

What is the Expiry Date on an Ordinance?

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Normally when one speaks of expiry dates, they do so in the context of dairy products or gift certificates. But what is the expiry date on an ordinance? An ordinance is an often used, but little discussed, practice in some South Asian jurisdictions. It is a legal instrument that permits the Executive to pass legislation on a temporary basis when the legislature is not sitting. The theory is that extenuating circumstances sometimes necessitates swift governmental action. When such events occur, it is critical that the government has the necessary tools at its disposal to govern effectively and expeditiously.

However, the expectation is that once the legislature resumes sitting the ordinance will be reviewed by the elected representatives so that it can either be passed as an Act or permitted to die a natural death. For example, Article 123 of India's constitution, which authorises the President to promulgate ordinances during a parliamentary recess, states that ordinances shall cease to operate under any one of four circumstances: it can be withdrawn by the Executive; the Legislature can transition it into an Act; it will automatically expire six weeks after both Houses of Parliament reassemble; or it can be disapproved by the Legislature before the end of that six week window. Since Article 174 enjoins that the Legislature shall meet at least twice in a year, but that six months shall not intervene between sittings, the maximum life of an Ordinance could never exceed six months plus six weeks (i.e. seven and a half months).

Similarly, Pakistan has almost identical wording under Article 89 of its Constitution. The only difference is that the "expiry date" on a Pakistani ordinance is four months. Thus, it would appear that the expiry date for an ordinance in Pakistan and India is at maximum four months and seven and a half months, respectively. However, the practice in Pakistan does not accord with the theory of its Constitution.

The reality is that the government of Pakistan is not averse to using ordinance powers to continually renew controversial and undemocratic edicts. For instance, in 1990 alone, the Human Rights Commission of Pakistan (HRCP) documented 18 ordinances that were introduced by the Sharif government. The Director of the HRCP was quoted in August 1991 as stating that "something has gone terribly wrong when a law concerning a citizen's life and death, even a constitutional amendment, can be clumsily drafted by some anonymous functionary, can be privately considered by a few individuals, and can be enforced in a few minutes, without the public getting any chance to discuss it."

And when the issue is not the re-promulgation of ordinances *per se*, the concern is that the Constitution is amended in order to validate any ordinance or other anti-democratic instrument passed during dictatorial rule. For example, the 8th Amendment to the 1973 Constitution was passed in 1985 and it sanctioned any and all conduct of General Zia's regime during the preceding 8-year period. This included the extremely controversial Hudood Ordinance, initially promulgated in 1979. The 8th Amendment is clear: a resolution of the National Assembly is required in order to invalidate any ordinance passed during that 8-year period.

Similarly, the 17th Amendment effectively did the same for General Musharraf. Receiving Presidential Assent on December 31, 2003, the 17th Amendment retroactively validated all of the amendments Musharraf had made since he assumed power in 1999. When ordinances, and constitutional manipulation, are used to put in place sweeping and draconian laws indefinitely, without any sort of review conducted by elected representatives, then that process needs to be re-evaluated if the desire is to live in a society that vaguely resembles a democracy.

While ordinance powers are used more frequently in Pakistan, they are no stranger to Indian politicians. However, the recent use of ordinance powers in India has been comparatively modest and respectful. For example, in the immediate aftermath of 9/11, the Vajpayee government passed the *Prevention of Terrorism Ordinance* (POTO). Although many commentators legitimately questioned the necessity for such excessive powers, the utilisation of an ordinance at that time was very consistent with its intended use under Article 123 of the Constitution. A pressing and urgent issue had arisen when the Legislature

was not sitting, and it needed to be addressed immediately. Once Parliament had reconvened, and within the prescribed time period, POTO transitioned into the *Prevention of Terrorism Act* (POTA). Whether one approved of POTA or not is irrelevant. The fact is that an undemocratic ordinance was ultimately subjected to a review and debate by elected representatives. Although the quality of that review is moot, what is inarguable is that a constitutional process was followed.

The value of what transpired at the beginning of 2002 is particularly striking when compared to prior practice. Article 213 of the Indian Constitution is very similar to Article 123; it provides the Governor of a State to promulgate ordinances when circumstances warrant such an intervention. Unfortunately, some states have abused this power. The most notable example was Bihar in the 1980s.

At that time the Bihar government passed ordinances to address issues relating to forestry, education and infrastructure. However, instead of passing an Act to codify the relevant provisions, the government would simply let the ordinance expire and then re-promulgate it. In some instances this went on for up to 6 years. Since there was no intention to ever subject the Executive-made ordinances to legislative scrutiny, this is a perfect example of how ordinance powers can be abused. In fact, the conduct of Bihar was so egregious, the issue culminated at the Supreme Court of India in 1987. In *D.C. Wadhwa vs. State of Bihar*, the court ultimately held that the Governor “cannot assume legislative function in excess of the strictly defined limits set out in the Constitution because otherwise he would be usurping a function which does not belong to him”. Consequently, the court ruled that the Executive in Bihar had acted contrary to the Constitution, and therefore its ordinances were held to be improper and invalid.

As a result of *D.C. Wadhwa*, it remains a settled matter in India that there must not be an Ordinance Raj in the country. This is exemplified in how POTO was treated and subsequently entrenched in the form of proper legislation. Unfortunately, the same cannot be said of Pakistan. In the absence of a properly empowered National Assembly, and the propensity of Pakistani Generals to retroactively validate undemocratic instruments, it appears that the Ordinance Nawab is here to stay until “consultation” and “debate” are no longer regarded as dirty words.