

## Interpreting Taxing Statutes # 5 – Ordinance making

**Ordinance making of the executive head is coextensive with the legislative powers of the legislature.**

### SYNOPSIS

Power of ordinance making

Drafting of ordinance

### **Power of ordinance making**

COI Art 123 empower the President to legislate by Ordinances at a time when it is not possible to have a Parliamentary enactment on the subject, immediately.<sup>1</sup> The ambit of this Ordinance-making power of the President is coextensive with the legislative powers of Parliament, that is to say, it may relate to any subject in respect of which Parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament.<sup>2</sup> Thus, an Ordinance cannot contravene the Fundamental Rights any more than an Act of Parliament. In fact, Article 13(3)(a) doubly ensures this position by laying down that law includes and Ordinance.

The Ordinance may be of any nature as Parliamentary legislation may take, eg it may retrospective or may amend or repeal any law or Act of Parliament itself. An Ordinance is of temporary duration for it must be laid before 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 Parliament. Requirement of laying an Ordinance before the Parliament is a mandatory constitutional

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<sup>1</sup> COI Art 213 deals with the ordinance making power of a Governor of a State.

<sup>2</sup> Basu 2020 p 209

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obligation cast upon the government and a failure to comply with this is a serious constitutional infraction and the abuse of Constitutional process.<sup>^3</sup>

Ordinance making power is to be exercised by the President on the advice of the Council of Ministers, not in the exercise of his individual judgment. Ordinance making power will be available to the President only when either of the two Houses of Parliament has been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. He shall have no such power while both Houses of Parliament is in session. Even though the Parliament is not in session, the President cannot promulgate an Ordinance unless he is satisfied that circumstances such as to take ‘immediate action’.<sup>^4</sup>

But ‘immediate action’ has no necessary connection with an emergency as is referred to in Article 352.<sup>^5</sup> Moreover, the President’s satisfaction could possibly be challenged in a court of law on the ground that it was mala fide, eg where the President has prorogued a House of Parliament in order to make an Ordinance relating to a controversial matter, so as to bypass the verdict of the Legislature.<sup>^6</sup>

### Drafting of ordinances

**Same procedure as a Bill** - The procedure described in the preceding paragraphs (except in so far it relates to anything to be done in Parliament) applies also, generally speaking, to the drafting of Ordinances which may be promulgated by the

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

<sup>4</sup> Basu 2020 p 210

<sup>5</sup> Basu 2020 p 210

<sup>6</sup> Basu 2020 p 211

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President under article 123 of the Constitution and to Regulations made by the President under the Constitution.

**Reason for the Ordinance** - Whenever a Bill seeking to replace an Ordinance by a Bill is introduced in either House, a statement explaining the circumstances which necessitated immediate legislation by Ordinance has to accompany it. [Rule 71 of Lok Sabha Rules 2014]