Rule of Ordinance in the Islamic Republic of Pakistan

A Question of Arbitrary Legislative Endowment

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Abstract

The Constitution of the Islamic Republic of Pakistan empowers the federal and provincial Governments via the President and the Governors of the respective provinces to enact the primary legislation independent of the representative legislatures in the form of Ordinances. However, the resulting enactment remains in force for a few months, and notionally, must be promulgated only under the circumstances of urgent necessity and when the national legislature is not in session. Yet, owing to the vagueness of the text of the relevant Constitutional provisions, the scope of this legislative authority has much potential for abuse, and it has so been alleged too, in numerous Constitutional petitions filed from time to time in the superior courts of Pakistan seeking the judicial review of the promulgating action on the ground of malafide etc. But the judicature in Pakistan has largely abstained from exercising its authority to keep itself from being stigmatized from the usual aftermath of the judicial pronouncement on questions of political fiat. Resultantly, the natural democratic right of the illiterate and ignorant people of Pakistan to be governed by laws made by the designated representative legislature is persistently being jeopardized. In this view of the matter, on the basis of an empirical study of the Ordinance and the emergency legislation in the United Kingdom, and the ensuing principles of good governance and democratic norms, this article argues that the Constitutional authority of the Governments in Pakistan to enact primary legislation by way of promulgating Ordinances is an arbitrary legislative endowment, and entails a review by a truly representative, legitimate and competent Constituent Assembly.

Keywords: legislative authority of government in Pakistan, ordinance in English law, ordinance in British India, ordinance in Pakistan, emergency legislation by ordinance in Pakistan.

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A. Introduction

The Constitution of the Islamic Republic of Pakistan, 1973, provides a federal Parliamentary structure of the State, comprising one federal and four provincial legislatures and Governments, and several federally and provincially administered tribal areas. Each legislature has the authority to legislate on the subject entrusted to it under the Constitution, and different Governments are under Constitutional obligation to perform their functions in accordance with the mandate given to them under the legislation enacted by the respective legislature and the Constitution. However, in case the relevant legislature is not in session and the circumstances exist that render it necessary to take immediate action, the Constitution empowers the President of Pakistan and the Governors of the Provinces to invoke the powers of the respective legislature to provide for the required mandate to enable the executive machinery to keep up with its functions in accordance with the norms of rule of law. In this respect, the relevant legislative text reads as under:

> The President may, except when the National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require.[1]

Perusal of the above quote from the Constitution reveals that the Ordinance can be promulgated only if the promulgating authority is satisfied. However, in view of Articles 48 and 105 of the Constitution of Pakistan, 1973, in performance of their functions, the President of Pakistan and the Governors of the Provinces are to act on the advice of the Prime Minister or the Chief Minister or the respective Cabinet. And for that matter, the question whether the President has any authority to refuse to promulgate the Ordinance at the desire of the Government has never arisen. So in effect, it is the Government itself enacting to regulate its affairs independent of the representative legislature. Moreover, this ensuing legislative instrument remains in force for a maximum period of 4 months,[2] and if not withdrawn or expired in the meanwhile, it is to be presented as a Bill in the next session of the representative legislature, and is termed an 'Ordinance'.

In this respect, an analysis of the relevant Constitutional provisions reveals that the scope of the promulgating authority has much potential for abuse, and has so been argued in different Constitutional petitions filed from time to time in the superior courts of Pakistan seeking the judicial review of this executive's legislative action on the ground of malafide etc. However, so far the courts in Pakistan have mostly held the question of the satisfaction of the promulgating authority as

1 *See* Art. 89 of the Constitution of the Islamic Republic of Pakistan, 1973. For the respective authority of the Governor of a Province *see* Art. 128 of the Constitution.

2 In case of Ordinance promulgated by the Governor of a province, the maximum life span of the enactment is 3 months. *See* Arts. 89 & 128 of the Constitution of the Islamic Republic of Pakistan, 1973.

to the existence of emergency circumstances to be non-justiciable.[3] Resultantly, there remains no judicial check on the authority of the Government to directly legislate on controversial pieces of legislation that cannot be conveniently processed through the representative legislatures. In this respect, it is pertinent to note that there is no ostensible limit on the power of the Government to re-enact a piece of legislation in case of disapproval by the legislature or after expiry of the period of the Ordinance, and one of such Ordinances, titled Criminal Law (Second Amendment) Ordinance, 1990, was persistently re-enacted 21 times within a span of almost 7 years.[4] On the other hand, owing to the colonial legacy of the oppressed system of governance and illiteracy, the majority of the electors are far behind the realization of their right to be governed by the laws exclusively made by their elected legislature having the sole prerogative to represent their will. Similarly, as a matter of pity, the hereditary generations of the members of the legislature and the constituent assemblies have taken this jeopardy of the rights of their ignorant electorate for granted and have served the cause of the individual and sovereign leaders of major political parties and regimes. Resultantly, the natural and democratic right of the oppressed citizens of Pakistan to be governed by the laws made by the designated representative legislature is persistently being jeopardized. In this view of the matter, while analyzing the Ordinance and emergency legislation in the United Kingdom in an empirical context and in the light of the resulting norms of democracy and good governance, this article argues that the Constitutional authority of the Governments in Pakistan to enact primary legislation by way of promulgating Ordinances is an arbitrary legislative endowment and entails review by a truly representative, legitimate and competent Constitutional Assembly.

The reason for selecting the jurisdiction of the United Kingdom is not unobvious; however, for the sake of completeness, suffice it to state that (1) the authority to ordain by Ordinance as a tool for urgent legislation in Pakistan is colonial legacy, inasmuch as, in order to deal with emergency situations, the same power has remained vested in different Governors and Governor Generals under most of the statutes of the UK Parliament enacted to run the affairs of the Crown Government in British India, and (2) like many other Commonwealth countries, various principles and theories of English law have remained the dominating fea-

3 However, in a recent case titled *Mobashir Hassan and Others v. Federation of Pakistan and Others PLD* 2010 SC 265, (para. 111) the Supreme Court of Pakistan has pointed towards the possibility of exercise of juridical review of the legislative action of the Government. Yet, in this respect, the apex Court seems be inspired by a case of foreign jurisdiction titled *State of Rajasthan and Others v. Union of India AIR* 1977 SC 1361, (1415). And for that matter, an analysis of this foreign case reveals that while articulating the rule of judicial review of exercise of Ordinance making authority, Bhagwati J. (1415) has relied upon the *Emperor v. Benoari Lal Sarma and Others AIR* (32) 1945 P.C. 48, (50). However, perusal of the case of *Benori Lal Sarma and Others* reveals that it has, in effect, upheld the case of *Bhagat Singh v. Emperor AIR* (Vol. 18) 1931 P.C. 111, (112) and had rejected any scope of judicial review of Ordinance making authority of the Governor General of India.

4 *See* for further details: *Riza Ahmed v. The State*, 1998 *Supreme Court Monthly Review* 1729, (1736).

ture of the legal system of Pakistan, be it the Constitution or other forms of law.[5] So in order to test the veracity and authority of the proposed argument of the article, it is imperative to visit the history of the emergence and development of the concept of Ordinance and emergency legislation as understood in the English law. However, as will be seen in the course of the following analysis and discussion concerning the growth of the English legislature in its present form firmly based on rule of law and sovereignty of Parliament, at one point of time, there had been serious concerns regarding the validity of emergency legislation by way of Ordinance of the monarch. However, later on, this legislative mechanism was applied by the British rulers to run a dominion and, unfortunately, has been followed by the present rulers of Pakistan to run a democracy in blatant disregard of the popular norms of democracy and good governance.

B. History of Ordinance in English Constitutional Law

Before going any further, it will be appropriate if the meaning and scope of the term Ordinance in the context of leading norms of Constitutional law are analyzed forehand. In this respect, a limited analysis of the use of the term Ordinance in different jurisdictions reveals that it has different connotations in different jurisdictions. For that matter, to start with an analysis of different law dictionaries as to the meaning of the term Ordinance, it reveals that it owes its genesis from the expression 'to Ordain'. Yet the authority to ordain essentially implies the power to command, and one who has the power to command has the authority to Ordain. And with the emergence of Constitutional law in its popular democratic sense, the authority to ordain laws, by now, stands vested in the assembly of some of the people chosen by the sum thereof. In the modern world of Constitutional jurisprudence, the legislation ordained by the majority vote of this representative assembly, subject to other conditions prescribed by the relevant Constitution, is termed an 'Act' and mostly only a kind of delegated or subsidiary legislation, made under such sub-Constitutional enactment, *i.e.* 'Act', is commonly called an 'Ordinance', for example, Municipal law in the United States and rules of University in the United Kingdom etc. However, contrary to that, this term has entirely different connotations in India,[6] Pakistan,[7] Malaysia,[8] Bangladesh[9] etc., formerly, the British colonies. In these jurisdictions, the term 'Ordinance' is mostly used to denote a limited time emergency legislation made under the Constitution and co-ordinate with the 'Act', as opposed to subsidiary or

5 However, by now, the Islamic jurisprudence has also gained importance in the legal system of Pakistan; however, the Constitution of Pakistan has remained saved and still seeks inspiration from the secular theories of the Constitutional law. *See* for detailed analysis of role of Islam in legal system of Pakistan: M. Lau, *The Role of Islam in the Legal System of Pakistan*, London Leiden Series on Law, Administration and Development, Vol. 9 (1st edn), Martinus Nijhoff Publishers, Boston, The Netherland, 2006.

6 *See* Arts. 123, 213, 239B of Constitution of India, 1950.

7 *See* Arts. 89, 128 of Constitution of Pakistan, 1973.

8 *See* Art. 150 (2B) Constitution of Malaysia, 1957.

9 *See* Art. 93 of Constitution of Bangladesh, 1972.

delegated legislation enacted under sub-Constitutional enactment. So the term Ordinance has different connotations in different parts of the world; yet it is used to denote a limited emergency legislation in Pakistan and a few other former British colonies.

C. Ordinances of the Crown in English Constitutional Law

In the English legal system, before the emergence of the idea of democracy in its present popular sense, the power to command and the consequential authority to ordain laws had been vested in the King as his Royal Prerogative. At that time ordinance, statute, act and charter were common connotations for the different promulgations ordained by the King and, as such, were used jointly and separately to denote the relevant laws. For example, "Ordinance Separating the Spiritual and Temporal Courts"[10] was the term used to designate a related law of William I. Similarly in 1188, a law was titled "Ordinance of Saladin Tithe"[11] in the reign of Henry II. The famous Magna Carta of 1215 by King John was termed 'Charter' of Liberties.[12] More so, during the reign of Edward I, the "Statute of Westminster the First"[13] of 1275 was specified as 'acts of the King' in the same statute. Similarly, in 1283, "The Statute of Merchants, or of Acton Burnell"[14] of Edward I was referred to as 'ordinance and act' therein. Moreover, in 1307, the 'Statute of Carlisle' of Edward I was also mentioned as 'ordinances and statutes' three times in the last paragraph of its text.[15] So in early centuries of the English legal system, the term Ordinance was not distinguishable from other nomenclatures used to denote the Royal enactments.

D. Ordinance Distinguished from Statute

An analysis of the early Constitutional history of the United Kingdom reveals that till the time of legislation by the King to the exclusion of the compulsory consent of his royal council, the term ordinance along with others was invariably used to denote a law made by the King. However, the gap between the 'Ordinance' and other terms widened when the clergy of peerage started with their movement to restrict the Royal Prerogatives to legislate. The benchmark to distinguish the ordinance of the King from a statute on the roll of the Parliament can be seen in

10 *Select Documents of English Constitutional History*, G.B. Adams & H.M. Stephens, (1st edn), 1901 reprint 1910, The Macmillan & Co., London, p. 1.
11 *Ibid.*, p. 27.
12 *Ibid.*, p. 42.
13 *Ibid.*, p. 68.
14 *Ibid.*, p. 72.
15 *Ibid.*, p. 89.

the proceedings of the House of Commons in May 1354[16] while confirming certain ordinances:

> 16. AND so the said commons prayed in this Parliament, that the *ordinances* of the staple and all the other *ordinances* made at the last council held at Westminster –, which they had considered with good deliberation and counsel and which seemed to them good and profitable for our lord the king and all his people, *be affirmed in this Parliament* and held *for a statute to endure forever*. To which prayer the king and all the great men unanimously agreed, as at all times, that *if anything is to be added it shall be added, or if anything is to be repealed it shall be repealed in Parliament, whenever it shall be necessary, and in no other manner.*[17]

In this way, the term 'Ordinance' of the King was distinguished from the term 'Statute' of the Parliament in English Legislative History for the first time. More so, not only was the Parliament's wish to affirm the proclamation of the King by way of Ordinance to bring the same on the statute roll of the Parliament conceded but, besides, any amendment to the latter too could have been made with the consent of the House. Moreover, the validity of the Ordinance as law for the interim period, *i.e.* till the same was brought on the statute roll, was not yet disputed because at that time the Parliament had no right to initiate the process of legislation. It was only the King who, besides being the fountain of justice and executive head of the state, was the sole legislature of the state as well. Thus, the presentation of the proclamation of the King to the Parliament was just a process to transform and put the same onto the roll of statutes of the Parliament so as to give an impression that the said laws were made by the common Parliament. That is, more precisely, the 'Ordinance' of the King was taken as an arrangement of legislation leading to 'statute' as on the roll of Parliament. This can also be firmly confirmed by the discussion of the Parliament on 'the relative authority of statute and ordinance' in 1363 on an ordinance concerning apparel.[18] In this discussion too, the Parliament expressed the view that the law under discussion regarding apparel should first be enacted by way of ordinance of the King and not by a statute of Parliament so that the same could be amended suitably in the next Parliament and then brought on the Parliament's statute roll. Hence, it was in the mid-

16 Prior to the aforesaid development, the Lord Chief Justice had already declared on 28 April 1354 in the meeting of Parliament that the establishment of the staple within the realm and the confirmation of Ordinances made about the staple in the last Parliament, was one of the three objects of the then meeting of the Parliament. *See Cobbett's Parliamentary History of England*, Vol. 1, 1066-1625, Edition (1806), (Hansard) R. Bagshaw, London, p. 122. Moreover, the aforesaid proceedings of May 1354 were a result of protest by the Parliament against the legislation by ordinance about six months earlier, in October 1353. Adams & Stephens 1910, p. 126.

17 *Ibid.*, p. 127 (emphasis added).

18 "–. And they said that it would be well to enact these things by *ordinance and not by statute*, so that if anything needed to be amended it could be amended in the next Parliament, and so it was done."; English Historical Documents; A.R. Myers (1st edn), 1969, Eyre & Spottiswoode, London, p. 444; Select documents of English Constitutional History, S.B. Chrimes & A.L. Brown (1st edn), 1961, Adam & Charles Black, London (emphasis added).

dle of the 14th century that the ordinance and statute were totally distinguished from each other in a way that the former was the promulgation of the law by the King and the latter confirmed that the Ordinance has been affirmed by the Parliament as well.

E. Ordinances of the Parliament

Turning the pages of history of English Constitutional law reveals that the use of the term 'Ordinance' was not confined to the unilateral enactment of the Crown alone; however, there have been two sets of events when the enactments of the clergy of the peers in the 14th century and those of the opponents of the King during the English civil war in the 17th century were termed Ordinances, but they could not stand the test of time and were revoked and considered void.

Firstly, in 1311, King Edward II, owing to his governing weaknesses, had to assent to the demand of the Parliament aiming to transfer his powers vis-à-vis 'care of well governing the kingdom as well as his domestic affairs' to certain lords appointed by the Parliament. In order to achieve the same, a commission comprising 7 bishops, 8 earls and 6 barons was appointed by the Parliament to propose the regulations.[19] These 21 persons were called the 'Lord Ordainers', and their proposed regulations were termed 'Ordinances of 1311'. These Ordinances were later on assented to by the King,[20] but were revoked in 1322 after the death of the leader of their architect, namely Thomas, Earl of Lancaster and Leicester .[21]

Secondly, during the English civil war, there was once again a legislative attempt to limit the powers of the King regarding control of the forces etc., and the refusal of King Charles I to assent thereto laid the foundations for the English civil war. So during the Civil War, the enactments passed by the (1) Long Parliament comprising the House of Lords and the House of Commons during 1642 to 1648-49; (2) House of Commons alone, during January 1649 to April 1653, when the long Parliament was expelled by Cromwell and Army, and the office of the King and the House of Lords were abolished and (3) Protector and his Council from December 1653 to September 1654 were also termed the 'Ordinance'.[22] Yet all these enactments during the Civil War were later considered void for want of the King's consent.

From the above (brief) discussion, it is clear that the term Ordinance, amongst others, was used to denote the enactments of the Crown; however, it was distinguished in the 14th century from the other nomenclatures to mean an enactment of the Crown short of the then parliamentary approval. Yet it has also been used to illustrate the unilateral legislative action of the Parliament in the 14th and 17th Centuries, but was later revoked and considered void, respectively.

19 *Cobbett's Parliamentary History of England*, Vol. I, 1807, London, p. 58.

20 *Select Documents of English Constitutional History*, edited by S.B. Cherimes & A.L. Brown (1st edn), 1961, Adam & Charles Black, London, p. 11.

21 Adams & Stephens, 1910, p. 96.

22 Acts and Ordinances of the Interregnum 1642-1660, collected & edited by C.H. Firth & R.S. Rait for Statute Law Committee, Vol. III, London, pp. iii-v.

However, with the transfer of legislative power from the King to the Sovereign Parliament, the use of the 'Ordinance' of the King also became a closed chapter.

F. Emergency Legislation in English Constitutional Law

In English Legislative History, like ordinary legislation, the power to legislate in emergency circumstances has also undergone successive phases of historical proceedings. However, in travelling from the monarch to the Sovereign Parliament, this legislative endowment had dropped one step further to the domain of the representative Government under the authority of the Parliamentary enactment.

In earlier times, the King, in English law, always had the authority to ordain valid laws in ordinary as well as emergency circumstances: the most popular example is the Ordinance of the Star Chamber for the censorship of the press. However, it was only in 1535 that, for the first time during the reign of Henry VIII, a formal Statute of Proclamation was passed by the Parliament to grant general legal sanction to the royal proclamation issued for good and politic order and for the good governance of the realm in case of urgent necessity only. Yet, there was no need for any such statutory grant inasmuch as, on this point, the judges had already clarified that, in the absence of any relevant statute, the King had the prerogative to issue proclamation.[23] But, by virtue of this statute, the King was held bound by the advice of his council.[24] The cumulative effect of this statute of proclamation was that the Ordaining power of the King to issue proclamation in emergency circumstances was circumscribed, from the Royal Prerogative to the delegated and enacted sphere for the first time in English Legislative History. However, like the Ordinances of the Parliament (as discussed in earlier paragraphs), this statute of proclamation (also known as 'Lex Regia' of England) too could not stand the test of time and was soon repealed, in 1547,[25] keeping the Royal Prerogative to issue proclamations in case of any emergency. Yet, this battle continued between the monarch and the Parliament over the right to ordain in emergencies with the force of law with or without the consent of Parliament.

However, the emergency legislation remained a part and parcel of the Royal Prerogative till the days when events started erupting that later culminated in the English Civil War. In this context, perusal of different historical documents reveals that the enactment of King Charles I, extending the application of emergency tax of 'ship money' to all counties of England, as opposed to the traditional application of the relevant statute to the coastal towns alone, happened to be the

23 A History of England Vol. 4 (England Under the Tudors), Founder Editor Sir Charles Oman (Vol. 4 by G.R. Elton (2nd edn), 1974, London, p. 169.

24 English Historical Documents, Vol. V (1485-1558), Edited by C.H. Williams, 1967, Eyer & Spottiswoode, London, p. 521.

25 1 Edw VI c. 12.

last major emergency legislation of the King in exercise of his Royal Prerogative.[26] According to this enactment, the King required all the counties of England and Wales to provide ships along with the charge for naval defence. And as a natural consequence, the King also apprehended litigation in the Courts of Westminster and in order to avoid inconvenience and save time in litigation, His Majesty had also sought the opinion of judges as to his exclusive authority to appreciate the circumstances endangering the defence and safeguard of the realm and to provide for appropriate means to prevent and avoid such danger.[27] The judges answered in the affirmative in favour of the subjective satisfaction of the King to provide for in emergency accordingly.

However, a few years later, on 1 December 1640, the Parliament resolved to declare the opinion of the Judges in the Ship Money case to be against the former resolutions and laws of the realm as well as liberty and right to property.[28] On the other hand, a few days after the aforesaid resolution (on 10 December 1640) ostensibly as a matter of bargain, the Parliament granted two subsidies for relief of the King's Army and Northern Countries after furious speeches.[29] Resultantly, the King assented to the Parliament's Bill to declare the opinion of the Judges in the Ship Money case to be contrary to the law. [30]

After the Act of 1640, it was confirmed that the King has no power to impose tax in case of emergency of war without the consent of the Parliament. However, a few years later, the essence of the same was violated by 'Oliver Cromwell' in his

26 The Trial of John Hampden, Efq; (Of Stoke-Mandeville in the County of Bucks) In the Great Case of Ship Money between His Majesty K. Charles I. and that Gentleman: also Mr. St. John's speech in the House of Lords, 7 January 1640, concerning Ship Money, with Mr. Waller's speech to the House of Commons, 22 April 1640, on the same subject, and his speech – in Parliament at a Conference – on the exhibiting articles by the Commons, against Mr. Justice Crawley – To which is added, the trual of T. Harrison Clerk, for words spoken against Mr. Justice Huttton – accusing him of high treason etc., by John Hampden, 1719, London, p. 6.

27 "When the Good and Safety of the Kingdom in general is concerned, and the whole Kingdom is in Danger: Whether may not the King, by Writ under the Great Seal of England, command all the Subjects of this Kingdom, at their Charge, to provide and furnish Such Number of Ships, with Men, Victuals and Munitions, and for Such Time as he Shall think fit, for the Defence and Safeguard of the Kingdom, from Such Danger and Peril; and by Law compel the doing thereof in Case of Refusal or Refractoriness? And whether, in Such a Case, is not the King Sole Judge, both of Danger, and when and how the same is to be prevented and avoided?" *See* The Trial of John Hampden, Efq; (Of Stoke-Mandeville in the County of Bucks) In the Great Case of Ship Money between His Majesty K. Charles I. and that Gentleman: also Mr. St. John's speech in the House of Lords, 7 January 1640, concerning Ship Money, with Mr. Waller's speech to the House of Commons, 22 April 1640, on the same subject, and his speech – in Parliament at a Conference – on the exhibiting articles by the Commons, against Mr. Justice Crawley – To which is added, the trual of T. Harrison Clerk, for words spoken against Mr. Justice Hutton – accusing him of high treason etc., by John Hampden, 1719, London, p. 6.

28 Cobbett's Parliamentary History of England, Vol. II, 1625-1642, Edition (1807), (Hansard) R. Bagshaw, London, pp. 671-672.

29 *Ibid.*, p. 672.

30 16 Charles I, c. 14.

"Instrument of Government"[31] designed to run the affairs of the Government during the English civil war, when the Kingdoms of England, Ireland and Scotland were replaced under his rule with the name of 'Common Wealth of England'. The office of King was replaced by 'Lord Protector', assisted by a council of 13-21 members. Under Article VI of this instrument, no law shall be changed or made except with the consent of the Parliament; however, to meet an emergency endangering the peace and security, the Lord Protector was authorized to raise money by tax etc. by promulgating ordinances. Yet, like the statute of proclamation of 1539, there was still compulsion of consent of the majority of his executive council, and the laws could be made only to prevent disorder and danger at sea and land, to raise money for war, for peace and for the welfare of the forming nations. The term of such legislation was until the meeting of the first Parliament only and was signified as 'laws and ordinances'. However, this instrument, along with all other laws, was declared to be void for want of royal assent. It is a matter of record that the same kind of special authority was given to the Governor General in British India under the Act of 1786[32] and 1833[33] to legislate with the advice of his council in cases of high importance essentially affecting the welfare and the public interest as well as the safety, tranquillity and interest of British possession in India. More so, like the 'Lord Protector', the Governor General was under strict obligation to consult his council before legislation but at the same time distinguished inasmuch as he had the authority to overrule the majority opinion of his council.

After the end of the Civil War followed by the movement of 'sovereignty of Parliament' and emergence of the concept of the 'rule of law', it became wholly alien to run the affairs of the Government with any measure less than or beyond the Act of Parliament. However, in case of emergencies, the Governments in the United Kingdom continued with the practice of taking measures independently of the Parliament and without any statutory force by way of providing 'regulations'. In earlier times, these regulations were, afterwards, presented to the Parliament for indemnification, inasmuch as though they were enforced by the executive, yet they had no valid force of law in the absence of such indemnification. In this context, Alexander Wedderburn, the then Solicitor General, during the fierce debate in 1776 on the Bill to indemnify the act of employing foreign (Hanoverian) troops to Gibraltar and Port Manhon,[34] said that "if the measure was fit and beneficial to the public, it should be ratified, though it were against the law; but if unfit and inexpedient, should be condemned though the letter of law were with it".[35] Likewise, during the same debate the then Attorney General, Edward Thurlow, said that

31 Acts and Ordinances of the Interregnum 1642-1660, collected & edited by C.H. Firth & R.S. Rait for Statute Law Committee, Vol. II, London, p. 813; Select documents of English Constitutional History, S.B. Chrimes & A.L. Brown, 1st edn, 1961, Adam & Charles Black, London, p. 407.

32 26 Geo III, c. 16, Art. VII.

33 3 & 4 Will. IV c. 85; Art. XLIX.

34 Parliamentary History of England, Vol. XVIII, 1774-1777, Edition (1813), (Hansard) R. Bagshaw, London, p. 816.

35 *Ibid.*, p. 1004.

> ministers always do the things at their own peril when they overstep the law. It was therefore idle to insist on the legality or illegality of the measure; if they should act in a manner not warranted by the Constitution, Parliament were the judges, and would proceed to acquittal or condemnation, according to the nature of the case.[36]

However, it was not that the Indemnity Bill always went through in routine inasmuch as the above Indemnity Bill was passed in the House of Commons but failed in the House of Lords because of the legislative text of the preamble. As the relevant text explicated, there were doubts about the need for the Indemnity Bill after the Government had acted in emergency without legislation. However, the House of Lords, taking strong exception to this technique of undermining the supremacy of the Parliament, objected to the bill in toto.[37] In the following years, the legality of raising the troops by subscription[38] and private aid[39] and clothing of new levies[40] without the consent of the Parliament was also discussed with great concern in the House of Commons and House of Lords. Similarly, in 1794, a Bill to indemnify the introduction of foreign (Hessian) troops to Great Britain was brought in the Parliament but was also rejected.[41] On the other hand, a bill to indemnify the orders of the executive without the consent of the Parliament was passed by both the Houses in case of civil emergency. As it was in the last quarter of the 18th century, that for the sake of safety and preservation of his subjects from the danger of famine, the King gave orders for export of biscuits to Newfoundland, Nova Scotia, Bay Chaleur and Labrador; and, the measures and their implementation by the officials were afterwards indemnified by an Act of Parliament.[42] Similarly, in order to provide amnesty to the orders, licensees, ordinances etc. passed during World War I, the Indemnity Act, 1920[43] was also passed by the Parliament. In respect of the scope of amnesty under this Act, the Solicitor General, Sir E. Pollock, argued that

> An Indemnity Bill is not uncommon after a war, but this War has been waged in so many parts of the world, and has covered so wide an area, that it is nec-

36 *Ibid.*, p. 1332.

37 Parliamentary History of England, Vol. XXX, 1792-1794, Edition (1813), (Hansard) R. Bagshaw, London, p. 1425.

38 Parliamentary History of England, Vol. XIX, 1777-1778, Edition (1814), (Hansard) R. Bagshaw, London, p. 614.

39 *Ibid.*, p. 623.

40 *Ibid.*, p. 684.

41 Parliamentary History of England, Vol. XXX, 1792-1794, Edition (1813), (Hansard) R. Bagshaw, London, pp. 1363-1391, 1425-1437.

42 16 Geo III, c. 37.

43 10 & 11 Geo V, c. 48; *See also* National Fire Services Regulations (Indemnity) Act, 1944: 7 & 8 Geo VI, c. 35; House of Commons (Indemnification of Certain Members) Act, 1949; 12, 13 & 14 Geo VI, c. 46; Rev J G Mac Manaway's Indemnity Act, 1951: 14 & 15 Geo VI, c. 29; Price Control and Other Orders (Indemnity) Act, 1951: 14 & 15 Geo VI, c. 59; Town and Country Planning Regulations London (Indemnity) Act, 1970 (c. 57); National Insurance Regulations (Validation) Act, 1972 (c. 4).

> essary to include matters in it, perhaps, which would not have been necessary in the case of other wars, and perhaps some complexity might appear to have been introduced.[44]

In view of the above analysis concerning the practice of the emergency actions and the Indemnity Bills, it is clear that in the English constitutional history, where, on the one hand, by presenting the Bill of indemnity, the executive submitted itself to the sovereignty of the Parliament in a subordinate capacity, on the other hand, the excessive action of the Government encroaching on the domain of the legislature was essentially illegal, requiring indispensable indemnity from the Parliament and, till then, the same could not have binding legal force to succeed in a Court of law. However, subsequently, in order to meet both ends, the power to legislate with the force of the Act of Parliament in case of certain well-defined emergency situations was delegated by the Parliament to the executive Government with the compulsory condition of presentation of the same before the Parliament. However, this resulted in two important questions of jurisprudence in the field of legislation concerning legal authenticity of the actions, whether completed or not, under the emergency enactments of the Government and as to the effects of rights created or liabilities incurred thereunder, when the same is disapproved by the Parliament. Yet, these questions cannot be analysed in the given short space of this article; however, at this juncture, it would be indeed beneficial and appropriate to trace the emergence of the delegated legislation in the United Kingdom in the context of the legislative mandate to deal with cases of emergencies.

Like the history of the term 'Ordinance' and that of the practice of the Indemnity Bill, there are established records of emergence of delegated or subordinate authority to enact measures in order to deal with acute and well-defined emergencies necessitating immediate action. Generally, the principal enactments of the Parliament delegating the aforesaid legislative power can be divided into two forms. One deals with the conditions affecting the health of the subjects of the realm and the other pertains to the peace and security of the realm. For example, there is a succession of Acts, starting from the Act of 1710,[45] to provide for immediate measures dealing with the plague in the Balkans. Under this Act, Her Majesty was authorized to prescribe the manner of quarantine to be performed in times of infection. More so, under the Act of 1832,[46] the Parliament delegated the authority to the Lord President or to the Principal Secretaries of State in alternative to each other along with one or more members from the Lords or the Privy Council to make rules and regulations; in order to prevent cholera or spasmodic or Indian cholera in England and Scotland by declaring that "it may be necessary that Rules and Regulations should from time to time be established within Cities, –; but it may be impossible to establish such rules and Regulations by the Authority of Parliament with sufficient Promptitude to meet the Exigency of any

44 128 H.C. Deb. 5 s., dated 3 May 1920, p. 1741.
45 9 Anne c. 2.
46 2 & 3 Will. IV, cc. 10-11.

such Case as it may arise". Likewise, under the series of laws relating to public health and national health services such as the Public Health Acts, the Parliament delegated the authority to Government at different levels to make regulations to prevent the diseases. For example, in Sections 130 and 134 of the Public Health Act, 1875,[47] the local Government was authorized to make regulations for prevention of diseases. However, this was repealed by the Public Health Act, 1936,[48] under which the power was transferred to the Minister and such regulations were to be placed before the Parliament within a prescribed time.[49] Subsequently, this requirement was modified by the Statute Law (Repeals) Act, 1993.[50] On the other hand, in order to secure public safety and security of the realm in World War I, the Parliament delegated the authority to the King to pass regulations to authorize the trials by Court Martial under the Defence of Realm Act, 1914[51] as amended by Defence of the Realm (No. 2) Act, 1914.[52] Later on, both these Acts were repealed and consolidated in the form of Defence of the Realm Act, 1914.[53] During World War II, His Majesty the King was again authorized under the Emergency Powers (Defence) Act, 1939[54] to make regulations not only for public safety, security and prosecution of war but also for the maintenance of public order, supplies and services essential to the life of the community.

On the other hand, there is also a long chain of enactments of the realm to deal with general emergencies in times of peace as well; however, the most important of them was the Emergency Power Act, 1920[55] and 1964,[56] which authorized the Queen to declare emergency and make regulations in the manner prescribed under the relevant laws. However, unlike British India, the term emergency was confined under the statute only to immediate threats to interference with the supply and distribution of food, water, fuel, or light, or with the means of locomotion and essentials of life only.

This Act of 1920 was recently repealed in toto by the Civil Contingencies Act, 2004. One of the essential features of this Act is that it encompasses both sorts of emergencies, *i.e.* endangering the human life and the security of the United Kingdom. The Act provides legislative powers in prescribed and limited emergency conditions to the executive. The scope of the term emergency was enhanced to include serious danger of damage to the environment, human welfare (human health, life and services related thereto, homelessness, damage to property, disruption of supply of money etc.), and threat to security arising out of war or terrorism. More so, emergency regulations may make provisions of any kind that could be made by an Act of Parliament or by the exercise of the Royal Prerogative,

47 38 & 39 Vict. c. 55.
48 26 Geo. V & 1 Edw. VIII, c. 49-(50), S. 346, Third Schedule, Part I, clause (1).
49 26 Geo. V & 1 Edw. VIII, c. 49-(50), S. 143 & 319.
50 1993 c. 50, S. 1(2), Sch. 2 Pt. II para. 24; S. 1 (1), Sch. 1, pt. X.
51 4 & 5 Geo. V. c. 29.
52 4 & 5 Geo. V. c. 63.
53 5 Geo. V. c. 8=5 & 6 Geo V c. 8.
54 2 & 3 Geo. VI, c. 62.
55 10 & 11 Geo V. c. 55.
56 Emergency Powers Act, 1964: Chapter 38.

including modification of an enactment or application thereof. These regulations shall lapse after a period of 30 days or at the expiry of seven days from the date of their presentation to the Parliament unless they are approved by the same. This act is also considered a fundamental part of the Constitutional law of the United Kingdom.[57] The most important feature of these regulations in line with that under Section 26 of the Act of 1920 is that after the lapse of the regulations, the past and closed transactions under the regulations are not to be affected.

In view of the above analysis of different questions relevant to emergency legislation in the context of English constitutional history, it is evident that the Parliament has always jealously guarded against the encroachment of its domain by the government on the pretext of emergency, and in the end, has provided a well-defined and circumscribed jurisdiction to step into its legislative sphere. And further, that the term Ordinance is absolutely foreign to the English legal system in denoting the primary legislation either emergency or otherwise. However, a brief analysis of different provisions of the UK Parliament relating to the colonial realm reveals a conflicting practice in this regard; however, the promulgating authority still largely remained focused on the peace and good government in India.

G. A Short Survey of Emergency Legislation by Ordinance in British India

The history of the Ordinance in British India dates back to 1773,[58] when under the East India Company Act, 1773, the Governor General and his four counselors were given the authority to legislate in the form of rules, regulations and ordinances. This was the first time that the term Ordinance was introduced in the then British realm in India and, as such, was clubbed with the other forms of subordinate legislation vested in executive government.[59] More so, it also carried another important characteristic of a subordinate form of legislation that this legislative authority was not exclusive but conditional inasmuch as, firstly, the laws were to be just, reasonable and not against the laws of the realm, and secondly, these laws were to be effective only if they were registered with the Supreme Court to be established under Article XIII of the Act. Subsequently, in order to strengthen the executive government in cases of high importance essentially affecting the *welfare and the public interest*, the Governor General at Fort William and the Governors at Fort Saint George and Bombay were given discretionary powers under the East India Company Act, 1786,[60] to overrule their councils subject to their personal liability to answer for the safety and tranquillity of the British possession in India. This was the first time that the person in charge of the executive affairs of the local government alone was given special powers to

57 First Report of the Joint Committee on Draft Civil Contingencies Bill 28 November 2003 HL 1074 para. 183.

58 13 George III, c. 63.

59 See also 299 H.C. Deb. 5 s., dated 28 March 1935, pp. 2127-2144, at pp. 2127 and 2131 – Clause. 117 & 119 (3) of 1935.

60 26 Geo III, c. 16, Art. VII.

deal in extraordinary circumstances. However, these powers were structured very carefully and were not unfettered inasmuch as (1) they could be exercised only in cases of high importance essentially affecting the *welfare and the public interest*; (2) before overruling the council, the Governor General or the Governor, as the case may be, had to hold material deliberations with the former and (3) the promulgating authority was to be personally responsible for the exercise of special power.

The East India Company Act, 1786, was later substituted by the first Government of India Act, 1833,[61] while maintaining similar well-confined Ordinance-making powers in the Governor General.[62] However, after the transfer of the powers of the Government of India from the East India Company to the British Crown under the Government of India Act, 1858,[63] the obligation to consult the legislative counsel was removed in the new enactment titled Indian Councils Act, 1861,[64] and the Governor General was vested with sole, exclusive and independent legislative power to promulgate Ordinances. However, again this legislative endowment still remained well circumscribed, inasmuch as the promulgating authority could invoke the jurisdiction only for the purpose of *peace and good government* in India and not otherwise. Perusal of different enactments of the UK Parliament providing for the Government in India from time to time reveals that the same condition remained part and parcel of every such enactment till the independence of British India and the separation of Pakistan.[65] Similarly, an analysis of the relevant legislative debates in the UK Parliament also shows that the legislature has intended the exercise of this legislative authority only in the case

61 3 & 4 Will. IV c. 85.

62 Section 94, 3 & 4 Will. IV c. 85.

63 21 & 22 Vict. C. 106.

64 24 & 25 Vict., c. 67; S. 23.

65 During the British Rule in India, the power to promulgate the Ordinance was phrased from time to time, to imply restriction on the authority of the Governor General to promulgate Ordinance except for the purpose of achieving the peace and good government. *See* S. 23 of Indian Councils Act, 1861; S. 72 Government of India Act, 1915; Section 42 Government of India Act, 1935 read with Section 317 and Ninth Schedule: No. 72. However, no such restriction is found in any of the three permanent Constitutions of Pakistan. *See* Arts. 69 & 102 Constitution of Pakistan, 1956, Arts. 29 & 79 Constitution of Pakistan, 1962 and Arts. 89 & 128 Constitution of Pakistan, 1973. Yet these were only two interim Constitutions of Pakistan: Government of India Act, 1935: Art. 42 and Constitution of Pakistan, 1972: Art. 94 which had the provision restricting the promulgating power to the peace and good government. In the context of Government of India Act, 1935, it is pertinent to point out that, originally, the S. 42 of the Act of 1935 did not have the "peace and good government clause". It was by virtue of S. 317 read with entry No. 72 of Schedule 9 of the Act of 1935 that the operation of like Section 72 of the Government of India Act, 1915 continued till the time of independence of British India: at the time of adaptation of the Act of 1935 as Interim Constitution of Pakistan, the S. 42 was substituted by the S. 72 of the Government of India Act, 1915. So the situation remained the same from 1861 to 1956, when the first permanent Constitution of Pakistan was passed. However, in the context of enlarged promulgating authority as to emergency or urgent necessity, later on all the permanent Constitutions of Pakistan in 1956, 1961 and 1973 contained a similar text as was contained in original Section 42, as was passed by the UK Parliament in 1935.

of *peculiar emergency*[66] and the *real emergency*[67] conditions as prescribed by the then enforceable Emergency Powers Act, 1920. However, a perusal of the relevant provisions of different permanent Constitutions of Pakistan reveals that none of these conditions was made a condition precedent for the promulgation of Ordinance while providing it as a tool to invoke the authority by the Government to legislate in emergency circumstances, rendering it an arbitrary legislative endowment.[68]

H. Conclusion

In view of the above discussion focusing on the use of the term Ordinance and the mechanism of emergency legislation in the United Kingdom, it remains clear that in the primary legislative sphere, the term Ordinance had mostly been used to denote a unilateral legislation either of the King or of the representative legislature alone. However, since the emergence of the concept of the sovereignty of the Parliament, the Ordinance also stands extinguished from the legislative sphere of primary enactments. Similarly, all the emergency actions of the executive had no force of law unless so indemnified by the Parliament, and with the development of the different theories of Constitutional law, this caveat to deal with the emergency situation by the Government is by now covered under well-defined and encompassed emergency provisions ordained by the Parliament in the form of the Civil Contingencies Act, 2004. However, given the realm of the British India dominion, the practice of the British Parliament has remained different, and the Ordinance has been used to enact primary legislation by the Governor General and the Governors in British India in emergency circumstances. Yet the promulgating power has still remained focused on *peace and good government* in India. However, unfortunately, like authority has been followed by the successive ruling elites in Pakistan to govern the citizens of an Islamic *'Republic'* of Pakistan under different provisions of various Constitutions of Pakistan, and instead of further curtailing the relevant authority, the last condition of *peace and good government* has also been removed from the text of all the permanent Constitutions of Pakistan having so remained in force from time to time. Yet indeed this legislative endowment under the present Constitution of Pakistan, 1973, to enact primary legislation by Ordinance is without any ostensible limitations, and so remains an arbitrary legislative endowment running counter to the principles of good governance and the popular democratic norms. Hence, it entails review by a truly representative, legitimate and competent Constituent Assembly.

66 164 H.C. Deb. dated 16 July 1861, 3 s., p. 963.

67 Government of India Act, 1935, S. 42; *See also* 299 H.C. Deb. 5 s., dated 13 March 1935, 5 s., pp. 454-455.

68 *See* Arts. 69 & 102 Constitution of Pakistan, 1956, Arts. 29 & 79 Constitution of Pakistan, 1962 and Arts. 89 & 128 Constitution of Pakistan, 1973.