Rolling Back Ordinance Raj

The Supreme Court, in **Krishna Kumar Singh v. State of Bihar**, made a series of pronouncements with potentially huge implications for the future of democratic governance in the country.

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According to Justice Chandrachud, the authority to issue ordinances is not an absolute entrustment, but is "conditional upon a satisfaction that circumstances exist rendering it necessary to take immediate action". In other words, ordinances are not immune from judicial challenge.

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Constitutional Provisions of Ordinance:

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- **Article 123**, which defines the ordinance-making power of the Union executive, states that when both Houses of Parliament are not in session, if the President is satisfied that "circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require".
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- It further provides that any ordinance shall have the same force and effect as a statute of Parliament, provided it is laid before both Houses.
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- What's more, the ordinance so made will "cease to operate at the expiration of six weeks from the reassembly of Parliament", or if Parliament at any time before the conclusion of the period passes resolutions disapproving of the ordinance.
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- In nearly identical terms, **Article 213** of the Constitution places on the Governor, acting on the advice of the Council of Ministers of his State, the power to pass ordinances on subjects of State authority.
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Does the idea of ordinance go along with the founder's aims?

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- The contest over the use of ordinances as a tool to make laws stretches well beyond the Constitution's adoption.
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- According to B.R. Ambedkar **"It ought to be 'Power to legislate when Parliament is not in session'**.
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- The founders' aim was always to impose a separation of power between the three recognised wings of government.
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- In this arrangement, the legislature (Parliament at the Centre, and the Assemblies and the Councils in the States) is tasked with the primary job of making laws; the executive's role is to administer the country by enforcing these laws; and the judiciary interprets the laws, sees if they are being followed, and, where required, reviews them to ensure that they are constitutionally compliant.
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- **The executive's power to issue ordinances, therefore, goes against this general grain of command**; for it acts neither as a check nor as a balance on the authority exercised by the other branches of government.
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Is ordinance an exceptional measure?

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- It's equally clear even from the bare text of the Constitution that the authority to issue ordinances is to be used only to meet the emergent demands of extraordinary situations.
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- In practice, however, ordinances have scarcely been used as a purely exceptional measure.
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- Most recently, the Central executive had issued an ordinance in 2014, which it subsequently repromulgated three times without approval, to overturn significant benefits guaranteed by the land acquisition law enacted by Parliament in 2013.
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- Their aim clearly was to **bypass the democratic requirements of argument and deliberation**, and to overcome numerical shortcomings that they faced in the Rajya Sabha.

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- What the government was doing, therefore, was to use its ordinance-making power as virtually an alternative tool of legislation.
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- It was a similar abuse of power that had been placed before the Supreme Court for its examination in Krishna Kumar Singh.
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Is it a clear case of abuse?

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- Here in question were a series of ordinances passed by the government of Bihar through which the State sought to take over some 429 Sanskrit schools, transferring in the process the services of all the teachers and other employees of the schools to the State government.
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- The first ordinance, which was issued in 1989, was followed by a succession of five ordinances, none of which was placed before the State legislature.
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- Ultimately, the government failed to enact a statute confirming the terms of the ordinances, and the last of them was allowed to lapse on April 30, 1992.
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- The employees of the schools, who stood discharged from service, as a result of the termination of the ordinances, took the State government to court.
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- When the case ultimately reached the seven-judge bench for arguments there were two fundamental questions to be answered: whether the ordinances issued by the Bihar government were constitutionally valid, and whether the petitioners had derived any legal right that survived the termination of the ordinances.
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- On the first, Justice Chandrachud went beyond existing precedent to hold that not only repromulgated ordinances, but even ordinances issued at the first instance, are subject to judicial review.
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- Here, he placed reliance on the celebrated **S.R. Bommai case (1994)**, where a nine-judge bench of the court had ruled that the judiciary could strike down a proclamation of emergency when the power had been exercised by the executive to secure an oblique purpose.
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Does ordinances are subjected to scrutiny?

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- Here, the court overruled two of its earlier judgments, and binned what it described as a theory of enduring rights.
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- It ruled that an ordinance is distinct from a temporary legislation, and it therefore **doesn't automatically create rights and liabilities that go beyond its term of operation**.
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- "While enacting a law, the legislature is entitled to define the period during which the law is intended to operate," wrote Justice Chandrachud. "...Hence, it lies perfectly within the realm and competence of the legislature which enacts a temporary law to provide that the rights or the liabilities which are created during the tenure of the law will subsist beyond the expiry of its term."
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- But an ordinance, unlike a temporary statute, is not a creature of the legislature. Therefore, the court held, these orders have the same force and effect of a legislation only so long as they are operational.
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- In other words, once the conditions imposed by Article 123 or Article 213, as the case may be, are infracted, the question of what effects will survive from the ordinance will have to be independently assessed.
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- Now, while Justice Chandrachud is certainly correct in ruling that an ordinance would not automatically create enduring effects, a test of public interest could prove somewhat problematic in the future.
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- There may well be cases where an ordinance creates outcomes that are manifestly irreversible, despite public interest demanding its reversing.
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- However, that said, these issues could well be ironed out when subsequent benches are faced with such questions.
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Way Ahead:

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- The court's verdict has to be seen as placing a vital check on what has until

now been a power rampantly abused by the executive.
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- Inconvenient as legislative debate and deliberation can be, the legislature constitutes a critical foundation of our democracy.
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- When Parliament reconvenes next week, it must be seen by both the ruling dispensation and the opposition as a forum for debate, for making laws based on critical reasoning.
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- To await the completion of the session, and to create laws then by circumventing this process through ordinance, debases altogether the Constitution and its finest ideals.
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