A LAW & ECONOMIC ANALYSIS OF 'ORDINANCE RAJ' IN INDIA: NAVIGATING THE RULE V. STANDARD DEBATE IN THE LEGAL DESIGN AS A MECHANISM TO REDUCE POLITICAL CARTELIZATION

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ABSTRACT

The data available for the promulgation of the ordinances clearly shows that the number of ordinances that have been enacted post the judgement in the Krishna Kumar Case[2] *is in no sense less than the ordinances that have been enacted during the years preceding the judgment. This is so despite the negative impact of the Krishna Kumar judgement on the utility that the executive ought to derive from the enactment of the ordinances. The authors seek to address this anomaly through the microeconomic models and present solutions through the lens of law and economics. This paper conceptualises the solution to the problem of the misuse and the abuse of ordinance-making power by proposing the formulation of the rules that shall seek to add objective grounds to test if the ordinance-making power has been used in a proper manner or it has been used with the mala fide intentions and ill-will on the part of the executive. The level of the delegation to the executive, that is, the scope of the decision-making with the, executive, has been analysed by proposing the total cost curve, which seeks to propose the optimum level of stringency in the rules so as to allow the scope for the legislature to meet the emergency situations as well. This is sought to be achieved by framing of such rules for the exercise of the ordinance-making power by the president and the governor, in such a way as to have the objective grounds for the test of the need for the ordinance-making power and also at the same time have the scope and lee-way to the legislature to decide, if the matter needs the enactment of the ordinance to meet the emergency that has arisen.*

Keywords: *Repromulgation, Krishna Kumar Judgement, Efficiency Analysis*

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[2] Krishan Kumar Singh v. Union of India, (2017) 3 SCC 1.

1. INTRODUCTION

The legislature has been conferred with the duty to enact legislation in India and it is the business of parliament to enact the primary legislations in the country. However, in certain emergency situations, this power to enact primary legislations has also been entrusted with the executive head of the state, i.e. the President, who under Article 123 of the Indian Constitution, may pass an ordinance which shall have the same effect as the legislation passed by the legislature[3]. A similar power has been given to the governors of the state under Article 213 of the Indian Constitution[4].

The intent of the constitution makers as is ascertained from the Constituent Assembly Debates,[5] was not to create a parallel mechanism for the enactment of the legislations, it was merely to deal with certain exigencies that may arise and necessitate an immediate action by the legislature, but it is not possible to convene the parliament during that time to get the legislations passed. However, this has been misused by the various state and central governments over the period of time to pass "autocratic legislations", i.e. the legislations without the approval of parliament or without obtaining general consensus of the parliament, but solely at the whims and fancies of the ruling dispensation.

Although passing of statutes by way of promulgation of the ordinances is a constitutionally permitted means, the successive governments at both the central as well as the state level have been weaponizing this instrument to curb deliberations and discussions, in the parliament[6]. This clearly has led to undermining of the republican aspect of the Indian Democracy[7]. Such practices have in turn reduced the role of the parliament only to provide legitimacy to the decisions taken without any discussion and deliberation by the executive in the closed offices[8]. However, the democracy, that forms part of the basic structure of the Indian Constitution as adopted in the year 1973, in the case of *"Kesavananda Bharati Case v. State of Kerala"*[9], is not only restricted to some few basic minimum conditions to be followed such as conducting free and fair elections, but rather includes within its amplitude parliamentary deliberations and

[3] INDIA CONST. art. 123.
[4] INDIA CONST. art. 213.
[5] RK Garg v. Union of India, (1981) 4 SCC 675, 687.
[6] Jain, A., *Democratic Decay in India: Weaponising the Constitution to Curb Parliamentary Deliberation*. Nat'l L. Sch. India Rev., 34, p.246 at 248 (2022).
[7] Id. At 248
[8] Madhav Khosla and Milan Vaishnav, *The Three Faces of the Indian State*, 32(1) Journal of Democracy 111, 114-116 (2021).
[9] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

adherence to the institutionalised mechanism for enacting the legislations[10]. Parliament has always played a very essential role in carrying this tradition of deliberations forward and promoting the public discourse. Such a practice of debates in the parliament also ensures accountability of the elected representatives for the decisions being taken and implemented[11].

When the ordinance making power was included to be part of the Indian Constitution, it was not *'perverted to serve political ends[12]'*. However, it is being consistently used by various governments to bypass the formally laid legislative procedure for passing legislations. According to the Statistical Handbook for 2021, as released by the Ministry of Parliamentary Affairs[13], a total of 714 ordinances have been promulgated between the period of 1952-2021. The yearly average for the promulgation of ordinances comes to be around 10.2 ordinances a year[14]. These figures clearly indicate that the provision which was added by the constitutional makers to deal with the emergency situations that may arise, is being used as a tool to bypass parliamentary scrutiny.

Although the literature on the misuse of the ordinance-making power of the President abounds[15], however, the issue has not been analysed from the law and economics approach; the authors seek to fill this gap in the literature by providing for law and economic analysis of the ordinance-making power, its misuse and its consequences. The authors also offer solutions based on this law and economic analysis.

The essay has been divided into six sections; in the first section, we present the constitutional provisions and important rulings of the apex court regarding the ordinance-making power of the President and Governor; the second section, discusses the application of law and economics on constitution, in the third section, we present the law and economic models to present a analysis of semantic problem of the repromulgation of the ordinances by analyzing the 2007 Supreme Court judgment in Krishna Kumar, in the third section, authors present a analysis of legalistic problem of an ordinance making using rationality analysis and game theory

[10] Supra note 4.
[11] Proksch, S.-O., & Slapin, J. B., *In The Politics of Parliamentary Debate: Parties, Rebels and Representation*, Cambridge: Cambridge University Press (pp. 1–14). (2014).
[12] Dr DC Wadhwa v. State of Bihar (1987) 1 SCC 378.
[13] Statistical Handbook 2021, Ministry of Parliamentary Affairs, Government of India available at Statistical Hand Book | Ministry OF Parliamentary Affairs, Government of India (mpa.gov.in).
[14] Author's Calculation based on data sourced from *supra* note 10.
[15] Singh, A., *The power of ordinance making in an emergency situation to avoid misuse*; Malik, R., Jain, S., & Kapruwan, D. (2020). Ordinance Making Power Is A Highjack Of Democracy-An Analysis Of The Trends From India. Bhardwaj, C. M. (2021). An analysis of the power to issue ordinance in India. *Statute Law Review*, *42*(3), 305-312.

conceptualizing ordinance making to be a convenient means of legislation, in the fifth section, we provide the recommendations, with the help of statistical analysis to cure this anomaly, and in the sixth section we conclude the essay.

2. LEGISLATIVE FRAMEWORK: ORDINANCE MAKING POWER

The Ordinance-making power of the President is defined in Article 123 contained in Chapter III of Part V of the Indian Constitution.[16] While the Ordinance making power of the Governor of the state is contained in Chapter IV of Part VI, Article 213[17] of the Indian Constitution. the power is described in the constitution as the 'Legislative Power' of the President and the 'Legislative Power of the Governor'. The power conferred upon the President to promulgate Ordinances under Article 123, is subject to two conditions: First that both the houses of the parliament should not be in session, and Second there should exist such circumstances that necessitate it to take immediate action.[18] Such an ordinance is deemed to have the same effect as any Act of the Parliament.[19] And the period of validity of such ordinance is six months from the date of promulgation or six weeks from the date of assembly of both houses of the parliament.[20] It shall also cease to have effect if a resolution disapproving the same has been passed by both houses of the parliament.[21] It may however be withdrawn earlier by the president[22]. The Legislative Power of the Governor contained in Article 213 of the Constitution is also similar to the one described above.[23] Although the Constitution has conferred power upon the President, it is formally vested with the Council of Ministers or the central executive and is used in practical sense at the satisfaction of the Council of Ministers[24].

Concerns have arisen around the misuse of this legislative power conferred upon the President and the Governor, by successive governments to enact legislation without parliamentary scrutiny and use the power even in cases where there did not exist such emergent circumstances that necessitated the promulgation of the Ordinance.

[16] INDIA CONST. art. 123.
[17] INDIA CONST. art. 213.
[18] INDIA CONST. art. 123 (1).
[19] INDIA CONST. art. 123(2).
[20] INDIA CONST. art. 123(2)(a).
[21] INDIA CONST. art. 123(2)(a).
[22] INDIA CONST. art. 123(2)(b).
[23] INDIA CONST. art. Art 213.
[24] RC Cooper v. Union of India , AIR 1970 SC 564, 587.

Historical Evolution of the Ordinance Making Power

Although the monarch in England was ripped off these prerogative powers around four hundred years ago[25], the Britishers used such powers to control and administer their Colonies.

The Indian Councils Act 1861, under its Section 23, conferred such power to issue direction bearing the force of law.[26] Further, the Government of India Act 1915, vide section 72[27] empowered the Governor General to promulgate such ordinances to deal with such emergent situations. This replaced the Government of India Act 1935, which also had such a provision contained in its sections 42, 43 and 44[28].

Hence, it can be concluded that the provision for the Ordinance-Making power has been adopted in the Indian Constitution from the earlier legislations, that have been enacted by the British Government.

The provision regarding the ordinances, was first introduced in the 'main principles' that were prepared by BN Rau[29] This provision has not been widely discussed in the Constituent Assembly also and was debated and passed in a single day on 23rd May 1949.[30] One of the most critical views presented in the assembly was that by Professor K.T. Shah, who while recognizing the fact that such circumstances may arise in future, which warrant the enacted of such important pieces of legislation in an emergency, said that even if we seek to justify it, it remains a *"negation of the rule of law",* all he proposed was that such a provision be drafted that such an ordinance does not last even a minute longer than such extraordinary circumstances may require.[31] Various members like HV Kamath, Pandit HN Kunzru, and B Pocker Sahib, also proposed multiple amendments to make the provision regarding the ordinances more precise. However, the same were not accepted by Dr B.R. Ambedkar and P.S. Deshmukh[32].

[25] Shubhankar Dam, *Presidential Ordinances in India: The Law and Practice of Ordinances*, 37-38 Cambridge University Press, New York (2014).
[26] Indian Councils Act, 1861, § 23, No. 24 & 25, Vict. c. 67., Acts of Parliament, 1861 (United Kingdom British India).
[27] Government of India Act, 1915, § 72, No. 5 & 6 Geo. 5. c. 61, Acts of Parliament, 1915 (United Kingdom British India).
[28] Government of India Act, 1935, § 42, No. 26 Geo. 5. & 1 Edw. 8. c. 2, Acts of Parliament, 1935 (United Kingdom British India)
[29] Shubhankar Dam, *Presidential Ordinances in India: The Law and Practice of Ordinances*, 55 Cambridge University Press, New York (2014).
[30] Ibid.
[31] Constituent Assembly Debates (CAD), Bk. 3. No. VIII, 208 (23 May 1949).
[32] Shubhankar Dam, *Presidential Ordinances in India: The Law and Practice of Ordinances*, 56 Cambridge University Press, New York (2014).

Judicial Response: Ordinance Making Power

The constitutional courts of the country have been answering various questions related to the ordinance-making power of the president since independence, some questions have been answered, however, there are others that still need a definitive answer by the courts.

The other question, with regard to the ordinance-making power of the president, is if the presidential satisfaction on the question of the existence of such a necessity to promulgate the ordinance is final or subject to judicial review. The opinion of the courts in the pre-independence times has been mostly that such a decision of the Executive is not justiciable[33] however this has been changing in the post-independence times, with various decisions in these lines.

In the case of RC Cooper v Union of India[34], the eleven judge bench of the apex court, although did not answer the question as the ordinance in question has been turned to an act and thus the issue being rendered academic, said that the said determination by the president is not final. Although a legislative attempt was made to declare such determination as final by insertion of Art 123(4) by the 38th Constitutional Amendment Act 1975[35], however the said clause was later repealed by the 44th Constitutional Amendment 1978[36].

The apex court has clarified in the cases of RK Garg[37] and AK Roy[38] have explained that the ordinance-making power of the President or the governor as the case may be are legislative powers and shall be subject to the same constitutional inhibitions as any other enactment by the parliament. Hence the question as to the nature of the power is settled by the apex court long back. However, these judgements ruled that the ordinances promulgated may be subject to judicial review on grounds of mala fide exercise of power, abuse of power as well as ill-will on the part of the executive.

The judgement in the case of AK Roy v. UOI has been mentioned in the case of SR Bomai v. Union of India[39] that as the express bar on the exercise of judicial review has been lifted by the

[33] See, MP Jain
[34] RC Cooper v. Union of India (1970) 1 SCC 248.
[35] 38th Constitutional Amendment Act 1975
[36] 44th Constitutional Amendment Act 1978
[37] RK Garg v. Union of India, (1981) 4 SCC 675.
[38] AK Roy v. Union of India, (1982) 1 SCC 271. The challenge in the said case was the National Security Ordinance and it was submitted before the honourable court that the power to promulgate an ordinance is an executive and not legislative power, however, this submission was rejected by the apex court.
[39] SR Bommai v. Union of India, (1994) 3 SCC 1.

44th Constitutional Amendment, the said determination by the president shall be justiciable on the grounds of fraud, ill will and oblique motives. These grounds for judicial review have been formally reiterated by the 7-judge bench in the recent case of the Krishna Kumar v. State of Bihar[40]. Thus, it is clear from the above analysis that the judicial review is available in the cases of arbitrary exercise of power by the executive.

The other major change in the ordinance landscape in the country post the Krishna Kumar Judgement is that in the case of non-introduction of the ordinance before the houses of the parliament, it shall be void-ab-initio and all the rights and liabilities thus created shall stand extinguished. This implies that it practically turns the situation as if no ordinance was ever promulgated. Put in other words the ordinance having the same force as an act, as is contained in 123(2), will depend on the occurrence of future events i.e. its presentation in the house of the parliament. It is seen that this presentation of the ordinance in the house of the parliament seeks to increase the costs of the executive in promulgating the ordinance, by making it subject to parliamentary scrutiny. This is further analysed in the subsequent section.

[40] Krishan Kumar Singh v. Union of India, (2017) 3 SCC 1.

3. APPLYING ECONOMIC ANALYSIS TO CONSTITUTION

We can look into the contents of the constitution by applying economics to various structures in the constitution, its objectives, and its outcomes. The Constitution is used to create public goods. And it itself can be seen as a product, and like the production of physical goods, every provision of the constitution has certain costs and benefits, it also involves inputs, both capital and factor inputs, derived from society. This can be illustrated with a simple example, that the provision in the constitution regarding the fundamental rights, while ensure the social benefits in form of making of an egalitarian society, where the citizens are ensured freedom, dignity and justice. This provision at the same time has some costs associated with it, such as the cost of enforcement of these rights (expenditure on courts, fees of lawyers etc). Similarly, each other provision in constitution also has certain costs and benefits associated with it.

In order to ensure that such costs are minimised and the benefits associated with the provisions are maximised, the mechanism of political competition is essential. Political competition lies at the very centre of the constitution, which can be reached by using rationality analysis, which simply means that the people make such decisions so as to ensure maximum benefit to themselves. Stakeholders within the constitution cannot be expected to work solely for the well-being of the country as they are also rational beings and do work according to their self-interest as proposed by public choice theory[41].

It is this political competition, which shall ensure that such decisions are taken as lead to an overall increase in social surplus. As the economic competition ensures the most optimal economic outcomes, similarly this political competition shall ensure the most optimal policies and practices being followed. In order to have political competition, we need to ensure accountability, which forms the bedrock of any democracy. Therefore, the vision of democracy is most efficient technique to analyse the market as it entails free competition. Democracy presents certain demands in form of aspirations of people, and policies made by leaders is the supply. To ensure that good beneficial policies are made the cardinal question arises that what is the most 'winning competition'?

[41] Buchanan, J.M., 1973. *Public choice and public policy* (No. 778-2016-51946, pp. 131-136).

The political competition along with accountability can be understood in two ways: through the market of votes and the separation of power.

Market for votes majorly pertains to the ensuring the free and fair elections, while separation of powers is to create a mechanism for checks and balances. In this piece, the authors mainly discuss the importance of political competition by focussing on the separation of power between the legislature and executive. The fundamental goal of this essay thus is to argue that modern economic analytic methods should be in the toolkit of any social or political theorist who wishes to think seriously about the practical institutional structure issues.

4. CONCEPTUAL FRAMEWORK: SEMANTIC ANALYSIS

Analysing the Impact of Krishna Kumar's Judgement

In this section of the paper, we seek to analyse the implications of Krishna Kumar judgment which has been formalised using objective variables and microeconomic models presented below.

As Explained above, post the Krishna Kumar Judgement[42], the costs for promulgation of the ordinance rise while at the same time, the expected utility from the promulgation reduces. For the purpose of this research, the authors seek to understand the expected utility of the executive in promulgating the ordinance, by way of following equation:

$$\pi(\alpha) - (1 - \pi)(\beta)$$

Wherein, π denotes the probability of successful end to the ordinance, i.e. it being enacted as a law. The α, denotes the utility it attains from the success of that ordinance. Naturally, $1 - \pi$ denotes the probability of ordinance meeting an unsuccessful end, i.e., it being disapproved by the legislature. While, β denotes the cost to the legislature in case of an unsuccessful end to the ordinance. These costs include, the cost of public backlash, the cost of non-attainment of the goal of legislation, and the cost of right and liabilities that extinguish with end to the ordinance, but were had been in force for the time being. Such costs, being subjective in nature, cannot be quantified in numerical terms, however, given the impact it has upon the electorate and party reputation in public, these still play a vital role, in any decision being taken by the government. Post the Judgement of Krishna Kumar, as it is mandatory to present the ordinance in the parliament in the next session, the probability of it meeting an unsuccessful end rises, as the government will not be able to postpone its presentation, according to its convenience, these

[42] Krishan Kumar Singh v. Union of India, (2017) 3 SCC 1.

concerns will be more visible in a coalition government that a full-majority one however, authors later show through data analysis that these trends exists even in majority government.

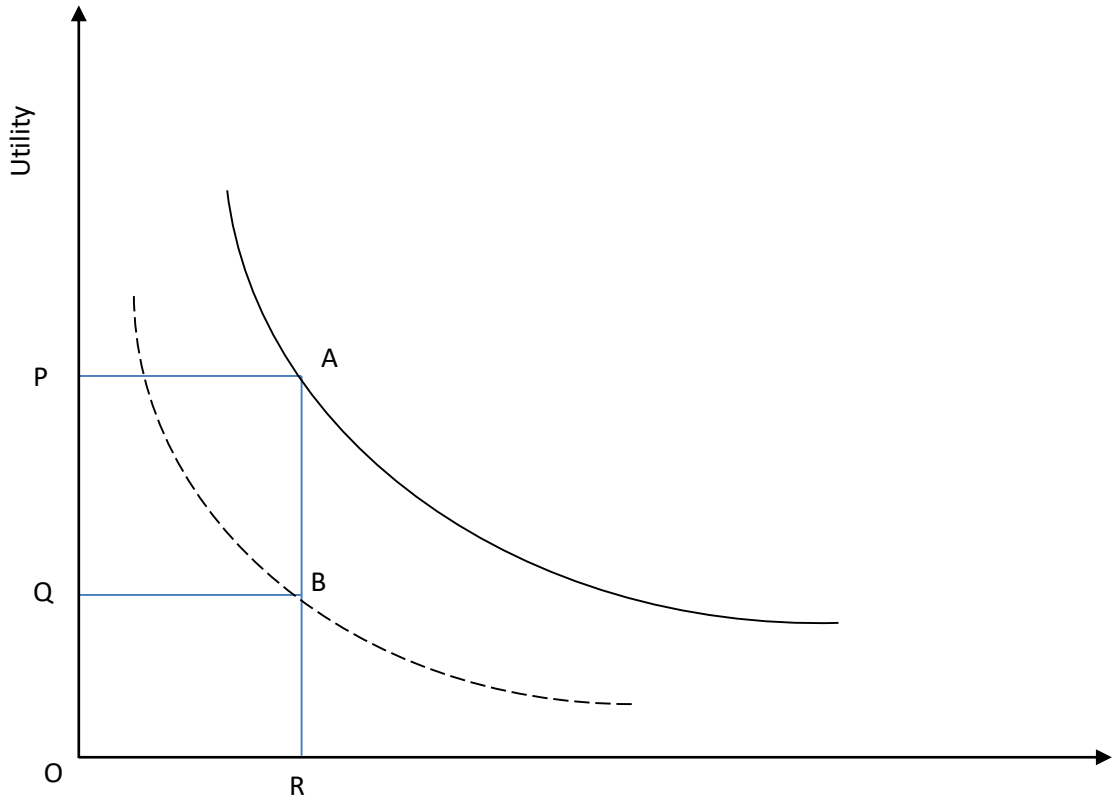


Figure 1

The diagram above captures this, as the downward sloping convex curve depicts the negative relationship between the utility to the executive and the bargain cost incurred by it in the process. Necessarily, a higher bargain and large number of negotiations will lead to lower levels of utility, as the freedom with the executive as is available in case of ordinance is reduced due to many factors such as opposition in parliament, public backlash as to the contents of the legislation, and other such costs.

As explained above, the Krishna Kumar Judgement reduces the total expected utility thereby causing a leftward shift in the total utility curve. Thus, the same level of bargaining now yields a lower utility to the executive and, it can be concluded that the number of ordinances should be reduced as the total utility to the executive from its promulgation has been reduced.

This doctrinal study has been carried out under a larger framework of the trade-off between parliamentary democracy and legislative expediency. From the statistical analysis, the author's findings suggest that even though according to the conceptual framework with the coming of Krishna Kumar's judgment, the number of ordinances should have been reduced there has been a constant increase in the number of ordinances.

Further, the authors seek to address this contradiction through the given microeconomic tools. Similar to the deterrent effect created by this judgement, it is argued that the judicial review of the ordinances shall also result in the deterrence being created and the reduced utility of the executive, however such a review is not possible in the cases where the satisfaction of the president is treated as subjective satisfaction and rests on his satisfaction. However, such a subjective satisfaction cannot be efficiently be a subject for the judicial review, until there are objective grounds laid for the exercise of such a power.

Such objectives grounds are existent in foreign jurisdictions such as Australia, United Kingdom and Canada, where 'emergencies' are better defined and statutorily laid[43]. The authors advocate for a similar rule to be laid in the country for the exercise of this power. This recommendation is supported by the model below. The proposed model seeks to provide a solution to address the problem of misuse of ordinance-making power by proposing detailed and extensive guidelines or rules for the use of power under Sections 123 and 213 of the Constitution, against the present standard of presidential satisfaction for promulgation of ordinances, as given in Article 123, or the governor's satisfaction under 213.

[43] Shubhankar Dam, *Presidential Ordinances in India: The Law and Practice of Ordinances*, Cambridge University Press, New York (2014).

Rules v. Standards: Delegation of Power

The authors present a game tree analysing the bargain between the legislature and the executive. Here, the executive gets to make decision in two scenarios: one where legal design entails rules and the other were legal design entails standard. The underlying idea is that when lawmakers adopt a standard, they allocate decision-making authority to someone else. Whereas, by laying down the rules, the powers of decision-makers can be constrained or liberated. This way rules and standards are related to delegation of powers. Further, whether the necessity of decision prevailed at the time of promulgation or not. For the purpose of this model, we take the ordinances promulgated under the conditions of genuine necessity. In this case once the ordinance can be subjected to judicial review or it cannot be. If no judicial review takes place the ordinance comes to an end. Whereas, if the judicial review takes place then outcomes will differ for the ordinances passed under the legal design with rules versus legal design with standards. In case of broad standards even if the decision is taken under necessity on judicial review either the court will strike down or uphold it. And in case of rules if decision is taken under necessity, on judicial review court will necessarily uphold it because now court will have objective criteria to determine if the necessity existed or not. This further implies that if ordinance was not promulgated for any collateral reasons but for the necessary want of such law, outcome of the judgment will be favourable for the executive who will have more certainty if the object they seek to achieve will be fulfilled or not. Thus, it can be said that defining of the clear rules may even be beneficial for the legislature in case of judicial review of the president or governor's satisfaction for the want of necessity to promulgate the ordinance.

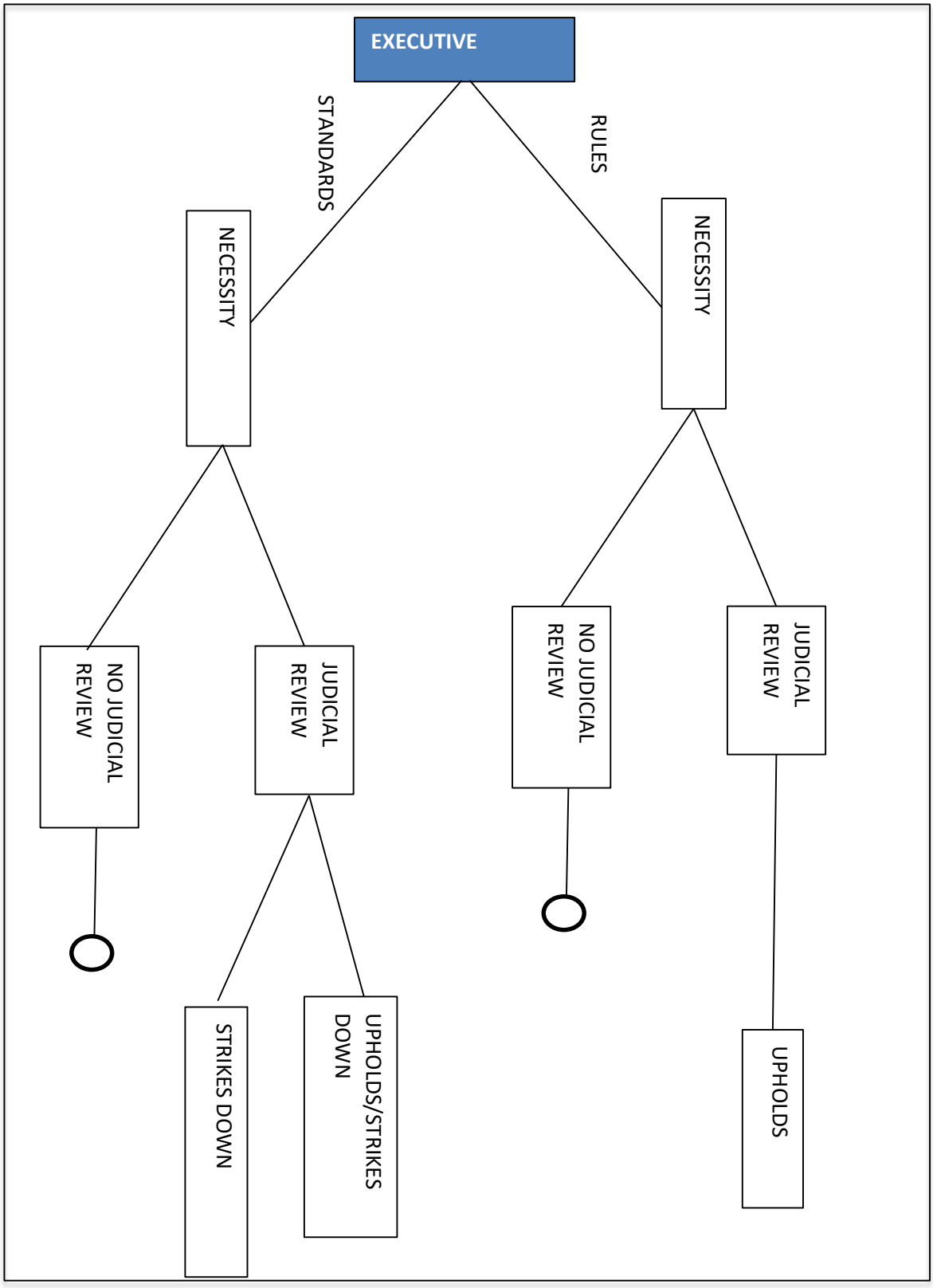

EXECUTIVE
STANDARDS
RULES
NECESSITY
NECESSITY
NO JUDICIAL REVIEW
JUDICIAL REVIEW
NO JUDICIAL REVIEW
JUDICIAL REVIEW
STRIKES DOWN
UPHOLDS/STRIKES DOWN
UPHOLDS

Figure 2

Having discussed the need for the proper rules instead of standard terms as "existence of necessity" it is essential to look at the amount of discretion that should rest with the executive in deciding the existence of such necessity or the level of strictness in defining the laws.

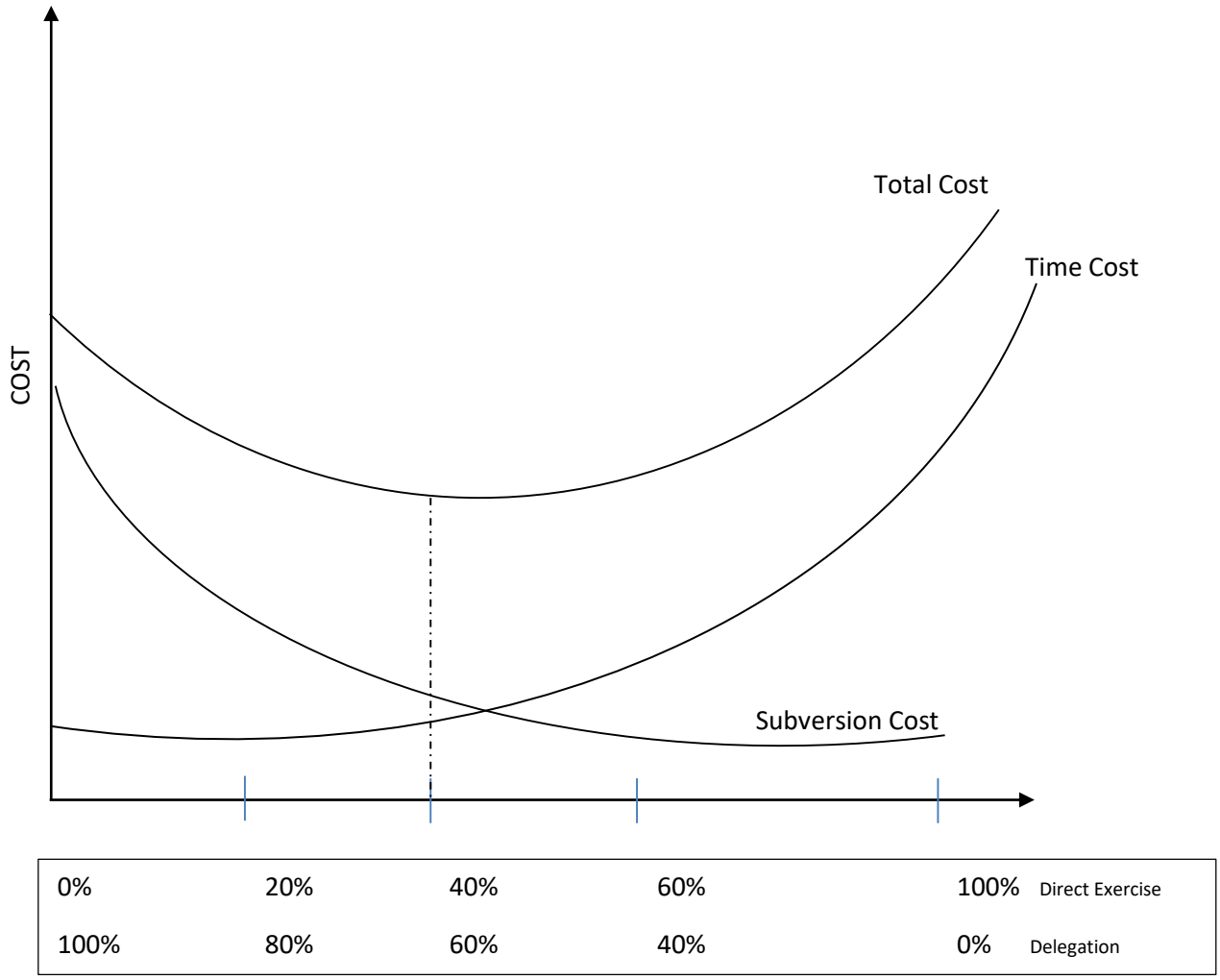


Figure 3

Subsequently another major question that we need to address is that what should be the optimum level of delegation and how strictly we need to define the necessity of ordinance to get efficient outcomes. In the figure 3, horizontal axis represents power directly exercised by Legislature over law-making which increases from 0 percent to 100 percent as we move from left to right and vertical axis shows costs. 0% Delegation means that there are very strict guidelines for the promulgation of ordinance while there is 100% direct legislations by parliament even in cases of necessity. while 0% direct Exercise refers to lack of any check and balance on the number of ordinances promulgated. We take two costs: time cost and subversion cost. Time cost refers to the time spent on negotiation and subversion cost refers to the cost of

arbitrary decision and erosion of checks and balance due to bypassing the separation of powers doctrine. As the direct exercise of power increases time costs also increases. Conversely, as more and more power is delegated the subversion costs against separation of power increases. Adding the two cost curves we get u-shaped curve of "total cost". We can say conclusively that if there is 100 percent control, time costs will be significantly high this cost becomes even more acute if the decision is to be taken in an emergency situation. Whereas, if direct exercise of power is 0 percent then the subversion cost will be significantly high. Therefore, balanced regulation corresponding to 40 per cent on X-axis will be most efficient as it is also the lowest point on the total cost curve, which corresponds to 60% delegation, i.e. somewhat a medium level of strictness for promulgation of the ordinance. These are hypothetical figures assumed for the purpose of this model to show the need for balance between very strict regulations and no guidelines for the exercise of power. b

Thus, the model seeks to recommend that the present standard of presidential satisfaction be replaced with the rules for the exercise of power, which shall aim to reduce the uncertainty and increase the objectivity in the entire process. Although such rules should not be such that they completely curtail the freedom of government to meet the emergent situations and must allow such room, but also check the misuse of such power.

5. CONCEPTUAL FRAMEWORK: LEGALISTIC ANALYSIS

The precondition existing for promulgation of an ordinance is that either of the two houses of the parliament should not be in session. As discussed earlier, ordinance is simply a tool to remedy a scenario, requiring legislative urgency where parliamentary legislation is not possible, to achieve. A converse understanding this will explain how this may incentivize the Cabinet to prevent the proper functioning in the parliament[44]. It must be recalled here that the power to convene a parliamentary session, decide its duration and decide the time for its prorogation or adjournment sine die, rests with the ruling party itself. The Authors seek to explain this phenomenon where the government intends to prevent the parliament from functioning by way of a game theory model.

	Opposition

[44] Shubhankar Dam, *Presidential Ordinances in India: The Law and Practice of Ordinances*, 37-38 Cambridge University Press, New York (2014).

		Intends to Aid In the Functioning of Parliament	Intends to prevent the parliament from functioning
Government	Intends to Aid In the Functioning Of Parliament	Alternative 1 **Parliament Functions**	Alternative 2 **Parliament Does Not Function [Government Bears The Cost]**
	Intends to prevent the parliament from functioning	Alternative 3 **Parliament Does Not Function** **[No cost upon the Government]**	Alternative 4 **Parliament Does Not Function [No cost upon the Government]**

The Matrix presented above discusses the attitude of two players, that is, the ruling party or the government and the opposition parties towards functioning of the parliament. Each of the player can either intend to aid in the functioning of the parliament or prevent the parliament from functioning well.

It must be remembered that the Parliament will able to function and the legislative business intended by the government can only be completed in a scenario where both the players want the parliament to function properly, this is presented as Alternative 1 in the matrix above in any other scenario, the parliament shall fail to function properly, and the legislative business fails to be completed this is shown in alternative 2, alternative 3 and alternative 4 in the matrix above, but in each case, the costs to the players will be different.

In alternative two where the government intended that Parliament functions properly, while Opposition intended otherwise; The Parliament shall fail to function properly. But this shall impose a higher cost upon the government as Government must have acted with a belief that Parliament shall function, and its legislative business shall be completed. In this scenario, the Government shall bear the cost in the form of time cost for the time lost in the preparation of the parliamentary session, adjournment cost and other costs such as public backlash that shall arise from its failure to meet the expectations and demands of the public is a timely ,manner moreover, the overall functioning of the government is hampered and that in turn in a cost upon the government.

It must be noted that the incentive for the opposition to disrupt the functioning of the parliament can be explained as the opposition, seeks to oppose the moves by the government, so as to maintain its political significance.

The third alternative presented above shows a scenario where the government intends the parliament not to function as it has the convenient mode of legislation by way of ordinances which seeks to reduce the cost of the government in enacting any piece of legislation, at is prevented from bargaining in parliament to get it passed, moreover the time taken in enactment of the ordinance is significantly less than that in the passing of an act. This also depends upon, the attitude of the government towards the parliament, if the prime minister and his cabinet view parliament as a cumbersome institution or has a serious contempt towards it, it is more likely to intend to escape the functioning of the parliament than aid towards it[45].

In the given scenario, the government shall not bear any cost. And be able to get the legislative business done easily. But this seriously affects the parliamentary democracy and spirit of public representation in the parliament, which shall in turn have long term consequences for a well-functioning democracy.

While the last alternative assumes a situation wherein both government and opposition intend to escape the functioning of parliament, Government because it has a convenient mode of legislation by way of ordinances. While opposition to prevent the government, from achieving its legislative aims in the parliament. This alternative also imposes a severe cost upon the parliamentary democracy in the country and affects the quality of democracy negatively.

The authors seek to explain that, given a scenario where the government does not know what the opposition intends, and what attitude the opposition carries towards the functioning of parliament in the next session, shall decide to prevent the functioning of Parliament and thereby rely upon ordinances as a convenient mode of legislation. Bearing significantly less costs as it might be in case it intends to aid in the functioning of the parliament. This is because, in the scenario where the government intends to aid in the functioning of Parliament, while the opposition intended otherwise, the government ends up bearing huge costs. Thus, in a scenario where it is unaware of the intention of the opposition, its dominant strategy shall remain to prevent the functioning of parliament and use ordinances as a convenient mode of legislation.

However, the government can be prevented from acting in such a manner that harms the functioning of democracy in the country by imposing costs upon it to ensure the proper functioning of the parliament, while the opposition can be prevented from disrupting the

[45] Ibid.

functioning of the parliament by having proper rules and regulations for the functioning of the parliament. This scenario is modelled in the second matrix presented below which seeks to explain the change in attitude of the government towards the functioning of the parliament by way of framing the rules and regulations for the functioning of the parliament.

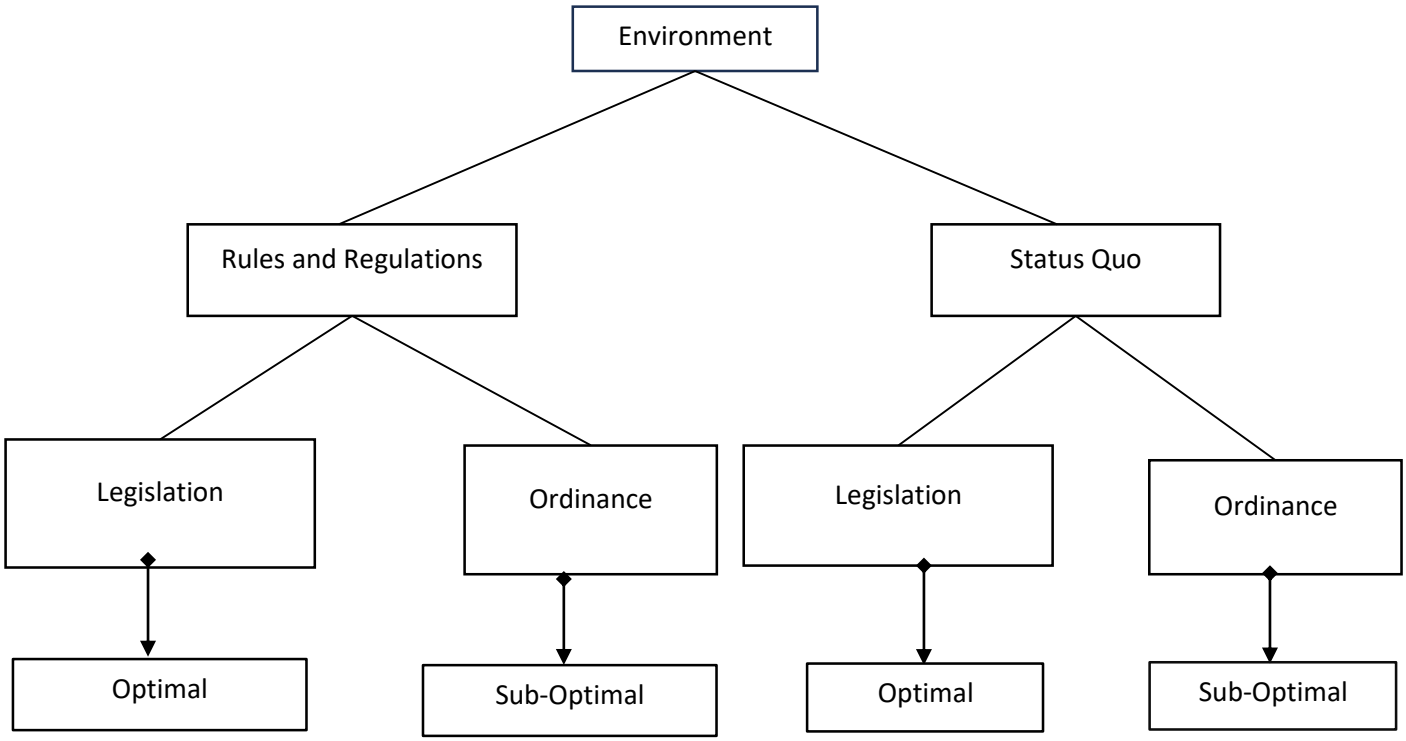


Figure 4

We here take two scenarios, the status quo and its alternative where proper parliamentary regulations exists and the voice of opposition is properly channelised. In both these environments, two tools of law-making exist, ie. either by an act of parliament or by way of passing an ordinance. Under the status quo, the cost for a government to pass an act in parliament is very high as the voice of opposition is not properly channelised therefore, there is a high bargaining cost, which also entails high time cost, and if the bargain turns into a dispute-like situation, then the government has to face adjournment costs. The government will, under such a situation, face all these costs along with increased public backlash, leading to sub-optimal outcomes even if they somehow manage to pass the act. Thus, in the status quo, passing an ordinance remains the dominant strategy for the government.

However, a proper code of conduct for the members creates a detterance that amongst the representatives so that members of opposition do not disrupt the functioning of parliament as conceptualised in the first matrix, then cost for passing an Act will reduce and cost for promulgating an ordinance will rise because ordinances have low representative gradient which

may cause dissatisfaction in public, people who will continue to be suspicious about the viability of law and motives of the government will naturally will not be able to accept it thus giving sub-optimal outcomes. Therefore, the dominant strategy for government will be making law through parliamentary procedure and not resort to ordinance making power for meeting its day-to-day business requirements.

6. DATA ANALYSIS AND FINDING

Methodology

The data analysis was conducted based on the secondary data collected by using information from Statistical Handbook 2019 which is available on the website of the Ministry of Parliamentary Affairs[46]. Additionally, data from 1952 - 2023 was also sourced from the RTI filed (LOKSS/R/T/23/00287). The test of the ordinances was also sourced from the Website of Legislative Department[47]. On the gathered data analysis was done using the Microsoft excel Software.

Results and Findings

Year	Total Number of Ordinances Passed
2009	9
2010	3
2011	3
2012	1
2013	11
2014	9
2015	9
2016	14
2017	7
2018	9
2019	16
2020	14

[46] Ministry of Parliamentary Affairs, https://mpa.gov.in/sites/default/files/Statistical%20Handbook_Updated_0.pdf .
[47] Legislative Department, https://legislative.gov.in/legislative-references/.

Year	No. of Ordinances containing Reasons for Promulgation	No. of Ordinances Not containing Reasons for Promulgation
2009	4	5
2010	0	3
2011	0	3
2012	0	1
2013	4	7
2014	2	7
2015	0	9
2016	6	8
2017	5	2
2018	4	5
2019	7	9
2020	8	6
2021	5	5
2022	0	0
2023	1	0

Table 2

2021	10
2022	0
2023	1

Table 1

Source: Statistical Handbook 2019, Ministry of Parliamentary Affairs, https://mpa.gov.in/sites/default/files/Statistical%20Handbook_Updated_0.pdf .

Source: Author's Analysis based on data available at https://legislative.gov.in/legislative-references/

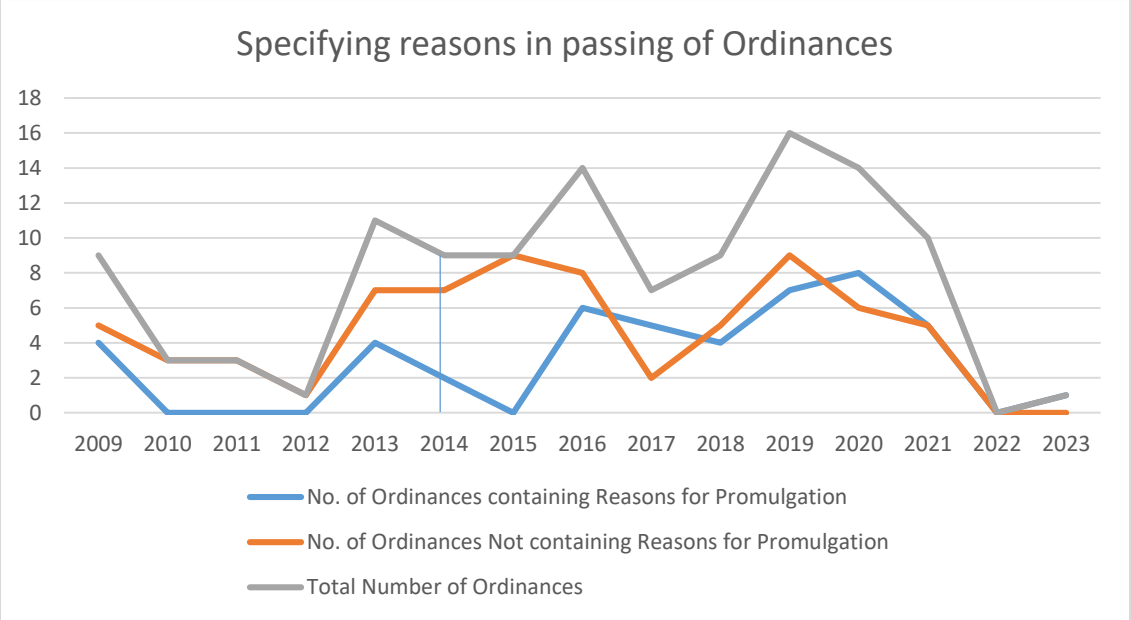


Chart 1

Firstly, a simple trend analysis on a number of ordinances promulgated between 2009 to 2023 was done. A closer look at Chart 1 shows that the trend of ordinances have remained broadly similar, before 2014 in the tenure of the UPA government and after 2014 in the tenure of the NDA government, however, the ordinances during the NDA government were comparatively more than those in the UPA government. Both phases have witnessed occasional drop in a number of cases, like in 2022 and 2012. Highest number of ordinances were promulgated in 2013 for UPA and in 2019 for NDA. This shows that Krishna Kumar's highest number of ordinances by NDA, which is 16, is significantly higher than the highest number of ordinances under UPA, which is 11 (Pre-Krishna Kumar Period). In fact, in the given years, witnessing ordinances in double digits occurred just after Krishna Kumar's judgement.

Therefore, the Krishna-Kumar Judgement has played a limited role in reducing the total number of ordinances being promulgated by the executive.

Further, for making generalised comments, the data of each ordinance were divided into two categories: (i) No. of Ordinances containing reasons for Promulgation, and (ii) No. of ordinances not containing reasons for promulgation.

This categorisation was made on the basis of what the text of the ordinances mentions. The primary of purpose for such categorisation was to assess the concentration of ordinances in categories where the government acknowledges the existence of emergency situations necessitating immediate legislation. The above chart makes it clear that ordinances not mentioning the existence of any emergency situation have mostly been higher than the ones containing reason.

This clearly shows that despite the deterrence created by Krishna Kumar's Judgement the number of ordinances has been on the rise. However, the specification of emergency situation in the promulgations have also increased. The impact of Krishna Kumar Judgement is clearly visible as until 2017, the number of ordinances containing the reason for promulgation has always been less than the number of ordinances not containing any such reason,

The above data analysis shows that contrary to the theoretical propositions conceptualised above the increase in the costs of promulgation has still not materialized in actual practice. Although a positive impact of Krishan Kumar's judgment is witnessed, the number of ordinances containing the reasons for promulgation has risen, which signifies a step towards reducing the number of ordinances being promulgated to serve perverted political ends. Nonetheless, the ordinance-making power is prone to misuse by in the given political environment.

However, As proposed in the conceptual framework above the misuse of ordinance-making power is sought to be reduced by. Having proper rules and regulations for the functioning of parliament. This is tested by way of the data analysis presented below, which analyses the relationship between the number of sittings of both houses of the parliament, and the number of ordinances promulgated. This is done by way of regression analysis, the results for which are presented below.

The following hypothesis is tested using the model:

H_0 *- The model is nonlinear in its estimated parameters*

H_1*- The model is linear in its estimated parameters*

Independent variable was taken to be Number of Sittings and the regression test was run against the Number of Ordinances. The result of ANOVA test provides the estimated value of F statistics of all the variables and the associated p-value demonstrates that the null hypothesis (H0) is rejected at 95% confidence level. Hence the model of all variables taken above is correctly specified. It is also suggested that the selected independent variable is significant and meaningful in explaining variations in the dependent variable. Moreover, the R square model of the variables show that the explanatory/ independent variable ,that is, Number of Sittings explains 64% variations in Number of ordinances. This suggests that selected model has better explanatory power.

The following equation can be derived from the summary of the model in the table:

Table 3

Number of Ordinances Passed as Dependent Variable		
		Total Sittings as Independent Variable
Independent Variables	Constant (a)	17.45346428 5.044862
	Total Sittings (b1)	-0.042393128 (0.**034417493) **** [-2.15856]
Statistic / Test	Adjusted R square	0.05036334
	Model Specification Test (F-test)	4.659368465** (0.034417)
Note: *** represents significance at 99% confidence level, ** represents significance at 95% confidence level, *represents significance at a 90% confidence level.		

Number of Ordinance = 17.4 – 0.042 (Number of Sittings)

The equation explains the contribution made by a set of independent variables on the dependent variable.

If one assumes that other variables remain constant then if the Number of Sittings increases by one unit it will lead to a decrease in the Number of Ordinances by 0.0423 units. The T-test is applied to test whether the estimated coefficient of b, that is, the Number of Sittings, is statistically significant or not. The estimated value of t statistics and its associated significance value (0.034) indicates that at the 95% confidence level estimated coefficient of b is statistically significant. Additionally, one can find that there exists an inverse relation between Number of Sittings and Number of Ordinances.

note

The above findings of the regression analysis support what has been hypothesized through conceptual framework that the number of ordinances that will be passed by any government is impacted by how well the parliament functions and how easily a government can pass an enactment. Thereby, ordinance has proved to be a convenient mode of legislation and is impacted by how well the parliament functions.

7. CONCLUSION

The data available for the promulgation of the ordinances clearly shows that the number of ordinances that have been enacted post the judgement in the *Krishna Kumar Case*[48] is in no sense less than the ordinances that have been enacted during the years preceding the judgment. This is so despite the negative impact of the Krishna Kumar judgement on the utility that the executive ought to derive from the enactment of the ordinances. The authors seek to address this anomaly through the microeconomic models and present solutions through the lens of law and economics. This paper conceptualises the solution to the problem of the misuse and the abuse of ordinance-making power by proposing the formulation of the rules that shall seek to add objective grounds to test if the ordinance-making power has been used in a proper manner or it has been used with the mala fide intentions and ill-will on the part of the executive. The level of the delegation to the executive, that is, the scope of the decision-making with the, executive, has been analysed by proposing the total cost curve, which seeks to propose the optimum level of stringency in the rules so as to allow the scope for the legislature to meet the emergency situations as well. This is sought to be achieved by framing of such rules for the exercise of the ordinance-making power by the president and the governor, in such a way as to have the objective grounds for the test of the need for the ordinance-making power and also at the same time have the scope and lee-way to the legislature to decide, if the matter needs the enactment of the ordinance to meet the emergency that has arisen.

The data analysis further revealed that the ordinances enacted post the *Krishna Kumar Judgement,* have increasingly been specifying the reason for the enactment, albeit what needs to be looked at that the reasons have not always been such as would '*necessitate the promulgation of the ordinance'* this is further sought to be addressed by the authors following a legalistic analysis of the ordinance making power, which reveals that the number of ordinances enacted have been found to be inversely proportional to the total sittings in the Lok Sabha and the Rajya Sabha. This is further addressed by the authors by proposing the game theory models which explain how the present legal framework, incentivises the legislature or the government to enact ordinances rather than passing the acts in the parliament. the authors propose that this behaviour on part of the legislature shall change with the framing of proper rules and regulations so as to regulate the proceedings in the parliament and ensure proper functioning of the parliament. This is backed by a game theory model explaining how the

[48] Krishan Kumar Singh v. Union of India, (2017) 3 SCC 1.

enactment of rules, regulating the business in parliament will lead to change in the attitude of legislature and lead to reduction in the number of ordinances being promulgated.

Summarily, the authors through this paper make two recommendations to reduce the misuse of the ordinance making power, one, to by way of semantic analysis, which reveals that there must exist proper rules coupled with equilibrium level of delegation to executive to regulate the circumstances in which ordinance may be promulgated.

The other, being by way of legalistic analysis, which reveals that there must exist proper rules to regulate the function of the parliament, which shall incentivise the legislature to enact acts rather than promulgating the ordinances, as opposed to the present framework, which incentivises the promulgation of ordinances, rather than passing the acts.

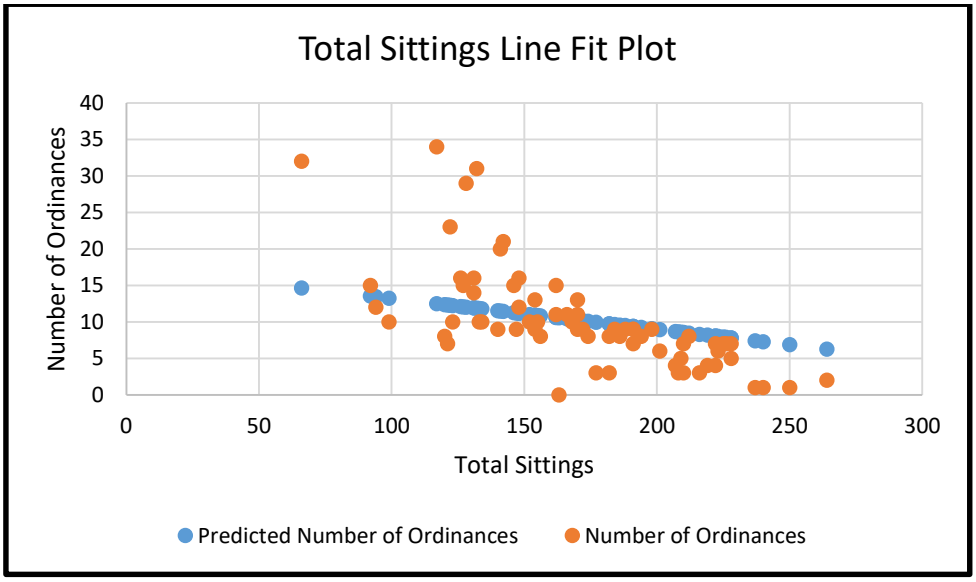
8. ANNEXURE-I

Regression Analysis between the Total Number of Sittings and the Number of Ordinances Passed in a Year

SUMMARY OUTPUT	
Regression Statistics	
Multiple R	0.253231495
R Square	0.06412619
Adjusted R Square	0.05036334
Standard Error	6.885911075
Observations	70

ANOVA					
	df	SS	MS	F	Significance F
Regression	1	220.9275	220.9275	4.659368465	0.034417
Residual	68	3224.272	47.41577		
Total	69	3445.2			

	Coefficients	Standard Error	t Stat	P-value	Lower 95%	Upper 95%	Lower 95%	Upper 95%
Intercept	17.45346428	3.459651	5.044862	3.60388E-06	10.54984	24.35709	10.54984	24.35709
Total Sittings	-0.042393128	0.01964	-2.15856	**0.034417493**	-0.08158	-0.0032	-0.08158	-0.0032


Total Sittings Line Fit Plot
Number of Ordinances
40
35
30
25
20
15
10
5
0
0
50
100
150
200
250
300
Total Sittings
Predicted Number of Ordinances
Number of Ordinances