted the strict rule of *locus standi* stands relaxed.<sup>64</sup> Enlarging the ambit of *locus standi* the court had observed that in social and public interest litigations any person ‘acting *bonafide*’ and having ‘sufficient interest’ may move to the court either for the purpose of vindication of fundamental rights or for the enforcement of some legal public duty or both.<sup>65</sup>
2. Rule of Exhaustion of Alternative Remedies: It is well settled by the Apex Court that where there exists an alternative and efficacious statutory remedy the Court should not intervene.<sup>66</sup> The Petitioners have unstinted right to file writ petition before the respective High Courts under Article 226 of the Indian Constitution. Article 32 (1) is not so absolute that it is devoid of application of any procedural rules. Article 32 (1)<sup>67</sup> guarantees the right to approach the Supreme Court but only through “*appropriate proceedings*”<sup>68</sup>. Indeed procedural factors such as *res judicata*<sup>69</sup>, delay in filing the petition<sup>70</sup> and parallel proceedings in another Court (*res subjudice*) are considered before entertaining the appropriateness of any proceeding. The rule of exhaustion of alternate remedies is another such procedural guideline and does not violate the fundamental right under Article 32. Therefore, for an “*appropriate proceeding*” under Article 32 there must be violation of fundamental rights, no alternative and efficacious remedy must be available and the petitioners must approach the Apex Court in the earliest reasonable possible time. It is known that to invoke jurisdiction of the Supreme Court the reason for not approaching the respective High Court must

<sup>63</sup>D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 143 (LexisNexis Butterworths Wadhwa Nagpur, 2015); Rural Litigation v. State of U.P., (1989) Supp. (1) S.C.C. 504 (¶ 16); Premchand Garg v. Excise Commissioner, Uttar Pradesh, AIR 1963 SC 996.

<sup>64</sup> D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579; Mumbai Kamagar Sabha v. Abdul Thai, AIR 1976 SC 1455; Fertilizer Corporation Kamagar v. Union of India, AIR 1981 SC 149.

<sup>65</sup> Rural Litigation v. State of U.P., (1989) Supp. (1) S.C.C. 504 (¶ 16); D.C. Wadhwa v. State of Bihar, AIR 1987 SC 579; S.P. Gupta v. President of India, AIR 1982 SC 149.

<sup>66</sup> Asst. Collector of Central Excise v. Jainson Hosiery, AIR 1979 SC 1889.

<sup>67</sup> INDIA CONST. Art 32, cl. 1.

<sup>68</sup> Prem Chand Garg v. Excise Commissioner U.P., AIR 1963 SC 996.

<sup>69</sup> Daryao v. The State of Uttar Pradesh, AIR 1961 SC 1457.

<sup>70</sup> Tridip Kumar Dingal v. State of W.B., (2009) 1 S.C.C 768 (784).

be elucidated.<sup>71</sup> The matter being of national concern and questioning constitutional validity of a central legislation falls outside the ‘territorial jurisdiction’ of any particular High Court, as the ‘cause of action’ has arisen in the whole of India.<sup>72</sup> Also, it is known that the Court may, in its discretion, exercise its writ jurisdiction in spite of the availability of an alternative remedy in following situations: (1) where writ seeks the enforcement of fundamental rights or the rights are infringed<sup>73</sup>, (2) Where there is a failure of the principles of natural justice, (3) Where orders or proceedings are wholly without jurisdiction, and (4) Where the *vires* of the law is challenged.<sup>74</sup> If the case satisfies all the pre-requisites then it is maintainable before the Supreme Court.

3. Matter of Larger Public Interest: This being a matter of large public interest concerning constitutional validity of a central legislation, on grounds of violation of fundamental rights of the aggrieved party (person or group of people), falls unswervingly under the jurisdiction of the Supreme Court since it is an ‘act of legislature’. Also, Article 32 (1), *inter alia*, ensures the unstinted right to the petitioners of instituting any ‘appropriate proceedings’ against the Government of India.<sup>75</sup> This being a matter of public policy is in ‘social and public interest’ and is therefore *per se* maintainable.

## K. CONCLUSION & SUGGESTIONS

After conducting a detailed analysis on the legal issues in question it can be concluded that the Ordinance promulgation power of the President is limited in scope as it is exercisable only in extraordinary circumstances and is subject to judicial review under Article 13 of the Constitution. The ordinance promulgation power is challengeable in the Court of Law on grounds of procedural delinquencies, inconsistency with the fundamental rights and unreasonable repromulgation. The immunity conferred to the President under Article 361 of the Constitution is not a bar to action challenging an ordinance on such grounds.

Although the limitation period for filling a writ petition is neither prescribed under any law nor any stringent doctrine lays any specific rule for determining the reasonable time to seek relief, it is suggested the aggrieved must approach the Court in the shortest reasonable time.

<sup>71</sup> Union of India v. Paul Manickam, AIR 1982 SC 1473.

<sup>72</sup> INDIA CONST. Art 226, cl. 1.

<sup>73</sup> State of Bombay v. United Motors Limited AIR 1953 SC 252.

<sup>74</sup> I. P. MESSAY, ADMINISTRATIVE BLOCK 321 (8th edition 2012.)

<sup>75</sup> INDIA CONST. Art 361, cl. 1.

Also, while instituting appropriate proceedings against the State it is very necessary to differentiate between personal liability of the President and collective liability of the Government of the State to answer for its actions by promulgating the ordinance.

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