

INDIAN FEDERALISM AND ARTICLE 123: A COMPARATIVE ANALYSIS OF PRE AND POST 1990

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Abstract:

Federalism is a basic feature of the Indian Constitution and Ordinance is a process of making law when the Parliament is not in session. The Indian Federal Structure has been established in such a way that the Union Government can make law through legislation in the Parliament as well as through ordinances. Under Chapter – III of Part-V of the Indian Constitution with the heading – “The Union”, explains that the President has the legislative power to promulgate Ordinances during the recess of Parliament. However, if the promulgation of ordinance is used excessively it violates the basic feature of the Constitution. In the last 70 years of the working of Indian Constitution it has been observed that this particular method of making law under Article 123 has been used and misused to fulfil the goal or narrow interest of the ruling party. It violates the federal principles where both the centre and the states have share in the governance and policy making. Therefore, it must be used to fulfil the urgency and that to when the Parliament is not in session. But promulgation and repromulgation of ordinance for many times questions the intention and integrity of the Central Government. It has established a wrong constitutional culture undermining the objectives for which the makers of the constitution had inserted it. It is a Constitutional right and should not be used as a legal license for making law.

Keywords: *Federalism, Ordinance, Parliament, Union Government, Constitution*

Introduction:

Every Constitution in the world believes in good governance and India is not an exception to it. The Constitution of India reflects different mechanisms on the basis of which the center-state governs them. Ordinance is one such mechanism of making law. In India Legislature, Executive and Judiciary are the three most important pillars of the Government

who need to function separately with check and balances so that a political system can function effectively. Whereas legislature makes law, executive executes it and judiciary observes that both these functions are carried out in accordance with the law of the land. The laws are enacted either through legislation in the house or through ordinance promulgated by the President or the Governor in emergency situation when the house is not in session. It is the second method of making of law which if use excessively violates the basic principle of the constitution which functions under the federal principles.

The 1990s can be viewed as a defining transition for India's polity; they paved the way for a political system more federal than ever before.ⁱ The year 1990s was a watershed in the history of Indian federal set up due to the economic and political developments in India. Three major developments of post-1990 have affected the federal relations; therefore, the period of post-1990 is a turning point. Those major developments are as follows.

Firstly, the Economic Reforms of 1991 which liberalised the Indian economy and at the same time it liberalised the hands of the States to take more steps for the welfare programme of the people but within the purview of the constitution.

Secondly, with the enactment of 73rd and 74th Constitutional Amendment Acts, the decentralisation of power in Indian federal structure has been surfaced. While introducing the Bill in the Lok Sabha on May 15, 1989, Rajiv Gandhi had said: "To the People of India, let us ensure maximum democracy and maximum devolution.....Let us gives power to the people."ⁱⁱ This Acts of 1993 has led the people of India to test the democracy in grass root level.

Thirdly, the coalition compulsion in Indian federalism is a fact since 1990. In the beginning of this coalition era, it has brought instability to the Indian political system. However, the political parties have experienced and learned how to stabilize the system.

Therefore, the year 1990 has been chosen as a base period for a comparative analysis of the issue of ordinance and its impact on Indian Constitution.

Research Problem:

Ordinance is a procedure to make law in time when the parliament is not in session but if it follows this rule to fulfil the narrow interest of the Government, it violates the constitutional principles. In last around 70 years of the functioning of the Indian Constitution it has been

observed that the use of ordinance under Article 123 has been used for 699 times. It means average 10 times in a year. It puts question marks to the intent of the promulgation of ordinance which has set up a different constitutional culture. So it is to see that whether the law enacted under ordinance has valued, devalued or undermine the Indian constitutional principles.

Methodology:

As the present research aims to analyze the functioning of Indian Constitution under Article 123 since the making of it, the method has been used for this research work is Historical-Analytical Method. Historical analysis is a method of the examination of data of the past events which comes during a particular research work. It is particularly applied to the evidence contained in documents. After collecting the data a comparative analysis has been carried out to find out to observe the research problems.

Constitutional Provisions:

Ordinances were incorporated into the Constitution from Section 42 and 43 of the Government of India Act, 1935, which authorised the then Governor General to promulgate Ordinances 'if circumstances exist which render it necessary for him to take immediate action'. India on its independence decided to follow the ordinance procedure to meet new the challenges.

The Indian Federal Structure has been established in such a way that the Union Government can make law through legislation in the Parliament as well as through ordinances. Under Chapter – III of Part-V of the Indian Constitution with the heading – “The Union”, explains that the President has the legislative power to promulgate Ordinances during the recess of Parliament.

Article 123 (1)ⁱⁱⁱ of the Indian Constitution reflects that “If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.”

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance—

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President. Explanation.—Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause. ^{iv}

(3) If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void. ^v

Working of the Indian Constitution:

In the last 67 years of Indian federal political system, the use of this provision by different Governments at the centre has guided the centralised traditions in federal India. The working of the Indian Constitution reflects that this provision has been issued by all governments at the center to make law rather than following the normal path of legislature. The Union Government has always used this provision to meet their own political interests which can be observed from the table given below.

From the very 1946, the issue of ordinance was started while making the constitution by the Constituent Assembly. In fact from 1946 to 1952, it has been issued for 35 times. It means it has been used before adoption of the constitution by the people of India on 26th day of November 1949 and its functioning from 26th of January 1950. It means it has become an inevitable part of all the Prime Ministers throughout the political history of India to legislate new laws.

Table No.01- Ordinances issued in different Lok Sabha:

Lok Sabha	Year	No. Of Ordinances	Cumulative Ordinance
Pre 1 st	1946-1952	35	35

1st	1952-1957	39	74
2nd	1957-1962	20	94
3rd	1962-1967	31	125
4th	1967-1971	38	163
5th	1971-1977	99	262
6th	1977-1980	28	290
7th	1980-1984	58	348
8th	1984-1989	35	383
9th	1989-1991	16	399
10th	1991-1996	108	507
11th	1996-1998	46	553
12th	1998-1999	25	578
13th	1999-2004	33	611
14th	2004-2009	36	647
15th	2009-2014	25	672
16th	2014-2019	27	699

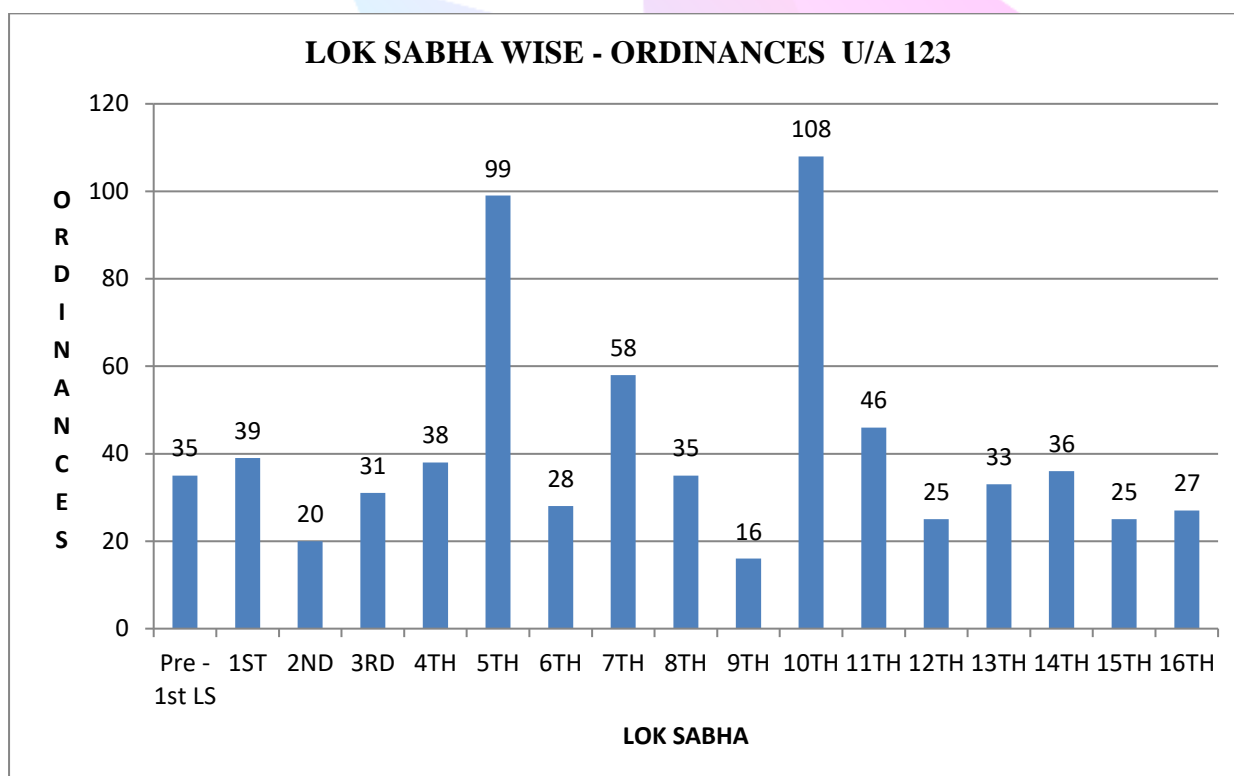
Source- Presidential Ordinances 1950-2017(Lok Sabha Secretariat, New Delhi -2015)

The above Table shows that from the independence up to the current Lok Sabha the different Central Governments have issued Ordinances for 699 times. It speaks the volume of use of these provisions in the Indian political set. Therefore, the critics have commented it the Indian Federal Republic as “federal in structure but unitary in spirit.” From the above table it is observed that throughout these years, the provision of the ordinance has been exploited to make legislation. The table mentioned above reflects that from the First Lok Sabha up to the Sixteen Lok Sabha till 2016, the promulgation of Ordinances has been used for Six Hundred Nineteen Nine (699) times. It means in every year an average of 10.43 Ordinances have been issued in both the pre and post 1990 periods and 43.68 in each of the above mentioned Lok Sabha.

Of these 699 ordinances, 456 were issued in about 50 years of rule and by six Prime Ministers of the Congress. Record books show that India’s first Prime Minister Pandit Nehru of Congress cleared about 70 ordinances during the period from 1952 to 1964. Indira Gandhi issued 77 Ordinances during 1971-77, Rajiv Gandhi issued 35 ordinances in his term and

Narsimha Rao used it for 77 times. The United Front government passed 61 Bills during 1996-98 under Deve Gowda and Gujral government issued 77 ordinances. The Vajpayee Government issued 58 times between 1998 to 2004. Dr. Manmohan Singh government used it for 36 (UPA-1) and 25 ordinances in UPA-2. The Modi Government passed 22 ordinances during 2014-2019.^{vi}From the above facts it is clear that all the governments have taken the route of making the laws through ordinances rather than the normal procedure of law making in the Parliaments. Whether the first Prime Minister or the present one, ordinance is a common means for all.

Figure No.01- Lok Sabha wise Ordinances:



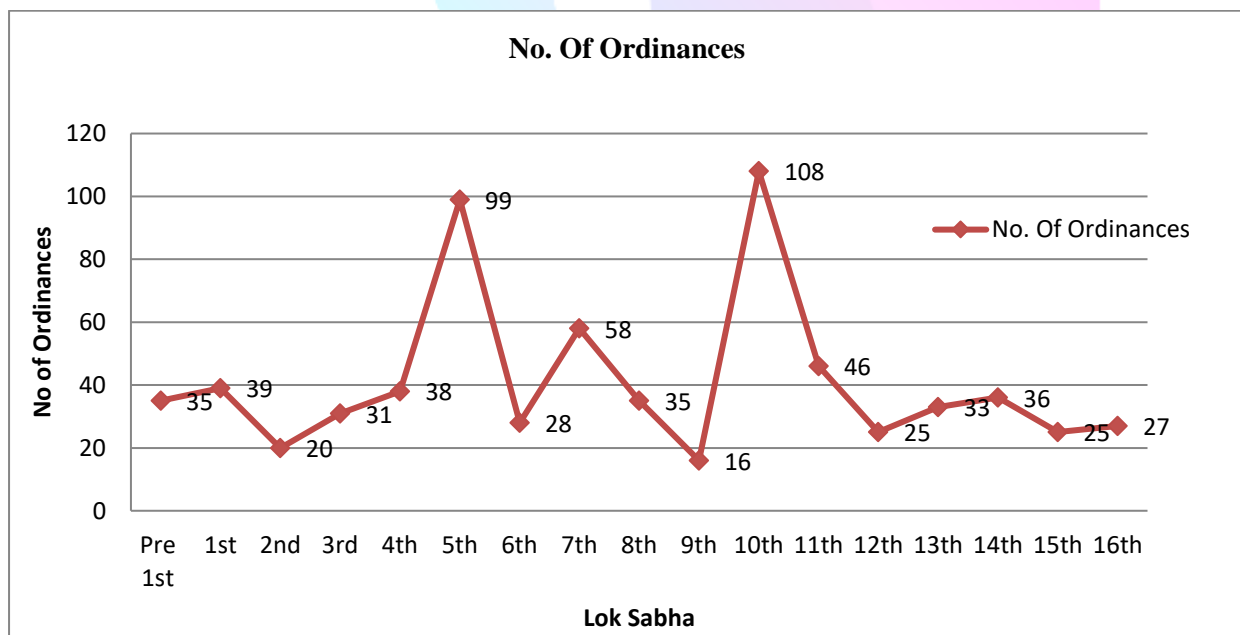
Source-Presidential Ordinances 1950-2017(Lok Sabha Secretariat, New Delhi -2015)

The figure above showed that Ordinance has been issued in all Lok Sabha by all the governments functioning at the center. The highest numbers of ordinances have been issued in 10th Lok Sabha i.e 108. In the 10th Lok Sabha, the Government was formed by the INC under the leadership P V Narasimha Rao. It was also the period which was responsible for the Economic Reforms in India. The figure displayed that in the 5th Lok Sabha the Ordinance has been used for the second highest, i.e. for 99 times. This period covers from the year 1971 to

1977 in which the INC had formed the Government under the leadership Mrs. Indira Gandhi. It was Mrs Gandhi who had imposed the National Emergency from 1975 to 1977 and the federal structure of India turned into a unitary one. Whereas in Rao Government the Economic liberalisation was the major event, for Mrs. Gandhi it was Emergency.

The lowest numbers of ordinances have been issued in the 9th Lok Sabha i.e.16 times and in the 2nd Lok Sabha it was 20. In the 9th Lok Sabh for the first time, a non-Congress Government was formed at the center in 1989. It was a coalition government which could not last long and in between 1989 -1991, two Prime Ministers occupied the chairs. The impact of Coalition politics which in returned brought political instability can be observed here. The 2nd Lok Sabha was chaired by a stalwart leader like Pandit Nehru from 1957-1962 where it has been used for 20 times.

Figure No-2- The Number of Ordinances from 1st Lok sabha to the 16th Lok Sabha:



Source-Presidential Ordinances 1950-2014(Lok Sabha Secretariat, New Delhi -2015)

The figure above shows that in the 5th and 6th Lok Sabha Ordinance has been issued higher than all. But the graph shows that except the 10th Lok Sabha, the issue of Ordinance has been considerably decreased. In 10th Lok Sabha, the Economic Reform was carried out and the Rao Government was in the Power. The impact of the Economic Reform can be seen clearly during this period in making the ordinance which is highest ever in Indian politics. But after

that, the Coalition era started and the importance of the regional parties increased in the formation of the central government. The effect of the coalition politics in Post-1990 period in the making of Ordinance is clearly visible from the above figure which has more or less decreased. But the truth is that Ordinance has always been issued by the Central Government to make law.

Table No-02- Ordinances form 1952-1990:

Year	Number of Ordinances Promulgated	Year	Number of Ordinances Promulgated
1952	9	1953	7
1954	9	1955	7
1956	9	1957	6
1958	7	1959	3
1960	1	1961	3
1962	8	1963	--
1964	3	1965	7
1966	13	1967	9
1968	13	1969	10
1970	5	1971	23
1972	9	1973	4
1974	15	1975	29
1976	16	1977	16
1978	6	1979	10

1980	10	1981	12
1982	1	1983	11
1984	15	1985	8
1986	8	1987	10
1988	7	1989	2
1990	10	----	---

Source-Presidential Ordinances 1950-2014(Lok Sabha Secretariat, New Delhi -2015)

The table above reflects that in the first phase of 1952 to 1990 it has been used for 393 times to make central legislation in federal set up of India. In this phase of 39 years, the average legislation through Ordinance is 10.07 per year which is slightly lower than the total average which is 10.43 per year.

In the 5th Lok Sabha, i.e. from 15.03.1971 to 22.3.1977, it has been used for a maximum of 99 times. This was the period when the National Emergency was imposed in India. For the first time, a non-Congress Government was formed at the Center in the year 1977 which lasted up to 1979 under the leadership of Shri Morarji Desai of Janata Party. During this period the Ordinance has been issued for more than 30 times.

Again in 1989 to 1990 Janata Dal formed the Government at the Center under the leadership of Shri V P Singh. In the 343 days of this Government, this provision has been used for less than 10 times. It means out of 393 times the Ordinances used in this period, except approximately 40 times, rest are issued by the Congress Government.

The table below shows that in the Second phase from 1991 up to 2016, the promulgation of Ordinance has been issued for 306 times in 26 years. It means an average of 12.24 per annum. The post-1990 phase better known as the end of Congress dominion in central politics is a period of turmoil due to coalition experiment. The Ordinances during this period have been promulgated more than the pre-1990 phase of Indian politics.

During the 10th Lok Sabha from 20.06.1991 to 16.05.1996, it has been used highest ever all periods, i.e.108 times. This was the period when the Congress was at the Center under

the leadership of Shri P V Narasimha Rao who is also responsible for the new economic reform of the Indian economy.

Another interesting fact is that from 1996 up to 1999 there was instability at the Center. Four Prime Ministers namely Shri A B Vajpayee, Shri H D Deve Gowda, Shri I K Gujral and again Vajpayeeji led the Central governments and the Ordinance has been used for 71 times, 46 times during 12th Lok Sabha and 25 times in 13th Lok Sabha. During the present Lok Sabha, it has already been issued for 27 times till 2016. The Coalition politics has played its role which can be observed from the above facts.

In the Second phase from 1991 up to 2016, the promulgation of Ordinance has been issued for 306 times. It means an average of 11.76 per annum. It is higher than both the total average as well as the pre-1990 period. The post-1990 phase has ended the dominance of Congress in central politics. It is also a period of political turmoil due to the coalition experiment.

Table No 03 shows report form 1990-2016:

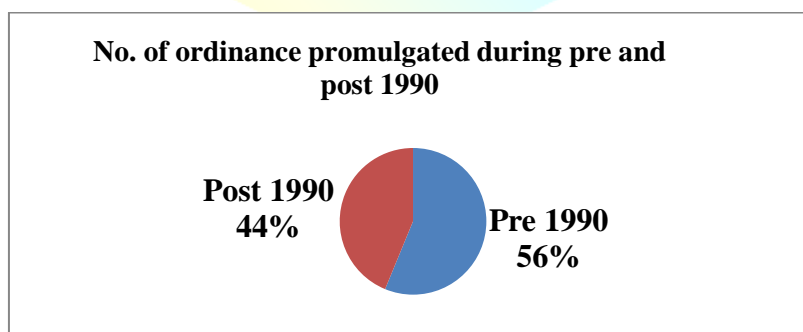
Year	Number of Ordinances Promulgated	Year	Number of Ordinances Promulgated
1991	9	1992	21
1993	34	1994	14
1995	15	1996	32
1997	31	1998	20
1999	10	2000	5
2001	12	2002	7
2003	8	2004	8

2005	4	2006	3
2007	8	2008	8
2009	9	2010	4
2011	3	2012	1
2013	11	2014	9
2015	12	2016	6

Source-Presidential Ordinances 1950-2014 (Lok Sabha Secretariat, New Delhi -2015)

The Ordinance has been promulgated more than the pre-1990 phase of Indian politics. During the 10th Lok Sabha from 20.06.1991 to 16.05.1996 it has been used highest ever, i.e.108. This was the period when the Congress was at the Center under the leadership of Shri P V Narasimha Rao who is also responsible for the new economic reform of the Indian economy. Another interesting fact is that from 1996 up to 1999 there was instability at the Center. Four Prime Ministers namely Shri A B Vajpayee, Shri H D Deve Gowda, Shri I K Gujral and again Vajpayeeji led the Central governments and the Ordinance has been used for 71 times, 46 times during 12th Lok Sabha and 25 times in 13th Lok Sabha. During the present Lok Sabha, it has already been used for 27 times till 2019. From the above facts it is clear that in all Lok Sabhas, the Central Governments have used the ordinances for making of laws without facing the normal procedures of the Indian Parliament.

Figure No 3 - No of Ordinances issued in pre and post-1990s:



Source-Presidential Ordinances 1950-2014(Lok Sabha Secretariat, New Delhi -2015)

The pie chart clearly shows that Ordinance has been issued more in the Pre-1990 period than the Post 1990 phase. It is because the Pre-1990 period consists of 393 times in 39 years whereas the Post 1990 period is of 306 times in 26 years. But the average of the Pre-1990 is less than the average of the Post-1990 period. However, it is clearly observed from the above facts that the ordinances have been used vehemently by all the central governments to make laws by passing the normal procedure of the Parliament. It violates the federal principles where both the center and the states play a key role while making law. One of the major reasons for the government issuing ordinances is because they do not enjoy majority in the Rajys Sabha. If it is not passed within six weeks from the start of the next Parliament, it lapses, but can be reissued through a so called repromulgation. Repromulgation of ordinances raises questions about the legislative authority of the Parliament as the highest law making body. On April 21, the Union cabinet headed by Prime Minister Narendra Modi passed the Criminal Law (Amendment) Ordinance, 2018 which allows courts to award the death penalty to those convicted of raping children below 12 years of age. The ordinance was promulgated by President Ram Nath Kovind a day later but was promptly challenged in the Delhi High Court which asked the centre whether it had carried out any scientific assessment before arriving at the conclusion that the death penalty would act as a deterrent against rape. The Delhi High Court bench of Acting Chief Justice Gita Mittal and Justice C Hari Shankar posed a slew of other questions to the centre, raising doubts over the legal soundness of the ordinance, before asking: "Have you been to the root cause of the crime, or is it (the ordinance) the effect of the public outcry?"^{vii}

Conclusion:

In the 1986 Supreme Court judgment of D.C. Wadhwa vs. State of Bihar, where the court was examining a case where a state government (under the authority of the Governor) continued to re-promulgate Ordinances, the Constitution Bench headed by Chief Justice P.N. Bhagwati observed: "The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be "perverted to serve political ends". It is contrary to all democratic norms that the Executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an Ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time."

The inability of the Government to pass the Bill has led to a large number of Ordinances have been issued in each passing year. In fact, the average of post-1990 era has been increased than the average of pre-1990 period as well as total average. Whereas the total average is 8.52, the pre 1990 it is 10.34 and in the post 1990 it is 12.25. It means the Governments at the Center have relied more on Ordinance than the Law passed in the House. This violates the constitutionalism, constitutional culture, and ethics of Indian Federal Structure. The above facts reflect the centralising tendency of the Indian federal system. On January 20 the President Pranab Mukherjee while answering questions during address to Central varsities and research institutions in New Delhi had remarked “Ordinance route cannot be taken, should not be taken for normal legislation”.^{viii} Therefore, there is no such provision called ordinance in federal countries like America, Canada and Australia. It means ordinance is not a free legal right of the executive to fulfil the wants of the central government bypassing the Parliament. It should be used in emergency situation when the Parliament is not in session and that to it must be rational.

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ⁱⁱ Punchi Commission Report on centre-state relations, Vol-I, Mar 2010,pg-90

ⁱⁱⁱ Article-123(1)

^{iv} Article-123(2)

^v Article-123(3)

^{vi} The Hindu, August29,2016.

^{vii} www.indialegallive.com/special-story/ordinance-raj-misuse-of-a-constitutionally-granted-right retrieved on 2.7.19

^{viii} The Hindu, August29, 2016.