

CONSTITUTIONAL LIMITS ON ORDINANCE-MAKING: RE-PROMULGATION AND EXECUTIVE OVERREACH IN INDIA

Samaira Kumar*

ABSTRACT

India has a parliamentary democracy, where the main job of making laws is given to Parliament and to the State Legislatures. But the Union Government and the State Governments are also given the power to issue something called an ordinance when the legislature is not in session, so that they can act in a real emergency (Articles 123 and 213). This paper looks at the constitutional rules on ordinance-making, how the courts have reacted over time, and the recent developments in this area. When the Constitution was being drafted, the idea was simply to fill the gap when Parliament was not sitting. But looking at the case law over the years, this power is increasingly being used by the executive to claim more authority for itself. Using a doctrinal method, this paper studies how the idea of executive necessity and legislative supremacy has developed, using Supreme Court judgments and recent developments from 2025 to 2026, such as the “Supreme Court (Number of Judges) Amendment Ordinance, 2026”. The main argument of this paper is that re-promulgating ordinances again and again, without any checks, amounts to a fraud on the Constitution. This is against the basic structure idea of separation of powers. The paper concludes that the ordinance-making power does serve a constitutional purpose, but that using it again and again is an unconstitutional encroachment on the powers of the legislature. Finally, the paper suggests some institutional safeguards to bring back the primacy of the legislature and protect India’s constitutional democracy.

KEYWORDS: *Executive Overreach, Judicial Review, Ordinance, Re-promulgation, Separation of Powers.*

1. INTRODUCTION

The Indian Constitution, which was adopted on 26 November 1949, sets up a parliamentary democracy that is based on the idea of separation of powers. Under this three-part structure, Parliament¹ and the State Legislatures² are given the main job of making laws, the executive³ is given the job of carrying out those laws, and the judiciary is given the job of interpreting them. This separation was done on purpose, and it is a basic feature of how the Constitution is designed. Keeping this separation intact is important for democratic governance and for the rule of law.

The process of making laws in Parliament is, by its nature, slow and careful. Parliament does not sit all the time, its sessions happen only periodically, and a real emergency can come up exactly when neither House is in session. To deal with this gap, “Articles 123 and 213 of the Constitution give the President and the Governor, respectively, the power to issue ordinances while the legislature is in recess.” This gives the executive a temporary law-making tool to respond

* 3rd Year, B.B.A. LL.B. (Hons.), SVKM’s NMIMS, Chandigarh & 2nd Year, B.B.A. in Digital Business & Entrepreneurship (DBE) Indian Institute of Management Bangalore.

¹ India Const. art. 123, cl. 1.

² Ibid.

³ India Const. art. 213.

to urgent situations that cannot wait for the next regular session of Parliament or of the State Legislature.

India borrowed this idea from the Government of India Act, 1935, which itself was influenced by emergency law-making provisions that were common in Westminster-style parliamentary systems. But unlike the United Kingdom, where these kinds of residual powers have more or less fallen out of use, the Indian Constitution actually wrote down this ordinance power clearly and put express time limits and mandatory legislative oversight on it. This shows a deliberate choice by the framers: they wanted to accept that emergency executive law-making was sometimes necessary, but they also wanted to firmly tie it down within a system of democratic accountability. The framers were especially aware that a newly independent democracy needed strong safeguards against too much legislative power getting concentrated in the hands of the executive.

The ordinance-making power was meant to work as a kind of safety valve, an extraordinary exception and not a normal tool of governance. As Dr. B.R. Ambedkar acknowledged during the Constituent Assembly debates, this power was taken from the “Government of India Act, 1935,” and was justified only because of the need for immediate executive action. It was clearly meant to be strictly temporary, limited in scope, and subject to compulsory legislative oversight once the legislature reassembled. The intention behind it was clear: the power to make law belongs to the elected legislature, not to the executive.

In practice, though, this power has changed in a troubling way. Since independence, governments at both the central and the state level have used ordinances not as emergency tools reserved for real crises, but as a routine administrative convenience. They have used them to avoid legislative debate on politically sensitive issues, to bring in economic reforms without parliamentary scrutiny, and, worst of all, to keep re-issuing expired ordinances again and again without placing them before the legislature for approval or rejection.

This habit of repeatedly re-promulgating ordinances goes against the very heart of parliamentary democracy. In “*D.C. Wadhwa v. State of Bihar*”⁴, the SC dealt with an institutional crisis where the State of Bihar had re-promulgated 256 ordinances up to 14 years without presenting before the legislature. The Constitutional Bench described this as a subversion of the democratic process and as the executive wrongly taking over a legislative function. This ruling was later reinforced by a seven-judge Bench in “*Krishna Kumar Singh v. State of*

⁴ *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).

Bihar”⁵, which clearly mentioned that this kind of systematic failure to place ordinances before the legislature amounts to a “fraud on the Constitution.”

Even with this clear guidance from the courts, the tension between executive convenience and constitutional discipline has still not gone away. Data from the 2025–2026 period⁶ shows an ongoing pattern of the executive relying on ordinances for matters that do not obviously meet the constitutional requirement of immediate necessity. The “Supreme Court (Number of Judges) Amendment Ordinance, 2026,” which increased the number of judges in the apex court from 34 to 38,” gives us a particularly useful case study to check whether the constitutional standard of immediate urgency is genuinely being applied, or is being quietly bypassed.”⁷

This paper looks closely at the constitutional framework governing the ordinance-making power, traces how judicial oversight has developed over time, looks at recent legislative trends, and suggests institutional reforms to stop further constitutional misuse. The analysis moves from the constitutional text and judicial doctrine, to empirical data, and finally to a set of institutional recommendations based on constitutional principle.

1.1 OBJECTIVES OF STUDY

This study is guided by the following objectives:

- To look at the constitutional framework governing the ordinance-making power under “Articles 123 and 213”, including the conditions that must be met, the time limits, and the legislative safeguards that are built into the constitutional text.
- To trace how judicial review of executive ordinances has developed, by going chronologically through landmark Supreme Court decisions from “R.C. Cooper v. Union of India (1970) to Krishna Kumar Singh v. State of Bihar (2017).”
- To look at recent trends in the use of the ordinance-making power during 2025–2026, focusing specifically on how many ordinances were issued, on what subjects, and on what constitutional justification was given for them.
- To do a case study of the “Supreme Court (Number of Judges) Amendment Ordinance, 2026,” and to check its constitutional legitimacy against the standard of “immediate necessity” under Article 123.

⁵ “Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1 (India)”.

⁶ PRS Legislative Research, Annual Policy Review 2025–26, available at https://prsindia.org/files/policy/policy_annual_policy_review/Annual%20Policy%20Review/2026-04-01/APR_2025-26.pdf (last visited 24th June, 2026)

⁷ Ibid.

- To suggest institutional safeguards legislative, constitutional, and judicial that can prevent misuse of the ordinance-making power and that can help preserve Parliament's position as the main law-making authority under the Constitution.

2. RESEARCH METHODOLOGY

This study uses the doctrinal legal research method, which is a careful method where constitutional provisions, statutes, and judicial decisions are analysed in order to draw legal conclusions. The case law is traced chronologically through Supreme Court decisions, in order to understand how constitutional doctrine in this area has developed step by step.

Doctrinal research basically means systematically going through and analysing existing legal material — the Constitution, statutes, case law, and secondary legal writing — in order to identify, clarify, and critique what the law currently says on a given question. In this study, this approach makes sense because the central questions are constitutional law questions: what does the Constitution allow, what has the Supreme Court decided, and what reforms does the law actually need?

The primary sources used in this study are the text of the Constitution of India, in particular Articles 123, 213, 85, and 174, along with the relevant provisions of the 38th and 44th Constitutional Amendment Acts. The Supreme Court's judgments in all the major cases dealing with the ordinance-making power are examined in chronological order, to map how judicial doctrine has developed over time. Official gazette notifications recording ordinances issued in 2025–2026 are also looked at, in order to give the study an empirical grounding.

To stay relevant to current events, this study also relies on empirical evidence of ordinances passed during the 2025–2026 legislative sessions, and examines how far the executive has actually stuck to the requirement of “immediate action.” The secondary literature used includes parliamentary and policy reports, academic commentary, and journal articles. The scope of the study is restricted to India, and the period covered from 1950 to June 2026.

3. CONTENT/DATA ANALYSIS

3.1 The Mechanical Scope of Articles 123 and 213

The power to make temporary laws through ordinances is structured in a fairly symmetrical way between the central and the state executives, under Articles 123 and 213⁸. The constitutional text carefully separates the President's power

⁸ India Const. art. 123; India Const. art. 213.

at the central level from the Governor's power at the state level, while still putting broadly similar conditions and limits on both.

- “Article 123 gives the President the power to issue ordinances while Parliament is in recess, that is, when both Houses (or one House, in a bicameral system) are not in session, and the President is satisfied that the circumstances require immediate action.”⁹
- “Article 213 mirrors this same mechanism at the state level, by giving the same kind of power to state Governors when the state legislative assembly (or either House of a bicameral state legislature) is in recess.”¹⁰

Importantly, an ordinance has the exact “same force and effect”¹¹ as a regular Act finalized by the legislature. This is what makes the ordinance making power both useful and dangerous both at the same time: it lets the executive make law with the same legal force as Parliament, but without the debate, scrutiny, and democratic legitimacy that comes with a law being passed by Parliament. However, this power only extends as far as the legislature's own competence goes; any ordinance dealing with a subject that is outside the legislative competence of Parliament or of the State Legislature is void from the very beginning, that is, void *ab initio*.¹²

3.2 The Life Cycle and Temporal Boundaries

The Constitution makes sure that an ordinance stays temporary by putting strict deadlines on it. These deadlines are meant to make sure that emergency legislation made by the executive is quickly checked and approved by the elected legislature:

- Laying Before the House: once the legislature comes back into session, the ordinance has to be placed before both Houses.¹³
- The Six-Week Rule: an ordinance automatically stops operating “six weeks after the date the legislature reassembles, unless a resolution disapproving it is passed before that, or unless it is formally replaced by an Act.”¹⁴
- Maximum Lifespan: since the Constitution says that not “more than six months can pass between two sessions of the legislature, the absolute

⁹ India Const. art. 123.

¹⁰ India Const. art. 213.

¹¹ India Const. art. 123, cl. 2.

¹² Available at: <https://lotusarise.com/qna/upsc/q-with-reference-to-the-indian-polity-consider-the-following-statements> (last visited 24th June, 2026).

¹³ Available at: <https://vajiramandravi.com/upsc-exam/ordinance-making-power-of-president/>; <https://prsindia.org/theprsblog/ordinance-making-powers-of-the-executive-in-india?page=180&per-page=1>.

¹⁴ Available at: https://testbook.com/question-answer/the-ordinance-ceases-to-operate-on-the-expiry-of-_-681478412fe15169bedccd0e.

maximum lifespan of an ordinance, in theory, works out to six months and six weeks.”¹⁵

Table 1: Comparative Analysis — Presidential (Article 123) vs. Gubernatorial (Article 213) Ordinance-Making Powers

Analytical Basis	The President (Article 123)	The Governor (Article 213)
Prerequisite Condition	Recess of one or both Houses of Parliament. ¹⁶	“Recess of the Legislative Assembly or both Houses of the State Legislature.” ¹⁷
Legislative Domain	Co-extensive with Parliament’s legislative power (Union and Concurrent Lists). ¹⁸	“Co-extensive with State legislative power (State and Concurrent Lists).” ¹⁹
Federal Autonomy	Operates independently; requires no prior external authorisation. ²⁰	Subject to central oversight; requires presidential instructions in specific legal scenarios. ²¹
Amendment Competence	Can modify or repeal central statutes, ordinances, or alter tax frameworks. ²²	Can modify or repeal state acts or ordinances within state legislative limits. ²³

Source: Authors’ compilation based on India Const. art. 123 and India Const. art. 213.

3.3 Comparative Matrix: Presidential vs. Gubernatorial Powers

Although structurally similar, the Governor's ordinance-making power actually works within narrower limits than the President's power, because of the federal checks built into Article 213.²⁴

- “A Bill containing the same provisions would have needed the prior sanction of the President before it could even be introduced in the State Legislature.”²⁵
- “The Governor would have thought it necessary to reserve a similar Bill for the President's consideration.”²⁶

¹⁵ Available at: <https://www.insightsonindia.com/2026/05/18/ordinance-in-india/>; <https://www.constitutionofindia.net/articles/article-123-power-of-president-to-promulgate-ordinances-during-recess-of-parliament/>

¹⁶ India Const. art. 123.

¹⁷ India Const. art. 213.

¹⁸ India Const. art. 123.

¹⁹ India Const. art. 213.

²⁰ India Const. art. 123.

²¹ India Const. art. 213, proviso.

²² India Const. art. 123.

²³ India Const. art. 213.

²⁴ India Const. art. 213.

²⁵ Ibid.

²⁶ Ibid.

- “A state law with the same provisions would have been invalid without the President's assent (for example, where there is an inconsistency on a Concurrent List matter under Article 254).”²⁷

This difference reflects how India's federal structure works: state executive power, even though it is wide within its own domain, is still subject to central oversight in areas where there could be conflict with Union legislative policy. This is a deliberate design choice in the Constitution, meant to make sure that the ordinance making power cannot be utilized to get around the federal bargain.

In practice, this difference matters most when state governments try to use ordinances to create legal arrangements that might conflict with central legislation on Concurrent List subjects. The relationship between Article 254 and the ordinance-making power under Article 213 has produced a fairly detailed body of case law, which requires state executives to be careful about the limits of their own legislative domain. This limit on the Governor's power is a useful safeguard, not just against the executive overreaching itself, but also against the national legal framework becoming fragmented because of unchecked state-level executive law-making on matters of shared federal and state concern.

3.4 The Evolution of Judicial Review: From Deference to Scrutiny

The way courts in India have approached the review of executive ordinances has changed over time, moving between two ways of looking at the issue: the Intermediary Approach (which treats an ordinance as structurally different from an Act) and the Negative Approach (which treats ordinances and statutes the same way, and refuses to look into the executive's motives).²⁸

For several decades, Indian courts preferred the Negative Approach, and treated the executive's “satisfaction” as a political question that courts should not review. This position can be seen clearly in “*S.K.G. Sugar Ltd. v. State of Bihar*”²⁹, where the Governor's satisfaction was held to be beyond the reach of judicial inquiry.³⁰ The courts reasoned that since an ordinance is same as an Act passed by the legislature, the same rule of not questioning legislative motive should apply to it as well.

²⁷ Ibid.

²⁸ Dr. Shashank Mishra, Judicial Review of Ordinances in India: Safeguarding the Basic Structure in the Face of Executive Power, IJFMR (2025), available at <https://www.ijfmr.com/papers/2025/2/41369.pdf>.

²⁹ *S.K.G. Sugar Ltd. v. State of Bihar*, AIR (1974) SC 1533 (India).

³⁰ Ibid.

This early position was based on treating ordinances and Acts as formally equal: because they had the same legal force, both were also treated as equally immune from judicial questioning of intent. The problem with this reasoning, as later case law would show, is that it ignores how differently the two are actually produced. An Act comes out of parliamentary debate — a process full of chances for public scrutiny, amendment, and democratic accountability. An ordinance, on the other hand, comes only from the executive's own decision, without going through any of that process. Treating the two as the same for the purpose of judicial review meant ignoring how constitutionally important the legislative process itself really is.

3.4.1 Chronological Legal Trajectory

- “R.C. Cooper v. Union of India (1970):”³¹ The Supreme Court began to shift this approach. It suggested that the President's decision on “immediate necessity” could be challenged in court where an ordinance was issued in bad faith, simply to avoid floor debate.³²
- The 38th and 44th Constitutional Amendments: ³³In an attempt to protect the executive from judicial review, the 38th Amendment Act of 1975 inserted Article 123(4),³⁴ which declared that executive satisfaction was final and could not be questioned in court.³⁵ Realising the danger this posed to separation of powers, Parliament passed the 44th Constitutional Amendment Act of 1978,³⁶ which deleted clause (4) and gave back to the judiciary its power to review whether the constitutional conditions for an ordinance had actually been met.³⁷
- “A.K. Roy v. Union of India (1982)”³⁸ and “R.K. Garg v. Union of India (1981):”³⁹ The Court confirmed that even though the ordinance power is legislative in character, it can still be judicially reviewed when it is challenged on real constitutional grounds, and not just on superficial ones.⁴⁰ This idea, that ordinances and legislation are equivalent, was reinforced again in “T. Venkata Reddy v. State of Andhra Pradesh (1985).”⁴¹

³¹ R.C. Cooper v. Union of India, AIR (1970) SC 564 (India).

³² Ibid.

³³ “Constitution (Thirty-eighth Amendment) Act, 1975 (India); Constitution (Forty-fourth Amendment) Act, 1978 (India)”.

³⁴ India Const. art. 123, cl. 4 (repealed 1978).

³⁵ Ibid.

³⁶ Constitution (Forty-fourth Amendment) Act, 1978 (India); see also India Const. art. 123, cl. 4 (repealed 1978).

³⁷ Ibid.

³⁸ A.K. Roy v. Union of India, AIR (1982) SC 710 (India).

³⁹ R.K. Garg v. Union of India, AIR (1981) SC 2138 (India).

⁴⁰ Ibid.

⁴¹ T. Venkata Reddy v. State of Andhra Pradesh, AIR (1985) SC 724 (India).

3.5 The Anti-Re-Promulgation Jurisprudence

- “D.C. Wadhwa v. State of Bihar (1987)”⁴²: “The Supreme Court dealt with an institutional crisis where the State of Bihar had systematically re-promulgated 256 ordinances over periods of up to 14 years, without ever placing them before the legislature.”⁴³ The Constitutional Bench stated that this kind of mechanical re-promulgation amounted to a subversion of the democratic process, and to the executive wrongly taking over a legislative function.⁴⁴
- “Krishna Kumar Singh v. State of Bihar (2017)”⁴⁵: “A seven-judge Bench finally settled this area of law, holding that the power to issue ordinances is not immune from judicial oversight.”⁴⁶ The Court ruled that consistently failing to place an ordinance before the legislature amounts to a serious abuse of power and to a “fraud on the Constitution.”⁴⁷ The Court also said that executive satisfaction must be based on objective facts that actually prove there is an immediate, pressing emergency.⁴⁸

3.6 Contemporary Trends: Institutional Mapping (2025–2026)

Looking at the current legislative landscape shows that the tension between executive convenience and constitutional discipline is still very much alive.⁴⁹ Between 2025 and mid-2026, six major ordinances were issued at the central and state level combined.⁵⁰ In 2025, four ordinances were issued, split equally between central and state-level matters.⁵¹ “By June 2026, the central executive had issued two important ordinances: the Income-Tax (Amendment) Ordinance, 2026, and the Supreme Court (Number of Judges) Amendment Ordinance, 2026.”⁵²

⁴² “D.C. Wadhwa v. State of Bihar, (1987) 1 SCC 378 (India)”.

⁴³ Ibid.

⁴⁴ I bid.

⁴⁵ Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1 (India).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Available at: <https://penacclaims.com/wp-content/uploads/2026/04/Roshani-Pal.pdf>.

⁵⁰ Available at: https://prsindia.org/files/policy/policy_annual_policy_review/Annual%20Policy%20Review/2026-04-01/APR_2025-26.pdf.

⁵¹ Ibid.

⁵² Available at: <https://vidur.in/the-income-tax-amendment-ordinance-2026/>; <https://www.legislative.gov.in/static/uploads/2026/05/43403bd5a664399763a253a82fdc9377.pdf>

Case Study: The Supreme Court (Number of Judges) Amendment Ordinance, 2026

This ordinance⁵³, issued by President Droupadi Murmu on 16 May 2026, gives us a particularly useful case study for testing the constitutional standard of “immediate urgency” under Article 123. It is notable not just because of its subject matter — the composition of the country's highest court — but also because of how close its issuance was to an expected parliamentary session.

- Statutory Alteration: “The ordinance amended Section 2 of the Supreme Court (Number of Judges) Act, 1956, and increased the statutory strength of the apex court from 34 judges (including the Chief Justice of India) to 38 judges.”⁵⁴
- Executive Justification: The government justified using Article 123 by pointing to a growing backlog of cases, and to an urgent need to reduce the burden on the existing bench.⁵⁵
- Constitutional Critique: While the goal of dealing with judicial pendency is a legitimate one, the timing of the ordinance raises some structural questions. It was issued only about two weeks before the Supreme Court went into its partial working recess.⁵⁶

Critics point out that judicial vacancies and case backlogs build up over long periods of time, so they are really a chronic, long-standing institutional problem rather than a sudden emergency that could not wait for a regular parliamentary session.⁵⁷ Empirical data on judicial administration shows that vacancy trends can actually be predicted years in advance, which makes it hard to call this an unforeseen situation.⁵⁸ This pattern suggests that the executive may be using the ordinance route as a matter of routine convenience, rather than strictly as an exceptional constitutional tool.⁵⁹

This is not just a doctrinal concern. When the executive regularly uses the ordinance power for matters that could be addressed through ordinary legislation, it slowly narrows the space available for parliamentary debate. Over time, this normalising of executive law-making can reshape constitutional

⁵³ The Supreme Court (Number of Judges) Amendment Ordinance, 2026, Gazette of India, pt. II sec. 1 (May 16, 2026) (India).

⁵⁴ Available at: <https://easemyprep.in/news/1226-president-murmu-promulgates-ordinance-to-increase-supreme-court-judge-strength-b>

⁵⁵ Available at: <https://www.scconline.com/blog/post/2026/05/18/supreme-court-judges-increase-ordinance-2026-explained/>

⁵⁶ Ibid.; <https://www.newindianexpress.com/india/2026/May/18/murmu-okays-ordinance-to-raise-top-court-bench-strength-new-count-at-38>

⁵⁷ Available at: <https://www.defactolaw.in/post/ordinance-making-power-of-president>

⁵⁸ Available at: <https://ghconline.gov.in/library/document/conference2728072018/IV1Delay%20in%20Process,%20Denial%20of%20Justice.pdf>

⁵⁹ Available at: <https://legalfirm.in/attorneys-advocates-chennai/what-is-judicial-backlog-and-how-does-it-affect-access-to-justice-in-india/>

expectations in ways that weaken the structural integrity of parliamentary democracy. Legislators may increasingly find themselves facing ordinances as something already decided, rather than as proposals that are genuinely open to debate and amendment. Courts, too, may find it harder to tell apart a genuine emergency from administrative convenience, once the executive has built a consistent pattern of treating both as equally valid grounds for using the power.

4. Arguments and Discussion

4.1 The Structural Tension Between Necessity and Democratic Accountability

The fact that ordinance-based governance keeps happening points to a structural tension within India's constitutional system.⁶⁰ Those who support it argue that in a large, fast-changing developing economy, the executive needs the flexibility to respond quickly to economic crises or urgent administrative needs when the legislature is not in session.⁶¹ The Supreme Court itself accepted in *R.K. Garg* that there can be situations where going through the parliamentary process would, because of the delay involved, actually weaken democracy rather than strengthen it.

This argument does carry real constitutional weight. The ordinance-making power was not put into the Constitution as a concession to executive ambition, but as a practical recognition that legislative scheduling has its limits in a diverse, complicated, and populous democracy. A government that cannot act in a genuine emergency simply because Parliament is not sitting is a government that cannot fulfil its basic duties towards its citizens.

However, this practical justification has clear constitutional limits. The text of Articles 123 and 213 makes the exercise of this power conditional on the existence of “immediate necessity” — not on ministerial convenience, policy preference, or a wish to avoid parliamentary debate. The difference between a genuine emergency and executive convenience is not just a matter of words; it marks the constitutional line between lawful use of the power and constitutional abuse.

⁶⁰ Available at: <https://www.ijlrr.com/post/ordinance-making-power-in-india-striking-a-balance-between-necessity-and-overreach>

⁶¹ Available at: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2219918>
https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/04/centre-stage_44217199/1ac01bba-en.pdf

4.2 The “Ordinance Raj” Problem

Using the ordinance-making power too often risks creating what is called an “Ordinance Raj,”⁶² which slowly weakens parliamentary democracy. When the executive uses ordinances to bypass regular legislative debate, it reduces accountability, weakens public deliberation, and disturbs the constitutional separation of powers.⁶³ Parliamentary debate is not just a procedural formality; it is a basic part of democratic legitimacy, through which different interests get heard and legislation gets scrutinised and, if needed, amended.

Further, re-promulgation takes advantage of a gap in the wording of Articles 123 and 213 to get around the requirement of legislative approval.⁶⁴ By continuously re-promulgating ordinances, the executive effectively creates permanent laws without the legislature's consent, turning what was meant to be an emergency exception into a routine administrative workaround.⁶⁵ This not only goes against the letter of the constitutional text, but also strikes at the unamendable basic structure principle of parliamentary democracy.

4.3 The 2026 Ordinance: Chronic Problem or Sudden Emergency?

The Supreme Court (Number of Judges) Amendment Ordinance, 2026 shows these tensions quite sharply. The ordinance deals with a chronic, long-standing problem — judicial vacancies and case backlogs — through a tool that the Constitution has reserved for sudden emergencies. The real question is not whether the goal is a good one (it clearly is), but whether the constitutional mechanism chosen was actually appropriate, given the nature of the problem being addressed.

Applying the standard set out in Krishna Kumar Singh, executive satisfaction must be based on objective facts that show there is an immediate, pressing emergency. Judicial vacancies are a predictable, recurring, and long-standing feature of the Indian judicial system. They do not suddenly appear during a legislative recess; they build up gradually, are well documented, and are something Parliament and the executive have already been paying attention to. Using Article 123 to deal with a problem of this chronic, institutional kind, especially when Parliament was due to meet again within weeks, raises serious questions about whether the constitutional threshold of “immediate necessity” was genuinely met.

⁶² Available at: <https://blog.ipleaders.in/is-india-becoming-an-ordinance-raj/>

⁶³ Available at: <https://www.ijrar.org/papers/IJRAR19D5894.pdf>; <https://vajiramandravi.com/upsc-exam/ordinance-making-power-of-president/>

⁶⁴ Available at: <https://www.scobserver.in/reports/krishna-kumar-singh-bihar-re-promulgation-of-ordinances-judgment-of-the-supreme-court-in-plain-english/>

⁶⁵ Available at: <https://ijlmh.com/paper/understanding-re-promulgation-of-ordinances-under-articles-123-and-213/>

At a deeper level, the frequent use of ordinances represents a democratic shortfall that goes beyond just the technical requirements of the constitutional text. When laws are made through ordinances instead of through proper legislative enactment, they are kept away from the scrutiny of elected representatives, from public opinion, from the expertise of parliamentary committees, and from the kind of deliberative process that sets democratic law-making apart from executive decree. This democratic shortfall matters even more in a constitutional system like India's, where Parliament represents the will of more than 1.4 billion people across an extremely diverse federation.

Looking at how other countries handle this also supports this concern. In Germany, emergency legislative powers are subject to strict constitutional limits, which are interpreted narrowly by the Federal Constitutional Court. In the United States, the non-delegation doctrine reflects a deep structural commitment to keeping legislative power with the legislature, and not letting the executive encroach on it. India's Constitution, read through the basic structure doctrine, reflects a similar commitment: the ordinance-making power is meant to be a carefully limited exception, not a parallel law-making power running alongside the legislature. The task for constitutional law going forward is to make sure that this exception is interpreted, applied, and watched over by the courts with the seriousness that India's democratic foundations demand.

5. Result/Findings

The doctrinal and empirical analysis carried out in this study gives the following key findings:

Finding 1: Progressive Strengthening of Judicial Oversight. Looking at the path of Supreme Court case law from *S.K.G. Sugar Ltd. (1974)* to *Krishna Kumar Singh (2017)*, we can see that judicial oversight over the ordinance-making power has gradually become stronger. The courts have moved from a position of almost total deference towards executive satisfaction, to a position where they are now willing to actively check the factual basis for that satisfaction and to strike down ordinances issued for collateral or bad-faith purposes. This shows an important constitutional development, which brings the ordinance-making power more in line with the Constitution's underlying democratic commitments.

Finding 2: Re-Promulgation is Constitutionally Impermissible. The practice of re-promulgation is clearly not allowed under Indian constitutional law. As shown in *D.C. Wadhwa (1987)* and confirmed in *Krishna Kumar Singh (2017)*, re-promulgation violates the express time limits placed on Articles 123 and 213, defeats the mandatory requirement of legislative oversight, and amounts to a fraud on the Constitution. No later constitutional or statutory development has

changed or reversed this position. This finding is directly relevant today, given how state governments have historically tended to treat the rule against re-promulgation more as an aspiration than as a binding obligation.

Finding 3: Contemporary Usage Reveals Systemic Drift. Empirical data from 2025–2026 shows that the central executive has continued to rely on the ordinance-making power for policy goals that are not obviously emergencies. The fact that ordinances were promulgated across so many different subject areas within a single legislative cycle suggests a pattern of relying on executive law-making out of administrative convenience, rather than out of strict constitutional necessity. While no instance of re-promulgation was found during this period, the frequency and subject matter of these ordinances still calls for ongoing constitutional scrutiny.

Finding 4: The 2026 Ordinance Raises Constitutional Questions. The “Supreme Court (Number of Judges) Amendment Ordinance, 2026” deals with a chronic, long-standing problem of judicial vacancies, using a tool that the Constitution has reserved for sudden emergencies. While the legislative goal here is legitimate, and the ordinance does not amount to re-promulgation, the choice to use the ordinance route for a problem of this chronic, institutional nature deserves scrutiny against the “immediate necessity” standard set out in Krishna Kumar Singh. This finding shows how important it is to apply the constitutional threshold strictly, regardless of how good the underlying policy objective might seem.

Finding 5: Institutional Reform is Necessary. The existing constitutional framework, although adequate in principle, lacks effective procedural safeguards to actually prevent the misuse of the ordinance-making power in practice. The absence of any mandatory requirement to document urgency, the lack of a statutory ban on re-promulgation, and the courts' traditional reluctance to step in before an ordinance is even issued, have together allowed the kind of systemic drift identified in the findings above. Targeted institutional reforms, both legislative and constitutional, are needed to restore constitutional balance and to give real, effective meaning to the democratic safeguards already built into Articles 123 and 213.

6. CONCLUSION AND SUGGESTIONS

6.1 Conclusion

The ordinance making power was embedded in the Indian Constitution as a temporary tool meant for genuine emergencies, and not as a routine alternative to regular law-making. The constitutional text, read along with the Constituent Assembly debates and Supreme Court case law, makes it clear that using this

power is conditional on there being a sudden, pressing emergency that cannot wait for a regular legislative session to be convened.

However, the way this power has actually been used over time shows a gradual erosion of this basic understanding. Successive governments have used ordinances to bypass legislative debate, to bring in economic policies without parliamentary scrutiny, and, worst of all, to keep re-promulgating expired ordinances indefinitely, effectively creating a kind of parallel law-making system that operates outside democratic oversight. To its credit, the Supreme Court has consistently condemned this practice in strong terms, from its sharp criticism in *D.C. Wadhwa* to its final, definitive ruling in *Krishna Kumar Singh*.

While recent actions, such as the Supreme Court (Number of Judges) Amendment Ordinance, 2026,⁶⁶ do address genuine administrative needs, using the ordinance route for long-term institutional problems risks making executive overreach seem normal. To protect the integrity of India's constitutional democracy, the executive needs to respect Parliament's primary law-making authority, and make sure that extraordinary powers are kept strictly for genuine emergencies. The Constitution's anti-re-promulgation case law already gives a clear and principled framework for this; what remains is to actually put it into institutional practice through concrete reforms.

That said, there is reason for some cautious optimism here. The gradual strengthening of judicial oversight that this study has traced, along with growing academic and civil society attention to executive overreach, suggests that the constitutional culture around the ordinance-making power is slowly changing for the better. Executive actors are increasingly aware that re-promulgation will attract strong criticism from the courts, and that there are real political costs to being seen as bypassing the Constitution. What remains is to turn this awareness into lasting institutional reform, through the legislative and procedural changes recommended in this paper, not in order to disable executive governance, but to make sure that it stays anchored to the Constitution's basic democratic commitments and to the principle of separation of powers that supports them. A Constitution that is able to discipline its own executive is one that takes democracy seriously, and India's constitutional case law has shown this capacity again and again. The reforms suggested here are meant to give that capacity a lasting institutional form.

6.2 Suggestions

To protect the separation of powers and to prevent the misuse of executive law-making, the following reforms are suggested:

⁶⁶ *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).

- Codifying “Immediate Urgency” Parameters: ⁶⁷Parliament should amend its relevant rules of business to require the executive to submit a formal “Urgency Memorandum” along with every ordinance.⁶⁸ This memorandum should give objective, verifiable data explaining why the matter could not wait for a regular legislative session, so that the constitutional standard of “immediate necessity” actually becomes enforceable in practice.
- Statutory Prohibition on Re-Promulgation: ⁶⁹A clear statutory or constitutional provision should be added to expressly prohibit the re-promulgation of an ordinance if a Bill containing identical provisions has either failed to pass, or was not even introduced, during the previous legislative session. This would give statutory backing to the constitutional prohibition that was already established in *D.C. Wadhwa*.
- Mandatory Automatic Floor Tabling: ⁷⁰Internal legislative procedure should be changed so that any ordinance that has been promulgated is automatically tabled as the very first item of business once the House reassembles. This stops the executive from quietly letting ordinances lapse and then re-issuing them, which is one way of getting around the constitutional requirement of legislative approval.
- Active Judicial Review: ⁷¹Building on the principles set out in *Krishna Kumar Singh*⁷², courts should actively examine the factual basis for the executive's “satisfaction” whenever an ordinance appears to be bypassing legislative debate. Cases of repeated re-promulgation should be treated as structurally invalid, and the constitutional threshold of “immediate necessity” should be enforced by the judiciary with a level of strictness that matches the democratic values at stake.

REFERENCES/BIBLIOGRAPHY

A. Cases

1. *A.K. Roy v. Union of India*, AIR (1982) SC 710 (India).
2. *D.C. Wadhwa v. State of Bihar*, (1987) 1 SCC 378 (India).
3. *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).
4. *R.C. Cooper v. Union of India*, AIR (1970) SC 564 (India).
5. *R.K. Garg v. Union of India*, AIR (1981) SC 2138 (India).
6. *S.K.G. Sugar Ltd. v. State of Bihar*, AIR (1974) SC 1533 (India).

⁶⁷ Available at: <https://www.ijllr.com/post/ordinance-making-power-in-india-striking-a-balance-between-necessity-and-overreach>

⁶⁸ Ibid.

⁶⁹ Available at: <https://ijlmh.com/paper/understanding-re-promulgation-of-ordinances-under-articles-123-and-213/>

⁷⁰ Available at: <https://www.iasgyan.in/daily-current-affairs/ordinance-question-before-the-supreme-court-constitutional-debate-issues-and-way-forward>; <https://asgp.co/wp-content/uploads/2023/07/DSGLUMISWZXMFMHSMGKEQORWKOMYXW.doc>

⁷¹ *Krishna Kumar Singh v. State of Bihar*, (2017) 3 SCC 1 (India).

⁷² Available at: <https://cmhlp.org/wp-content/uploads/2023/01/IJLR-MARCH-SC2.pdf>.

7. T. Venkata Reddy v. State of Andhra Pradesh, AIR (1985) SC 724 (India).

B. Constitutional and Statutory Provisions

1. Constitution (Thirty-eighth Amendment) Act, 1975 (India).
2. Constitution (Forty-fourth Amendment) Act, 1978 (India).
3. India Const. art. 123.
4. India Const. art. 213.
5. Supreme Court (Number of Judges) Act, 1956 (India).
6. The Supreme Court (Number of Judges) Amendment Ordinance, 2026, Gazette of India, pt. II sec. 1 (May 16, 2026) (India).

C. Secondary Sources

1. Dr. Shashank Mishra, Judicial Review of Ordinances in India: Safeguarding the Basic Structure in the Face of Executive Power, IJFMR (2025), available at <https://www.ijfmr.com/papers/2025/2/41369.pdf>.
2. PRS Legislative Research, Annual Policy Review 2025–26, available at https://prsindia.org/files/policy/policy_annual_policy_review/Annual%20Policy%20Review/2026-04-01/APR_2025-26.pdf.
3. Understanding Re-Promulgation of Ordinances Under Articles 123 and 213, IJLMH, available at <https://ijlmh.com/paper/understanding-re-promulgation-of-ordinances-under-articles-123-and-213/>.