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Q5

Resorting to ordinances has always raised concern on violation of the spirit of separation of power doctrine. While noting the rationales justifying the power to promulgate, analyse whether the decision of the Supreme Court on the issue have further facilitated to resorting to this power. Should the power to promulgate the ordinances be repealed?

UPSC Civil Services Mains 2015 · GS II · 12 marks · Separation of Powers

Separation of powers between various organs; dispute redressal mechanisms and institutions.

Core demand of the question

- Note the rationales for ordinance power
- Analyse whether Supreme Court decisions have further facilitated resort to ordinances, and say whether the power should be repealed

Revision summary

Articles 123 and 213 exist for immediate law when the legislature is not sitting.

An ordinance is temporary and must be laid; **re-promulgation** without the House is a fraud on the Constitution after D.C. Wadhwa.

A.K. Roy treated ordinance power as legislative and made necessity hard to review on merits.

Court doctrine has not encouraged **re-promulgation**; weak review of first-time "satisfaction" still lets politics use the tool.

The power should not be repealed; it should be fenced by Wadhwa, privilege, and a published necessity record.

Introduction

Articles 123 and 213 let the President and the Governor promulgate ordinances when the House is not in session and immediate action is needed. Every large ordinance session revives the charge that the executive is making law without the legislature. The power has a constitutional rationale; the Supreme Court has tried to police abuse; repeal would be the wrong cure.

Body**Rationales that justify promulgation**

- Parliament and State legislatures cannot sit every day; a war, a market failure, a tax leak, or a court-fixed deadline may need a rule with the force of law before the next sitting.
- **Article 123** requires the President's satisfaction that circumstances exist which render it necessary to take immediate action; the ordinance has the same force as an Act, but it is temporary and must be laid before the House.

- If not approved within the stated period after reassembly, it lapses; that design treats the ordinance as a bridge, not as a parallel Parliament.
- Federal and Westminster practice elsewhere also knows temporary executive legislation subject to later legislative control; India wrote that logic into the text rather than leaving it to convention alone.
- Abolition would leave a gap when the House is dissolved or prorogued and a genuine emergency in the legal sense of speed, not only **Article 352**, arises.

How the power is abused

- **Re-promulgation** without laying, as in Bihar's practice condemned in **D.C. Wadhwa v. State of Bihar (1987)**, turns a bridge into a wall against the Assembly.
- The Union has, in recent years, used ordinances on land, coal, insurance and arbitration when the Rajya Sabha arithmetic was hard, which looks like bypass rather than necessity.
- Satisfaction is political; if courts treat it as wholly unreviewable, the executive writes law for six months at a time and dares the House to disapprove.

Have Supreme Court decisions facilitated more resort?

- D.C. Wadhwa held that successive **re-promulgation** without placing the ordinance before the legislature is a fraud on the Constitution; that decision restricts, rather than facilitates, habitual use.
- **A.K. Roy v. Union of India (1982)** accepted ordinance power as legislative in character when the conditions of **Article 123** are met, and it did not open a wide merits review of necessity; that caution can make cabinets bolder, because "satisfaction" is hard to upset.
- R.C. Cooper and later cases still allow limited judicial look at mala fides and at whether the preconditions exist; they do not give the Court a veto on every ordinance's policy.
- Krishna Kumar Singh (the Bihar ordinance chain) kept the Wadhwa line against colourable **re-promulgation**; it did not invite the executive to issue more first-time ordinances.
- **The fair analysis is mixed:** the Court has not facilitated **re-promulgation**, and it has not built a strict day-to-day test of "immediate action", so politically convenient first ordinances still issue. The facilitator is parliamentary arithmetic and Cabinet will, more than a pro-ordinance judgment.

Should the power be repealed?

- **Repeal would be unwise:** genuine recesses and genuine urgency would then have no legal tool short of an emergency proclamation or an illegal executive order.
- The remedy is to keep **Articles 123 and 213**, enforce Wadhwa against **re-promulgation**, require a published statement of necessity, and treat repeated ordinances on the same subject as a breach of privilege and of constitutional morality.
- A constitutional amendment could add an express bar on **re-promulgation** and a short mandatory sitting, rather than delete the power.
- Should the power be repealed? No. Should unreviewable, repetitive ordinances continue? Also no.

Flow diagram

Arts 123 and 213 -> Necessity when House not in session
Necessity when House not in session -> Ordinance as temporary law
DC Wadhwa -> Bar on re-promulgation
Ordinance as temporary law -> Must face the House
Bar on re-promulgation -> Must face the House
Repeal -> Gap in genuine urgency

Conclusion

Ordinance power exists because the House is not always in session and the law may need immediate force. The Supreme Court in Wadhwa blocked the worst **re-promulgation**; it has not handed the Cabinet a free pass, but it has also not strictly tested necessity, so political use continues. The power should be retained and fenced, not repealed.

Facts & figures

Article 123

President may promulgate an ordinance when both Houses are not in session if immediate action is necessary; it has the force of an Act for a limited period.

Article 213

Corresponding ordinance power of the Governor, with additional limits where the Governor needs instructions from the President.

D.C. Wadhwa v. State of Bihar (1987)

Struck at the practice of re-promulgating ordinances without placing them before the legislature as a fraud on the Constitution.

A.K. Roy v. Union of India (1982)

Upheld the legislative character of ordinance power while dealing with the National Security Ordinance; merits of necessity remain closely guarded.

Re-promulgation

Issuing a fresh ordinance to continue a lapsed one without legislative approval; the core abuse Wadhwa named.

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