

GOVERNOR AND HIS POWERS

DUAL ROLE AS ACKNOWLEDGED BY SUPREME COURT IN B.P.SINGHAL V. UNION OF INDIA :

As head of **State** = bound by the advice of his Council of Ministers.

As a vital link /formal channel of communication between the Union Government and the State Government.

S.R.BOMMAI – DELINEATES THE POSITION OF GOVERNOR :

- 1) Governor's role is not **expected or required to implement** the policies of the government or popular mandates.
- 2) Like the President, He *owe their allegiance and loyalty to the Constitution and not to any political party*(Article 159) + **discharge purely constitutional functions**, irrespective of their earlier political background.
- 3) When he delivers the special address under Article 176 of the Constitution, it is the views of statement, *which may be neither his own nor that of the Centre.*
- 4) Governors are expected to be apolitical, Governors cannot be politically active.

Functions and Powers of the Executive :

i. Judicial Power

ii. Legislative Power

iii. Executive Power.

- i. JUDICIAL POWER: The Constitution confers certain powers on the State Government which may be characterised as 'judicial' in nature.

The State Executive has power to appoint judges to the subordinate Courts in the State [Art. 233-237].

Besides, the question whether a member of the State Legislature has become subject to a disqualification or not is formally decided by the Governor [Art. 192].

Power to grant Pardon (Art.161)

(ii) LEGISLATIVE POWER

a) PARTICIPATION IN THE LEGISLATIVE PROCESS

b) RULE MAKING

c) ORDINANCE-MAKING POWER : The State Executive has ordinance-making power similar to that enjoyed by the Central Executive.

(iii) EXECUTIVE POWER : The executive power of the State Government is co-extensive with the legislative power of the State Legislature.

Doctrine of “occupied field” : Bishambar Dayal Chandra Mohan v. State of Uttar Pradesh : But when there is a law on that aspect, the Government cannot meddle with that subject through its executive power under Art. 162. Because executive has to exercise its statutory powers according to the provisions of the relevant statute.

GOVERNOR AND HIS POWERS

SUPREME COURT VIEWS ON ROLE OF GOVERNOR ::

DUAL ROLE AS ACKNOWLEDGED BY SUPREME COURT IN B.P.SINGHAL V. UNION OF INDIA :

As head of **State** = bound by the advice of his Council of Ministers.¹

As a vital link /formal channel of communication²between the Union Government and the State Government.

WHAT HAPPENS WHEN THERE IS A CONFLICT BETWEEN CENTRE AND STATE : When the views of Centre and state conflicts, governor acts as an **impartial or neutral Umpire** , in a manner harmonious manner, assessing the scope and ambit of each role properly. *He is not an employee of the Union Government, nor the agent of the party in power nor required to act under the dictates of political parties.*³

S.R.BOMMAI – DELINEATES THE POSITION OF GOVERNOR :

In S.R.Bomma v. Union of India : “In the early days of Indian democracy, the same political party was in power both at the Centre and the States. The position has changed with passage of time. Now different political parties, some national and some regional, are in power in the States. *Governor cannot be removed by Union Government on the ground that he/she is not in sync with its mandate and policies.*

- 1) Governor’s role is constitutionally is clearly defined without political overtones. He is not **expected or required to implement** the policies of the government or popular mandates.
- 2) Like the President, He *owe their allegiance and loyalty to the Constitution and not to any political party*(Article 159) + ***discharge purely constitutional functions***, irrespective of their earlier political background.

¹ Article 153 of the Constitution provides that there shall be a Governor for each State. Article 154 vests the executive power of the state in the Governor. Article 155 provides that the Governor of a State shall be appointed by the President, by warrant under his hand and seal.

² State of Rajasthan vs. Union of India – 1977 (3) SCC 592,

³ Hargovind Pant vs. Raghukul Tilak (Dr.) – 1979 (3) SCC 458],

- 3) When he delivers the special address under Article 176 of the Constitution, it is the views of statement, *which may be neither his own nor that of the Centre.*
- 4) , Governors are expected to be apolitical⁴, Governors cannot be politically active.

Functions and Powers of the Executive :

- i. **Judicial Power**
- ii. **Legislative Power**
- iii. **Executive Power.**

JUDICIAL POWER: The Constitution confers certain powers on the State Government which may be characterised as 'judicial' in nature.

The State Executive has power to appoint judges to the subordinate Courts in the State [Art. 233-237].

Besides, the question whether a member of the State Legislature has become subject to a disqualification or not is formally decided by the Governor [Art. 192].

Power to grant Pardon (Art.161)

POWER TO GRANT PARDON : (UPSC 2015)

The Governor is empowered to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends [Art. 161].

This power of the Governor is very much similar to the power of the President under Art. 72⁵, **discussed MODULE 4.** Article 161 of the Constitution confers upon the Governor of a State similar powers in respect of *any offence against any law relating to a matter to which the executive power of the State extends.*

AS PER THE ADVICE OF COM ONLY : The power under Arts. 72 and 161 of the Constitution is absolute and cannot be fettered by any statutory provision. **But the**

⁴ Dr. B. R. Ambedkar stated : "If the Constitution remains in principle the same as we intend that it should be, that the Governor should be a purely constitutional Governor, with no power of interference in the administration of the province....."

⁵ Satpal Singh V. State of Haryana : "Whatever applies to the President under Art. 72 equally applies to the power of the Governor under Art. 161. It has now been settled that the Governor does not exercise the clemency power in his own discretion but on the advice of his Council of Ministers".

president or the Governor, as the case may be, must act on the advice of the Council of Ministers.

WHY > The State Government has full freedom in exercising the power of clemency, which is a matter of policy, and even excluding a category of persons which it thinks expedient to exclude as long as there is *no insidious discrimination involved*.

CPRC V. CONSTITUTIONAL LAW : Art. 161 is of much wider amplitude than S. 401, Cr.P.C., for while under the former the State Government can give an absolute and unconditional pardon, the latter does not empower it to do any such thing. *In any case, the power given under Art. 161 cannot be fettered by any statutory provision.*

PRESIDENT V. GOVERNOR : Because of Arts. 72 and 161, the power of the Governor to grant pardon, etc., overlaps, to some extent, with the similar power of the President, particularly in case of a death sentence.

K.M.NANAVATI CASE ⁶:

- A. FACTS :** The Supreme Court discussed some aspects of this power. Nanavati, a high naval officer, was found guilty of the offence of murder and was sentenced to life imprisonment by the Bombay High Court.
- B. GOVERNOR ACTION :** The Governor of Bombay suspended the sentence till the disposal of his appeal by the Supreme Court and directed that he be detained in the naval jail.
- C. SUPREME COURT : HELD :** The Supreme Court held in effect that the Governor's order suspending the sentence could operate *only till the matter became sub judice in the Court* on filing the petition for special leave to appeal, and no further. Thereafter, **it is for the Court to pass such order as it thinks fit**. The Court refused to grant to Nanavati the exemption he prayed for.

MISUSE OF CLEMENCY POWER: Several cases have come to light showing that, at times, the power to grant pardon is misused by the State Governments.

In ***Swaran Singh case***, D, an MLA of the U.P. Assembly, was found guilty of murdering one J. He was convicted and sentenced to imprisonment for life. Within a period of two

⁶ In Nanavati v. State of Bombay

years, the Governor of U.P. granted *remission of the remaining long period of his life sentence*.

HELD : Although the Judicial review of the Governor's decision under Art. 161 is not exercisable on the merits but it can be subject to limited judicial review.

WHY ? "*all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide, and ordinarily guidelines for fair and equal execution are guarantors of valid play of power*".⁷ + Finer canons of constitutionalism.

FINDING OF MISUSE OF POWER : SC QUASHES THE ORDER !

In Satpal v. State of

Haryana, a BJP leader

sentenced to life

imprisonment in a murder

case was pardoned by the

Governor of Haryana. The

Supreme Court ruled that the

Governor was not properly

advised and had exercised his

power "*without applying his*

mind" and, accordingly,

quashed the clemency order.

CASE STUDY : Under the Representation of the Peoples Act, a person sentenced to imprisonment for not less than two years is disqualified from being a candidate at an election.

In *Sarat Chandra Rabha v. Khagendra Nath* : X was convicted for 3 years. He was remitted. Question was whether he is disqualified under RPA ?

HELD: In law the remission does not touch the order of conviction by the Court and the sentence passed by it. Thus the sentence of imprisonment is not affected and the appellant remains disqualified although he may not have to undergo the full sentence.

HELD : "There cannot be any dispute with the proposition of law that the power of granting pardon under Art. 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said power could be exercised. *But the said power being a constitutional power conferred on the Governor by the Constitution is amenable to judicial review on certain **limited grounds***".

LIMITED GROUNDS OF JUDICIAL REVIEW : The Court pointed out the following grounds on which the Court could interfere with an order passed under Art. 161, viz.,

⁷ *Kehar Singh and Maru Ram case*.

if the Governor exercises the power himself without being advised by the Government;

if the Governor transgresses the jurisdiction in exercise of the power under Art. 161

if the Governor has passed the order without application of mind;

if the order is mala fide

if the Governor has passed the order on some extraneous consideration

WAY FORWARD : These cases are telling examples of criminalisation of politics and show how powers vested in high functionaries by the Constitution can be manipulated to favour criminal politicians.

- 1) Develop a non-political mechanism for the exercise of this power so that it is exercised purely on the merits of each case without any political connotations.
- 2) The courts do exercise the power of judicial review over exercise of power under Art. 72 or 161 so as to ensure that this power is not misused or used arbitrarily in favour of influential politicians who commit crimes with impunity.

(ii) LEGISLATIVE POWER

(a) PARTICIPATION IN THE LEGISLATIVE PROCESS : Like the Central Executive, the State Executive also participates intimately in the legislative process. The powers of prorogation and dissolution of the Legislature vest in the Executive. The Governor has to signify his assent to a Bill passed by the State Legislature before it can assume legal sanctity or reserve it for Presidential assent.

(b) RULE MAKING : Several provisions of the Constitution confer rule-making powers on the Governor. He can make rules regarding:

Authentication of orders and other instruments : Art. 166(2).

Conditions of service of the members of the State Public Service Commission (Art.318) as well as civil servants(Art.309).

Convenient transaction of Government business;Art.166(3).

Procedure in respect of communications between the Houses of State Legislature (Art.208)

Recruitment of secretarial staff of the Legislature. (Art.187(3))

Recruitment of officers, etc., for a High Court (Art.229)

Examine and elucidate the constitutional scope of the ordinance making power of the president and the governors in India 2014 UPSC.

(c) ORDINANCE-MAKING POWER : The State Executive has ordinance-making power similar to that enjoyed by the Central Executive.

EXPLANATION : According to Art. 213(1), which is in *pari materia* to Art. 123, which has already been discussed earlier,

WHEN> the State Governor may promulgate such ordinances as the circumstances appear to him to require when—(1) the State Legislative Assembly is not in session; or if the State has two Houses, when one of the Houses is not in session; and (2) the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action.

NEEDS ASSENT OF PRESIDENT : PROVISIO (ART.313(1)) : He needs instructions from the President if

- a) Normally that bill, for its introduction in state legislature, would require previous sanction of the President.
- b) Governor deemed it necessary to reserve a Bill for President's consideration,
- c) an Act of the State Legislature to that effect would have been invalid under the Constitution without receiving the President's assent.

The power to make ordinances though formally vested in the Governor is, in effect, exercised by the Council of Ministers on whose advice the Governor acts, except when the matter is one in which the Governor has to seek instructions from the President.

VALIDITY :

1. An ordinance ceases to operate at the **expiration of six weeks** from the reassembly of the Legislature. If the State has a bicameral legislature, and the two Houses assemble on different dates, the period of six weeks is to be counted from the later of the two dates.

2. An ordinance ceases to operate earlier than six weeks if a resolution disapproving it is passed by the Assembly, and is agreed to by the Council, if any [Art. 213(2)(a)].
3. An ordinance may be withdrawn by the Governor at any time [Art. 213(2)(b)].

EFFECT OF LAW : An ordinance has the same force and effect as an Act passed by the State Legislature. [Art. 213(2)]. The ordinance-making power is co-extensive with the legislative power of the State.

- An ordinance cannot make a provision which cannot be validly enacted by an Act of the State Legislature [Art. 213(3)].

EFFECT OF AN ORDINANCE : Article 123(2) or 213(2) says that an ordinance has the same force and effect as an Act of the Legislature. What happens when an ordinance lapses without being replaced by an Act of the Legislature? ***Is the ordinance to be regarded as void ab initio?***

1. State of Orissa v. Bhupendra Kumar Bose : FACTS : Election held in municipal corporation as per ordinance. There was no law validating such ordinance was passed. Supreme Court held that ordinance was invalid.

HELD : *Rights created under the ordinance* must be held to endure and last even after the expiry of the ordinance. Here the Court in the factual context ruled that the effect of the ordinance did not cease when it lapsed.

2. T. Venkata Reddy v. State of Andhra Pradesh : The Court refuted the argument that when an ordinance is not replaced by an Act, as required by Art. 123(2) or 213(2), the ordinance is to be deemed to be *void ab initio* and it should be assumed that it never became effective.

REVERSED BHUPENDAR CASE : The Court argued, after reading Arts. 123(2) and 213(2), that the wordings of both of these provisions says that the *ordinance shall be void from its commencement if it is not approved, or is disapproved by the Legislature.*

The constitutional provision merely says that **the ordinance shall cease to operate.** This means that the ordinance remains effective till it ceases to operate. Accordingly, a mere disapproval of an ordinance by the concerned legislature cannot revive closed or completed transaction.

If the Legislature wants to revive the pre-ordinance position, it can do so by passing a law having retrospective effect. Therefore, abolition of the posts by the ordinance having become a completed event, no question arises of revival of those posts after the lapse of the ordinance. The effect of the ordinance was irreversible except by express legislation as stated above.

3. KRISHNA KUMAR V. STATE OF BIHAR : FEB.2017 : The question as to whether rights, privileges, obligations and liabilities would survive an Ordinance which has ceased to operate must be determined as a matter of construction. The appropriate test to be applied is the test of public interest and constitutional necessity. This would include the issue as to whether the consequences which have taken place under the Ordinance have assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief;

JUSTICIABILITY OF ORDINANCE-MAKING POWER : The question has been raised from time to time whether the 'satisfaction' of the Governor (i.e. of the Government) to issue an ordinance is justiciable or not.

The Governor of Andhra Pradesh issued an ordinance reducing the age of retirement of civil servants from 58 to 55. The ordinance was challenged inter alia on the ground of non-application of mind. The Court stated in this connection. "The power to issue an ordinance is not an executive power but is the power of the executive to legislate". Therefore, an ordinance cannot be declared invalid for the reason of non-application of mind.

WHY> An executive act is liable to be struck down on the ground of non-application of mind OR mala fides OR extraneous= **not the act of the Legislature.**" The Court cannot examine the motives of the Legislature in passing an Act.

T. Venkata Reddy v. State of Andhra Pradesh : The Supreme Court has again reiterated the proposition that an ordinance cannot be struck down on such grounds as non-application of mind, or mala fides, or that the prevailing circumstances did not warrant the issue of the ordinance.

WHEN IT CAN BE DECLARED AS UNCONSTITUTIONAL ? The Courts can declare a statute unconstitutional when it transgresses constitutional limits, but they cannot

inquire into the propriety of the exercise of the legislative power. In Nagaraj and Venkata Reddy, viz., the Court cannot take cognizance of “legislative malice” in passing a statute. Accordingly, motive for promulgation of an ordinance cannot be examined by the Court.

M.P. JAIN ARGUES:

- a) SEPARATION OF POWERS : It needs to be emphasized that the doctrine of Separation of Powers envisages not only separation of powers, as such, but also separation of the three organs who wield these powers. When the Executive promulgates an ordinance, it exercises legislative power which in itself amounts to the negation of the doctrine of Separation of Powers, as it combines legislative power with executive power. Although an ordinance may have the same effect as an Act of the Legislature, and the function of making an ordinance may be regarded as legislative, yet there is a vital difference between the two: *an ordinance is made by the Executive while an Act is made by a democratically elected Legislature after due deliberation and discussion.*
- b) The Constitution itself differentiates between an Act and an ordinance as is very clear from the phraseology of Art. 123 or 213. An ordinance has a tempo-ary life; it is not a permanent law like an Act. The very fact that an ordinance lapses automatically after a while, and has to be replaced by an Act of the Legislature shows that the Constitution does not confer the same status on an ordinance as that of an Act.

The following discussion itself brings out clearly the fact that the Supreme Court does not treat an ordinance as being on all fours with an Act. In the eyes of the Court itself, an ordinance is a merely temporary expedient—an inferior kind of law. Accordingly to treat ‘legislation’ by the executive as *pari passu* with legislation by a legislature, as has been done in the above cases, does not appear to be sound.

MISUSE OF THE POWER TO MAKE ORDINANCES : The power to promulgate ordinances is meant to be used sparingly and only in an emergency and when the State Legislature is in recess. An ordinance has only a limited life. Art. 213 is so structured that no ordinance made by the State Government can remain in force for more than 7½ months without being approved by State Legislature and enacted into an Act.

REPROMULGATION :

However, in Bihar, an objectionable practice *arose of not placing the ordinances before the Legislature for approval*. These ordinances were re-promulgated word to word after the prorogation of the Legislature.

WHY ? This practice was helped by the fact that *the Assembly always met for less than six weeks*. The State Government proceeded on the basis that it was not necessary to introduce any legislation in the Legislature but that the law could be continued to be made by the Government by having ordinances repromulgated by the Governor from time to time. In this way, an ***ordinance raj*** in the real sense of the term was ushered in the State. This amounted to law-making by an executive fiat instead of by the Legislature.

1. D.C. Wadhwa v. State of Bihar :

FACTS : the Bihar Sugar-cane (Regulation of Supply and Purchase) Ordinance was kept in force for more than 13 years through the process of re-promulgation instead of seven and a half months as envisaged by the constitutional provision. . A writ petition was filed in the Supreme Court as a matter of public interest litigation on January 16, 1984, challenging such a practice as unconstitutional.

HELD:

1. The primary law-making authority is the legislature and not the executive and the ordinance making power is “in the nature of an emergency power”.
2. It amounted to usurping of the law-making function of the legislature.

“It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision.”

The Court ruled that the systematic practice of the Bihar Government in promulgating ordinances successively without enacting them through the Legislature was “clearly unconstitutional” and amounted to “a fraud on the Constitution”.

In *Venkata Reddy*, as stated above, an ordinance was given a high status by the Supreme Court, and was equated to an Act of the Legislature. But the later case (*Wadhwa*) shows that an ordinance cannot be placed on the same pedestal as an Act for all purposes, the reason being that an ordinance is made by the Executive and not by the Legislature, and that ordinance-making power is subject to some limitations to which legislative power is not subject.

2. KRISHNA KUMAR V. STATE OF BIHAR : FEBRUARY 2017 :

1. The Ordinance making power does not constitute the President or the Governor into a **parallel source of law making or an independent legislative authority**;
2. WHY ORDINANCE SHOULD BE LAID DOWN ? The requirement of laying an Ordinance before Parliament or the state legislature is a mandatory constitutional obligation cast upon the government. Laying of the ordinance before the legislature is mandatory because the legislature has to determine: (a) The need for, validity of and expediency to promulgate an ordinance; (b) Whether the Ordinance ought to be approved or disapproved; (c) Whether an Act incorporating the provisions of the ordinance should be enacted (with or without amendments);
3. IF NOT : If ordinance is not laid down, it is
 - **serious constitutional infraction and abuse of the constitutional process**;
 - **Re-promulgation of ordinances is a fraud on the Constitution and a sub-version of democratic legislative processes.**

WHY ORDINANCE IS ALTERNATIVE>

- While contending *that ordinances should be issued only to meet certain exigencies and under compelling circumstances*, it is equally important to understand that disruption as a parliamentary tactic plays a significant role.
- A dysfunctional House sometimes constitutes a compelling circumstance in itself.
- Generally, it is the combination of Opposition obstructionism and government obstinacy in not making any concessions to those across the aisle that derails legislative business and leads to ordinances.

The courts can only define **the boundaries between the use and abuse of power**, but it is up to parties in the legislature to observe the limits of constitutional propriety and show that they have both the time and the will to enact laws

(iii) EXECUTIVE POWER : As regards the content of the executive power in a State, whatever has been said under the Central Government is fully relevant. The extent and the scope of the State executive power has been discussed under Federalism.

USUAL RULE : The executive power of the State Government is co-extensive with the legislative power of the State Legislature.⁸

To avoid conflict of State executive power and the Central executive power in the concurrent area, *the proviso to Art. 162* provides that the executive power of the State in this area = **is subject to any law made by Parliament, or restricted by the executive power of the Centre** expressly conferred on it by the Constitution or any law made by Parliament.

Doctrine of “occupied field” : Bishambar Dayal Chandra Mohan v. State of Uttar Pradesh : “If there is no law covering a particular aspect, the government can carry on the administration by issuing administrative directions or instructions until the Legislature makes a law in that behalf. The State Government can act within its competence and take executive action even if there is no legislation to support such executive action”

But when there is a law on that aspect, the Government cannot meddle with that subject through its executive power under Art. 162. Because executive has to exercise its statutory powers according to the provisions of the relevant statute.⁹ Any instructions in exercise of its executive power = constitute delegated legislation.

The executive cannot go, in exercising its executive power, against a constitutional or a statutory provision. Defining ‘executive power’, the Supreme Court has stated that the executive power vested in the State Government under Art. 154(1) connotes the residual of government functions which remain after the legislative and judicial functions are taken away. The executive power includes acts necessary for the carrying on or supervision of the general administration of the State including both a decision as to action and the carrying out of the decision.

⁸ Ambesh Kumar v. Principal, LL.R.M. Medical College, AIR 1987 SC 400 : 1986 Supp SCC 543; Bharat Coking Coal Co. Ltd. v. State of Bihar, (1990) 4 SCC 557

⁹ S. Arunachalam v. State of Tamil Nadu, ILR (1996) 3 Mad 1508; V. Chandra v. State of Tamil Nadu, ILR (1996) 1 Mad 1007; Association of Management of Pvt. Colleges v. State of Tamil Nadu, AIR 1998 Mad 34

GOVERNOR AND HIS POWERS

SUPREME COURT VIEWS ON ROLE OF GOVERNOR ::

DUAL ROLE AS ACKNOWLEDGED BY SUPREME COURT IN B.P.SINGHAL V. UNION OF INDIA :

As head of **State** = bound by the advice of his Council of Ministers.

As a vital link /formal channel of communication between the Union Government and the State Government.

WHAT HAPPENS WHEN THERE IS A CONFLICT BETWEEN CENTRE AND STATE : When the views of Centre and state conflicts, governor acts as an **impartial or neutral Umpire** , in a manner harmonious manner, assessing the scope and ambit of each role properly. *He is not an employee of the Union Government, nor the agent of the party in power nor required to act under the dictates of political parties.*

S.R.BOMMAI – DELINEATES THE POSITION OF GOVERNOR :

- 1) Governor's role is not **expected or required to implement** the policies of the government or popular mandates.
- 2) Like the President, He *owe their allegiance and loyalty to the Constitution and not to any political party*(Article 159) + **discharge purely constitutional functions**, irrespective of their earlier political background.
- 3) When he delivers the special address under Article 176 of the Constitution, it is the views of statement, *which may be neither his own nor that of the Centre.*
- 4) Governors are expected to be apolitical, Governors cannot be politically active.

Functions and Powers of the Executive :

- i. **Judicial Power**
- ii. **Legislative Power**
- iii. **Executive Power.**

JUDICIAL POWER: The Constitution confers certain powers on the State Government which may be characterised as 'judicial' in nature.

The State Executive has power to appoint judges to the subordinate Courts in the State [Art. 233-237].

Besides, the question whether a member of the State Legislature has become subject to a *disqualification or not is formally decided by the Governor* [Art. 192].

Power to grant Pardon (Art.161)

POWER TO GRANT PARDON : (UPSC 2015)

The Governor is empowered to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends [Art. 161].

AS PER THE ADVICE OF COM ONLY : The power under Arts. 72 and 161 = Constitution is absolute = **president or the Governor, as the case may be, must act on the advice of the Council of Ministers**

CPRC V. CONSTITUTIONAL LAW : Art. 161 = absolute and unconditional pardon, V. S. 401, Cr.P.C = does not empower it to do any such thing.

PRESIDENT V. GOVERNOR : Because of Arts. 72 and 161, the power of the Governor to grant pardon, etc., overlaps, to some extent, with the similar power of the President, particularly in case of a death sentence.

MISUSE OF CLEMENCY POWER: Several cases have come to light showing that, at times, the power to grant pardon is misused by the State Governments.

In ***Swaran Singh case*** : Held that the Judicial review of the Governor's decision under Art. 161 is not exercisable on the merits but it can be **subject to limited judicial review**. WHY ? "*all public power, including constitutional power, shall never be exercisable arbitrarily or mala fide, and ordinarily guidelines for fair and equal execution are guarantors of valid play of power*".¹ + Finer canons of constitutionalism.

FINDING OF MISUSE OF POWER : SC QUASHES THE ORDER ! : In **Satpal v. State of Haryana** : The Governor was not properly advised and had exercised his power "*without applying his mind*" and, accordingly, quashed the clemency order. However it can amenable to judicial review on certain **limited grounds**".

¹ *Kehar Singh and Maru Ram case.*

LIMITED GROUNDS OF JUDICIAL REVIEW : The Court pointed out the following grounds on which the Court could interfere with an order passed under Art. 161, viz.,

if the Governor exercises the power himself without being advised by the Government;

if the Governor transgresses the jurisdiction in exercise of the power under Art. 161

if the Governor has passed the order without application of mind;

if the order is mala fide

if the Governor has passed the order on some extraneous consideration

WAY FORWARD :

- 1) Develop a non-political mechanism for the exercise of this power.
- 2) The courts do exercise the power of judicial review over exercise of power under Art. 72 or 161 prevent misuse.

(ii) LEGISLATIVE POWER

(a) PARTICIPATION IN THE LEGISLATIVE PROCESS : Like the Central Executive, the State Executive also participates intimately in the legislative process. The powers of prorogation and dissolution of the Legislature vest in the Executive. The Governor has to signify his assent to a Bill passed by the State Legislature before it can assume legal sanctity or reserve it for Presidential assent.

(b) RULE MAKING : Several provisions of the Constitution confer rule-making powers on the Governor. He can make rules regarding:

Authentication of orders and other instruments : Art. 166(2).

Conditions of service of the members of the State Public Service Commission (Art.318) as well as civil servants(Art.309).

Convenient transaction of Government business;Art.166(3).

Procedure in respect of communications between the Houses of State Legislature (Art.208)

Recruitment of secretarial staff of the Legislature. (Art.187(3))

Recruitment of officers, etc., for a High Court (Art.229)

Examine and elucidate the constitutional scope of the ordinance making power of the president and the governors in India 2014 UPSC.

ORDINANCE-MAKING POWER : The State Executive has ordinance-making power similar to that enjoyed by the Central Executive.

EXPLANATION : According to Art. 213(1), which is in *pari materia* to Art. 123, which has already been discussed earlier,

WHEN> the State Governor may promulgate such ordinances as the circumstances appear to him to require when—(1) the State Legislative Assembly is not in session; or if the State has two Houses, when one of the Houses is not in session; and (2) the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action.

NEEDS ASSENT OF PRESIDENT : PROVISIO (ART.313(1)) : He needs instructions from the President if

- a) Normally that bill, for its introduction in state legislature, would require previous sanction of the President.
- b) Governor deemed it necessary to reserve a Bill for President's consideration,
- c) an Act of the State Legislature to that effect would have been invalid under the Constitution without receiving the President's assent.

The power to make ordinances though formally vested in the Governor is, in effect, exercised by the Council of Ministers on whose advice the Governor acts, except when the matter is one in which the Governor has to seek instructions from the President.

VALIDITY :

1. An ordinance ceases to operate at the **expiration of six weeks** from the reassembly of the Legislature
2. An ordinance ceases to operate earlier than six weeks if a resolution disapproving it is passed by the Assembly, and is agreed to by the Council, if any [Art. 213(2)(a)].
3. An ordinance may be withdrawn by the Governor at any time [Art. 213(2)(b)].

EFFECT OF LAW : An ordinance has the same force and effect as an Act passed by the State Legislature. [Art. 213(2)]. The ordinance-making power is co-extensive with the legislative power of the State. An ordinance cannot make a provision which cannot be validity enacted by an Act of the State Legislature [Art. 213(3)].

EFFECT OF AN ORDINANCE : Article 123(2) or 213(2) says that an ordinance has the same force and effect as an Act of the Legislature. What happens when an ordinance lapses without being replaced by an Act of the Legislature? ***Is the ordinance to be regarded as void ab initio?***

T. Venkata Reddy v. State of Andhra Pradesh : HELD : The Court argued, after reading Arts. 123(2) and 213(2), that the wordings of both of these provisions says that the *ordinance shall be void from its commencement if it is not approved, or is disapproved by the Legislature.*

The constitutional provision merely says that **the ordinance shall cease to operate.** The effect of the ordinance was irreversible except by express legislation as stated above.

KRISHNA KUMAR V. STATE OF BIHAR : FEB.2017 : The question as to whether rights, privileges, obligations and liabilities would survive an Ordinance which has ceased to operate must be determined as a matter of construction. The appropriate test to be applied is the test of public interest and constitutional necessity. This would include the issue as to whether the consequences which have taken place under the Ordinance have assumed an irreversible character.

JUSTICIABILITY OF ORDINANCE-MAKING POWER : The question has been raised from time to time whether the 'satisfaction' of the Governor (i.e. of the Government) to issue an ordinance is justiciable or not.

WHY> An executive act is liable to be struck down on the ground of non-application of mind OR mala fides OR extraneous= **not the act of the Legislature.**" The Court cannot examine the motives of the Legislature in passing an Act.

WHEN IT CAN BE DECLARED AS UNCONSTITUTIONAL ? The Courts can declare a statute unconstitutional when it transgresses constitutional limits, but they cannot inquire into the propriety of the exercise of the legislative power. In Nagaraj and Venkata Reddy, viz., the Court cannot take cognizance of "legislative malice" in passing a statute. Accordingly, motive for promulgation of an ordinance cannot be examined by the Court.

M.P. JAIN ARGUES:

- a) SEPARATION OF POWERS.
- b) The Constitution itself differentiates between an Act and an ordinance as is very clear from the phraseology of Art. 123 or 213. An ordinance has a temporary life; it is not a permanent law like an Act.

MISUSE OF THE POWER TO MAKE ORDINANCES : An ordinance has only a limited life. Art. 213 is so structured that no ordinance made by the State Government can remain in force for more than 7½ months without being approved by State Legislature and enacted into an Act.

REPROMULGATION : However, in Bihar, an objectionable practice *arose of not placing the ordinances before the Legislature for approval*. These ordinances were re-promulgated word to word after the prorogation of the Legislature. In this way, an **ordinance raj** in the real sense of the term was ushered in the State. This amounted to law-making by an executive fiat instead of by the Legislature.

1. D.C. Wadhwa v. State of Bihar : HELD:
 1. The primary law-making authority is the legislature and not the executive and the ordinance making power is “in the nature of an emergency power”.
 2. It amounted to usurping of the law-making function of the legislature.

The Court ruled that the systematic practice of the Bihar Government in promulgating ordinances successively without enacting them through the Legislature was “clearly unconstitutional” and amounted to “a fraud on the Constitution”.

2. KRISHNA KUMAR V. STATE OF BIHAR : FEBRUARY 2017 :
 1. The Ordinance making power does not constitute the President or the Governor into a **parallel source of law making or an independent legislative authority**;
 2. WHY ORDINANCE SHOULD BE LAID DOWN ? (a) The need for, validity of and expediency to promulgate an ordinance; (b) Whether the Ordinance ought to be approved or disapproved; (c) Whether an Act incorporating the provisions of the ordinance should be enacted (with or without amendments);
 3. IF NOT : If ordinance is not laid down, it is
 - **serious constitutional infraction and abuse of the constitutional process**;

- **Re-promulgation of ordinances is a fraud on the Constitution and a sub-version of democratic legislative processes.**

The courts can only define **the boundaries between the use and abuse of power**, but it is up to parties in the legislature to observe the limits of constitutional propriety and show that they have both the time and the will to enact laws

(iii) EXECUTIVE POWER : As regards the content of the executive power in a State, whatever has been said under the Central Government is fully relevant. The extent and the scope of the State executive power has been discussed under Federalism.

USUAL RULE : The executive power of the State Government is co-extensive with the legislative power of the State Legislature.²

To avoid conflict of State executive power and the Central executive power in the concurrent area, *the proviso to Art. 162* provides that the executive power of the State in this area = **is subject to any law made by Parliament, or restricted by the executive power of the Centre** expressly conferred on it by the Constitution or any law made by Parliament.

Doctrine of “occupied field” : Bishambar Dayal Chandra Mohan v. State of Uttar Pradesh : But when there is a law on that aspect, the Government cannot meddle with that subject through its executive power under Art. 162. Because executive has to exercise its statutory powers according to the provisions of the relevant statute.³ Any instructions in exercise of its executive power = constitute delegated legislation. The executive cannot go, in exercising its executive power, against a constitutional or a statutory provision. Defining ‘executive power’, the Supreme Court has stated that the executive power vested in the State Government under Art. 154(1) connotes the residual of government functions which remain after the legislative and judicial functions are taken away. The executive power includes acts necessary for the carrying on or supervision of the general administration of the State including both a decision as to action and the carrying out of the decision.

² Ambesh Kumar v. Principal, LL.R.M. Medical College, AIR 1987 SC 400 : 1986 Supp SCC 543; Bharat Coking Coal Co. Ltd. v. State of Bihar, (1990) 4 SCC 557

³ S. Arunachalam v. State of Tamil Nadu, ILR (1996) 3 Mad 1508; V. Chandra v. State of Tamil Nadu, ILR (1996) 1 Mad 1007; Association of Management of Pvt. Colleges v. State of Tamil Nadu, AIR 1998 Mad 34