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A Saga from Permissibility to Constitutional Fraud in India
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ABSTRACT

In *Krishna Kumar v State of Bihar*, the Supreme Court of India pronounced that an Ordinance enacted during a legislative recess must be mandatorily laid before the legislature when it reconvenes. However, the textual reading of the relevant constitutional provisions as contained in Article 123 and 213 of the Constitution of India does not prohibit the re-promulgation of Ordinances once the same is either rejected or cease to have an effect. The Supreme Court of India in *DC Wadhwa v State of Bihar* partially depreciated such practice of consistent (re) promulgation of Ordinances without placing them before the legislature, by declaring them as a fraud on the Constitution. However, the issue of whether such re-promulgation is a fraud on the Constitution and thus invalid, was

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not authoritatively answered. The present case note discusses the propriety and the constitutional sustainability of re-promulgation of Ordinances in the exercise of legislative powers conferred upon the nominal executive head of State under Article 123 to the President of India and Article 213 to the Governor of State in the light of *Krishna Kumar v State of Bihar* decision.

KEYWORDS

Constitutional Fraud – *D.C. Wadhwa v State of Bihar* – Executive – *Krishna Kumar v State of Bihar*, – Legislature – Ordinance – Parliament – Re-promulgation – Supreme Court of India

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1. Preliminary Contour

The golden words “*contra legem facit qui id facit quod lex prohibet; in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit*”¹ meaning “one who contravenes the intention of a statute without disobeying its actual words, commits a fraud on it”² are significant in the context of the Ordinance-making power of the executive as envisaged in the Constitution. The government of every hue and shape has resorted to excessive use of the Ordinance, which is only earmarked for the emergent situation when the legislature is not

¹ Open Jurist, <https://openjurist.org/law-dictionary/contra-legem-facit-qui-id-facit-quod-lex-prohibet-in-fraudem-vero-qui-salvis-verbis-legis-sententiam-ejus-circumv>, accessed 20 June 2018.

² Y. P. Singh, *Law, Morality and Indian Politics*, The Statesman, New Delhi, 11 January 2017, <https://www.thestatesman.com/features/law-morality-and-indian-politics-1484168547.html>, accessed 25 June 2018.

in session.³ However, the recurring use of Ordinances is circumventing the Parliamentary system, which is nothing, but a subversion of the democratic process. Therefore, it goes against the essence and rigor of Constitutionalism, an idea of limited government.⁴

The use of the Ordinance is not a recent phenomenon. Statistically, from 1952 to 2014, the President of India promulgated as many as 668 Ordinances under the ruse of emergent situations. The flurry of Ordinances reflects that governments tend to adopt the Ordinance route to further political interests, rather than to endure an extraordinary situation.⁵ Factually, whenever Ordinances were issued, hardly any efforts were made to explain the circumstances or conditions that forced the government to pursue such an extraordinary route to enact a law. Similarly, no justifications were provided as to why the issuance of Ordinance could not have waited for the resumption of the legislature.⁶

Under the doctrine of separation of power, the executive has unfettered right to initiate and formulate policies and to execute it, unhindered by the legislature.⁷ However, in a Parliamentary system, the Parliament embodies the will of the people, and therefore, should be able to monitor the execution of policies to ensure its constitutional propriety.⁸ Nonetheless, this high-handed power has been retained in the Constitution to cope with unforeseeable situations that may require swift policy responses.⁹ Nevertheless, the consistent re-promulgation suggests that successive governments are issuing Ordinances to avoid critical discussion and debate in the legislature, consequently reducing its role to act as a rubber stamp for validating Ordinances.¹⁰

The alarming consistency with which the executive is invoking this exceptional power puts the entire democratic framework in peril and negates the Parliamentary scrutiny and accountability. The resultant effect of such broad power is that it erodes the legislature's

³ G. Bhatia, *Executive Legislation and the Separation of Powers in India*, Admin Law Blog, <https://adminlawblog.org/2017/03/23/gautam-bhatia-executive-legislation-the-separation-of-powers-and-the-indian-supreme-court/>, accessed 25 August 2018.

⁴ F. Mustafa, *When not to use power* The Indian Express, New Delhi, 6 January 2015 <http://indianexpress.com/article/opinion/columns/when-not-to-use-power/>, accessed 20 August 2018.

⁵ *ibid.*

⁶ V. Venkateshan, *Tyranny of the Majority*, Frontline 23 January 2015 <http://www.frontline.in/the-nation/tyranny-of-the-majority/article6756766.ece> accessed 20 August 2018.

⁷ P. B. Kurland, *The Rise and Fall of the Doctrine of Separation of Powers*, 1986, 85 Michigan Law Review, 592 https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11922&context=journal_articles, accessed 21 August 2018.

⁸ *Executive—Its Accountability to Parliament*, https://rajyasabha.nic.in/rsnew/practice_procedure/naccount.asp accessed 20 November 2018

⁹ N. Arora, *Article 123 and Democracy: The Inherent Conflict*, SCC Online 23 March 2017, <http://blog.sconline.com/post/2017/03/23/article-123-and-democracy-the-inherent-conflict/>, accessed 20 April 2018.

¹⁰ Mustafa (n 4).

ability to act as an effective forum to discuss and debate policies.¹¹ In the wake of no apparent emergencies, the frequent promulgation of law through Ordinances tantamount to the usurpation of legislative powers by the executive. Therefore, it violates the principle of separation of powers.¹²

2. Recounting the Past: Historical Narratives

The Ordinance-making power was derived from the Government of India Act, 1935, which authorized the then Governor-General of India to issue an Ordinance when the Federal legislature was not in session. This extraordinary power was employed by colonial powers to suppress the freedom movement and civil unrest in India.¹³ The imposition of martial law for prolonged periods, restrictions on press activity, and limits on freedom of association are a few instances of its abuse. Moreover, Ordinances such as Bengal Criminal Law (Amendment) Ordinance (1924) and the Lahore Conspiracy Case Ordinance (1930) were promulgated to place freedom fighters and revolutionaries on trial in special courts, attests its misuse by the Governor-General of colonial India.¹⁴

As a result of that, Pandit Nehru, who later becomes the first Prime Minister of India (*hereinafter* PM), severely criticized issuance of Ordinances as “enforced submission” while speaking about “humiliation of Ordinance” in his Presidential Address.¹⁵ Interestingly, PM Nehru’s objections on the promulgation of Ordinances, which he considered undemocratic and humiliating, suddenly after his accession to the post of PM, transformed into a dire necessity.¹⁶ As PM Nehru’s cabinet had promulgated as many as 102 Ordinances in Independent India, by the time he died in May 1964.¹⁷

The slew of Ordinances promulgated by PM Nehru evoked harsh reactions from the first speaker of Parliament G.V. Mavalankar, who, in 1950, wrote to PM Nehru that it is “inherently undemocratic” and large-scale use of it conveys an “impression that government is

¹¹ A. G. Rubinoff, *The decline of India's parliament* (1998) 4 *The Journal of Legislative Studies* 4 <https://doi.org/10.1080/13572339808420571>, accessed 20 July 2018

¹² P. Parameshwar Rao, *Separation of Powers in a Democracy: The Indian Experience*, 37 *Peace Research* 1, 2005, https://www.jstor.org/stable/24469690?seq=1#metadata_info_tab_contents, accessed 28 April 2018.

¹³ C. Uday Singh, *Bypassing Elected Legislatures – Ordinance Raj in India*, *Live Law*, 24 August 2016, <http://www.livelaw.in/bypassing-elected-legislatures-ordinance-raj-india/>, accessed 27 April 2018.

¹⁴ S. Dam, *Presidential Legislation in India: The Law and Practice of Ordinances*, BPRESS, 2014 https://works.bepress.com/shubhankar_dam/36/, accessed 17 April 2018.

¹⁵ *ibid* 52.

¹⁶ S. Dam, *Constitutionally Lawless: Ordinance Raj in India*, Center for the Advance Study of India, 10 March 2014, <https://casi.sas.upenn.edu/iit/shubhankardamm> accessed 2 May 2018.

¹⁷ *Dam* (n 14) 59.

carried on by Ordinances”.¹⁸ On this, PM Nehru retorted back and stated that though the Parliamentary procedure is desirable and essential to “check errors and mistakes”, but the process “involves considerable delay” that results in holding “important legislation”, which are vital for the socio-economic progress of the country.¹⁹ So, the government did not pay heed to his advice and continues to promulgate laws through Ordinances. After witnessing this, speaker G.V. Mavlankar again in 1954 warning about the dangers of such practice, wrote that, being the first Lok Sabha (Lower House), it is critically important to “lay down a tradition” and “if this Ordinance issuing is not limited by convention only to extreme and very urgent cases, the result may be that, in future, governments may go on issuing Ordinances giving Lok Sabha no option but to rubber-stamp [them]”²⁰. To this PM Nehru, wrote back by emphasizing that “a very limited number of Ordinances” has been issued, and the Parliament was informed about “the reason for having issued each one of them”.²¹

This historical backdrop indicates the dilatory process of Parliamentary procedures and evokes concerns related to the promulgation of Ordinances. Possibly, PM Nehru was aware of the dire consequences of the Ordinance-making power, therefore, he was generous to appraise the Parliament about the reasons for issuing Ordinances. However, lately, similar practices honoured in dereliction than the adherence by successive governments.

3. Judicial Perspective and Subsequent Practices: A Gross Disdain

Ordinance lapses or ceases to operate at the expiration of six weeks from the reassembly of the legislature or before the expiration of that period, if legislature disapproves of it. However, its abuse keeps lurking as there is no embargo upon the government to re-issue it multiple times if it lapses.²² It may get worse as the legislative intentions do not come under the ambit of judicial scrutiny as the Courts may not have a proper vantage point to understand policy thickets, therefore, it would not deprive a government of that advantage.²³

¹⁸ K. Rajagopal, *A Nehru-Mavalankar Debate on Ordinances*, The Hindu, New Delhi, 02 March 2015, <http://www.the-hindu.com/news/national/a-nehrumavalankar-debate-on-Ordinances/article6948861.ece>, accessed 16 May 2018

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*

²² S. Dam, *Making Parliament irrelevant: a postcard from India*, 4 The Theory and Practice of Legislation 1, 2016, <https://doi.org/10.1080/20508840.2016.1159396>, accessed 12 May 2018.

²³ R.H. Fallon, Jr, *Constitutionally Forbidden Legislative Intent*, 2016, 130 Harvard Law Review 2, <http://cdn.harvardlawreview.org/wp-content/uploads/2016/12/523-589-Online-3.pdf>, accessed 19 May 2018.

To mitigate such developments, the frequent use of the Ordinance was admonished by the Supreme Court of India (*hereinafter* SCI) in *D.C. Wadhwa v State of Bihar*²⁴ (*hereinafter* the Wadhwa case). It held that “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”.²⁵ However, cautiously allowed flexibility for the re-promulgation of Ordinances to confront “a situation... because the legislature may have too much legislative business” or “the legislature’s Session may be short”, therefore, “the Governor may legitimately find that it is necessary to re-promulgate the Ordinance”.²⁶

As per the exceptions provided in the *Wadhwa* case, in specific situations, the legitimacy of the re-promulgation of the Ordinance cannot be questioned as it is being issued to meet governance necessities. In all other circumstances, it would be a “colourable exercise of power on the part of the executive” to continue with the Ordinance by adopting the “methodology of re-promulgation”.²⁷ Nonetheless, the executive frequently circumvented the SCI’s decision with impunity under the guise of the *Wadhwa* exception to vindicate re-promulgating of Ordinances.²⁸

Considering the sheer size and population of India, it is comprehensible that there could be situations or compulsions that may require urgent interventions, which cannot be deferred until reconvening of the Parliament. Still, systematic recourse to Ordinance without the existence of exceptional circumstances erodes the credibility of the legislative process and subvert the democratic system based on the rule of law.²⁹

Furthermore, by its nature, Ordinances are self-limiting as it comes with a built-in “sunset clause” and does not contain “savings clause”. Therefore, the repeated use of Ordinances fundamentally assaults the very core of “stability and consistency” principles and the rule of law.³⁰ Nevertheless, the SCI also has to bear the responsibility for the subversion of this democratic constitutional arrangement. It allowed re-promulgation practices, which ideally be issued only to meet particular exigencies, that too under compelling circumstances.

²⁴ *D.C. Wadhwa v State of Bihar* MANU/SC/0072/1986.

²⁵ *ibid* 10.

²⁶ *ibid* 10.

²⁷ *ibid* 11.

²⁸ S. Dam, *Repromulgation Game*, The Hindu, 03 June 03 2015, [http://www.thehindu.com/opinion/columns/legal-eye-column-repromulgation/article7275518.ece.](http://www.thehindu.com/opinion/columns/legal-eye-column-repromulgation/article7275518.ece), accessed 29 May 2018.

²⁹ *Singh* (n 13).

³⁰ A. P. Kumar, *Exception or Rule? The Ordinance Route*, 53 EPW 20, 2018, <https://www.epw.in/journal/2018/20/law-and-society/exception-or-rule.html>, accessed 29 May 2018.

In *Rustom Cavasjee Cooper v Union of India*,³¹ in which the SCI had the opportunity to denounce the exercise of the re-promulgation of Ordinances, but shied away. It held that “the gaps between sessions the legislative power of promulgating Ordinance is reposed in the President in cases of urgency and emergency. The President is the sole judge whether he will make the Ordinance....The power under Article 123 relates to policy and to an emergency when immediate action is considered necessary...”³².

It is explicit from the above majority opinion that it refrained from making any comment on *mala fides* or arbitrary use of the Ordinance. Conversely, the minority judgment did express that “the exercise of power by the President can be challenged” by “establishing bad faith or mala fide and corrupt motive”.³³ However, again, when the question arose whether an Ordinance can be struck down on the ground of *mala fides*? The SCI in *T. Venkata Reddy v State of Andhra Pradesh*³⁴ held that “the propriety, expediency and necessity of a legislative Act are for the determination of the legislative authority and are not for determination by the courts”³⁵. However, in the recent judgment of *Krishna Kumar Singh v State of Bihar*³⁶ (*hereinafter* the Bihar case), albeit on narrower grounds, the SCI has widened the scope of judicial review of Ordinances. After this judgment, the Courts now can examine any oblique motives behind the issuance of Ordinances.

4. Permissibility in Wadhwa to (Re) Construction in Krishna Kumar

The benign gift of the “Ordinance-making power” was engrafted in the constitutional scheme, solely intended for emergencies, and was required to place Ordinance before the legislature as soon as it assembles. Nonetheless, a cursory look at the practice reveals that this power has not been used sparingly or in urgent situations,³⁷ rather employed for political expediency.³⁸ In such a scenario, this unchecked and unrestricted executive power may permeate delinquencies, while disregarding the finer canons of Constitutionalism.

³¹ *Rustom Cavasjee Cooper v Union of India* MANU/SC/0011/1970.

³² *ibid* 82.

³³ *ibid* 83.

³⁴ *T. Venkata Reddy v State of Andhra Pradesh* MANU/SC/0372/1985.

³⁵ *ibid* 9.

³⁶ *Krishna Kumar Singh v State of Bihar* MANU/SC/0009/2017.

³⁷ S. Bhattacharya, *Why Modi Is Opting for the Ordinance Route to Pass Laws*, WSJ, 31 December 2014, <https://blogs.wsj.com/indiarealtime/2014/12/31/ordinance-route/>, accessed 20 July 2018.

³⁸ *Kumar* (n 30).

Bhagwati CJ had expressed similar apprehensions in the *Wadhwa* case and stated that “this power can be exercisable by the executive only when the legislature is not in Session”; otherwise, it would subvert the democratic process. In that case, “the people would be governed not by the laws made by the legislature but by laws made by the executive”³⁹. Indeed, the existing use of the Ordinance, in many ways, has become a parallel arrangement, and often, the preferred legislative method in addressing politically delicate issues.⁴⁰

4.1. Brief Factual Matrix: A Case of Disorderly Conduct

It is appropriate to have a glimpse of the facts relating to this appeal: In 1989, the Governor of Bihar promulgated an Ordinance, called “The Bihar Non-Government Sanskrit Schools (Taking over of Management and Control) Ordinance, 1989”.⁴¹ The Ordinance life should have ceased to operate at the expiration of six weeks from the reassembling of the legislature.⁴² However, from January 1990 to March 1992, a chain of Ordinances was promulgated by the Governor to keep it alive indefinitely.⁴³

The provisions in the Ordinances issued were not materially different from those of previous Ordinances and followed a consistent pattern, but those were never laid before the legislature.⁴⁴ Whenever Ordinances lapsed by efflux of time, six weeks after the convening of the session of the legislative assembly or when the previous Ordinance ceased to operate, a new Ordinance was issued when the legislative assembly was not in session.⁴⁵ Therefore, the legislative assembly had no occasion to consider whether any of the Ordinances should be approved or disapproved.⁴⁶

The protracted history of the Bihar case exemplified that the prerogative powers of the Governor are replete with the propensity to abuse and disproportionately over-employed.⁴⁷

³⁹ *Wadhwa* (n. 24) 10.

⁴⁰ B. Debroy, *Ordinance has become a parallel & preferred legislative arrangement*, The Economic Times, New Delhi, 24 July 2014, <https://www.smu.edu.sg/news/2014/07/24/ordinance-has-become-parallel-preferred-legislative-arrangement>, accessed 24 July 2018.

⁴¹ *Krishna Kumar Singh* (n. 36) 20.

⁴² *ibid* 22.

⁴³ *ibid* 22.

⁴⁴ *ibid* 23.

⁴⁵ *ibid* 23.

⁴⁶ *ibid* 23.

⁴⁷ S. Chatterjee, *Krishna Kumar II: laying re-promulgations to rest?*, 1 Indian Law Review 3, 2017.

Article 123⁴⁸ and 213⁴⁹ are singleton provision in chapters III and IV of the Constitution dealing with the legislative powers of the Union and State, respectively. The two necessary conditions required to be fulfilled by the Governor to promulgate the Ordinance are: Firstly, the House shall not be in session, and secondly, the Governor must be satisfied qua the existence of circumstances warranting the promulgation of the Ordinance. Apart from this condition, a further substantive restriction under Article 213 (1)⁵⁰ is provided that the Ordinance cannot be promulgated without the President's instructions.

Admittedly, it is apparent from the debates in the Constituent Assembly that the retention of such odd power was a negation of the rule of law. However, the pressing need for governance yielded its presence with an understanding that the power should be invoked

⁴⁸ Article 123. Power of President to promulgate Ordinances during recess of Parliament (1) 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 Ordinance 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 House of Parliament and shall cease to operate at the expiration of six weeks from the reassemble 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 (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.

⁴⁹ Article 213. Power of Governor to promulgate Ordinances during recess of Legislature (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require: Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if (a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President (2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Legislature of the State assented to by the Governor, but every such Ordinance (a) shall be laid before the legislative Assembly of the State, or where there is a Legislative Council in the State, before both the House, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and (b) may be withdrawn at any time by the Governor Explanation Where the Houses of the Legislature of a State having a Legislative Council 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 (3) If and so far as an Ordinance under this article makes any provision which would not be valid if enacted in an Act of the legislature of the State assented to by the Governor, it shall be void: Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this article in the Concurrent List, an Ordinance promulgated under this article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the president and assented to by him.

⁵⁰ *ibid.*

to address emergent situations.⁵¹ Therefore, it was thought proper that, in addition to pre-promulgation rigors, the legislative scrutiny of the Ordinance be done by the legislature once it resumes its session.

The Constitution further provided that every such Ordinance—“(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council;⁵² and (b) may be withdrawn at any time by the Governor.⁵³ These two-layered checks, which are almost analogous to the Court’s powers of judicial review, were considered necessary to check the abuse of this broad power. Deplorably, the State of Bihar has betrayed the mandate of the Constitution, by adopting a practice of re-promulgating Ordinances on a massive scale from time to time without enacting it into Acts of the legislature.⁵⁴

As highlighted above, the practice was that after the session of the State legislature was prorogued, the same Ordinances that had ceased to operate were re-promulgated containing substantially the same provisions almost in a routine manner. The constitutionality of such action was adversely commented by the SCI in the *Wadhwa* case, *per curiam* so stated:

“the only question is whether the Governor has the power to re-promulgate the same Ordinance successively without bringing it before the legislature. That clearly the Governor cannot do. He 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.....The startling facts which we have narrated above clearly show that the executive in Bihar has almost taken over the role of the legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid.... there must not be Ordinance Raj in the country”⁵⁵.

⁵¹ Constituent Assembly Debates, Volume VIII, 14 June 1949, <https://indiankanoon.org/doc/1599043/>, accessed 30 July 2018.

⁵² *Article 123* (n. 48).

⁵³ *ibid.*

⁵⁴ D.C. Wadhwa, *Re-promulgation of Ordinances: A Fraud on the Constitution*, Gokhale Institute of Politics and Economics, 1983.

⁵⁵ *Wadhwa* (n. 24) 12.

In essence, the SCI in the *Wadhwa* case has stated that the exercise of bypassing the legislature through continuous Ordinance making tantamount to the colourable exercise of power. It is akin to achieving something indirectly, which cannot be achieved directly due to constitutional inhibition, therefore, categorized such endeavours as a “fraud on the Constitution”.⁵⁶ Given this position of law, it is understandable that consistent re-promulgation of Ordinance on same the subject in near-identical terms is impermissible, but it prompts two questions:

- a. Whether every re-promulgation of such Ordinance is the colourable exercise of power, and thus, fraud on the Constitution?
- b. In case such Ordinances are re-promulgated, whether the first promulgation and all subsequent promulgation are a fraud on the Constitution or acts done under the regime of the first Ordinance is saved and valid in law?

Before we analyse the above twin cords on which the *Bihar* case hinges, the following observation from the *Wadhwa* case is apposite to reiterate. In that case, the Court held that if there are circumstances where the government is unable to push legislation mainly due to too much legislative business or brief legislative session, in that event, the Governor may legitimately re-promulgate the Ordinance.⁵⁷ On this account, the re-promulgation of the Ordinance is constitutionally permissible, provided it is not a means adopted to bypass the legislature.

4.2. Prudence of Majority and the Wisdom of Dissent

From the above exalted legal position, it is pertinent to ponder on what are the criteria or circumstances that would have the effect of bypassing the legislature, and therefore, constitutes fraud on the Constitution? Is repeated re-promulgation of Ordinance unconstitutional? These are vexed issues and require determination on the merits of individual cases. However, such issues shall no longer remain open to debate because of the majority decision in the *Bihar* case, which states that every Ordinance be placed before the legislature, irrespective of its expiry. The breach thereof will nullify the actions initiated under the Ordinance. The majority of seven judges (5:2) speaking through Chandrachud J. ruled that:

“Not placing an Ordinance at all before the legislature is an abuse of Constitutional process, a failure to comply with a constitutional obligation. A government which has failed to comply with its constitutional duty and overreached the legislature cannot legitimately assert that the Ordinance which it has failed to place at all is valid till it ceases to operate. An edifice of rights and obligations cannot be built in a constitutional order on acts which amount to a fraud on power. This will be destructive of the rule of law. Once an Ordinance has been placed before the legislature, the constitutional fiction by which it has the

⁵⁶ *Wadhwa* (n. 24) 11.

⁵⁷ *ibid.*

same force and effect as a law enacted would come into being and relate back to the promulgation of the Ordinance. In the absence of compliance with the mandatory constitutional requirement of laying before the legislature, the constitutional fiction would not come into existence”⁵⁸.

Interestingly, the majority has also stated that:

“Re-promulgation of Ordinances is constitutionally impermissible since it represents an effort to overreach the legislative body which is a primary source of law-making authority in a parliamentary democracy. Re-promulgation defeats the constitutional scheme under which a limited power to frame Ordinances have been conferred upon the President and the Governors. The danger of re-promulgation lies in the threat which it poses to the sovereignty of Parliament and the state legislatures which have been constituted as primary law gives under the Constitution. Open legislative debate and discussion provides sunshine which separates secrecy of Ordinance making from transparent and accountable governance through law making”⁵⁹.

These observations, to a great degree, circumscribed the power of the executive to re-promulgate Ordinances during the legislative prorogue as it has confined its issuance to the limited grounds.⁶⁰ Consequently, the SCI has re-established the supremacy of the legislature in law-making and its supervisory role over the executive law-making activities.⁶¹ Also, by holding that Ordinances should be tabled before the legislature, the SCI has made it emphatically clear that any re-occurrence of Ordinances are controlled under the legislative scheme of Article 123 or 213 and can be judicially scrutinized.⁶²

Undoubtedly, the majority’s dictum to mandatorily lay Ordinance before the legislature, the SCI has attempted to reconstruct the balance between the power of the executive to make laws and its accountability. As a result, the SCI in the *Bihar* case has upheld the inbuilt accountability and subjected the executive powers to the scrutiny of the elected representative.⁶³ In this context, the observation made by the SCI in *Bachan Singh v State of Punjab*⁶⁴ discussing essential elements of the rule of law, holds vital relevance. In this case, the SCI opined that “law making must be essentially in the hands of a democratically elected legislature, subject of course to any power in the executive in an emergent situation to promulgate ordinances effective for a short duration while the legislature is not in

⁵⁸ *Krishna Kumar Singh* (n. 36) 70.

⁵⁹ *Krishna Kumar Singh* (n. 36) 54.

⁶⁰ G. Mukherjee, The Supreme Court and executive law-making: the afterlife of failed ordinances in Krishna Kumar Singh II, 1 *Indian Law Review*, 2017, 3, 317.

⁶¹ *ibid.*

⁶² *ibid* 324.

⁶³ H. Kitrosser, *The Accountable Executive*, Minnesota Legal Studies Research Paper No. 08-41, 2009 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1284617, accessed 30 July 2018.

⁶⁴ *Bachan Singh v State of Punjab* MANU/SC/0356/1982.

session as also to enact delegated legislation in accordance with the guidelines laid down by the legislature”⁶⁵.

Moreover, the *Bihar* case also afforded primacy to different constitutional actors to check and balance one another’s power, thereby preventing any arbitrary exercise of power by the executive.⁶⁶ To an extent, the *Bihar* case has brought much-needed clarity and certainty in the jurisprudence of the re-promulgation of Ordinances. However, it is equally crucial to inquire into the sole minority opinion by Lokur J in which he was categorical in holding that:

- a) The laying of an Ordinance promulgated by the Governor of a State before the State legislature is not mandatory under Article 213(2) of the Constitution. The failure to lay an Ordinance before the State legislature does not result in the Ordinance not having the force and effect as a law enacted and would be of no consequence whatsoever.⁶⁷
- b) The re-promulgation of the Ordinance is permissible in law, and this is not *per se* fraud on the Constitution. Although, a consistent act of the re-promulgation to eschew legislative oversight is a fraud on the Constitution.⁶⁸ At this stage, the respective compelling reasons founding the contrary views maybe take note of.

As noted above, the majority relied upon the legislative history of the Ordinance-making power and the fetters imposed in the exercise of said power. It is inferred from that only in an emergent situation the Ordinance route is to be adopted. Therefore, the operative test to invoke such power is not desirability, but the necessity. Further, the majority opinion concluded that since the Ordinance-making is a legislative function conferred upon the executive through directing the legislative power in its realm. Therefore, legislative oversight on the exercise of such power restricts its ability to become a parallel law-making body is a constitutional concomitant of an elected legislature.

In this case, the majority Judges were clear in their mind that the consequence of non-laying of Ordinance before the legislature shall not cease to have effect because the phrase cease to operate in Article 213⁶⁹ is founded upon the Ordinance being laid. At that time, it is either disapproved or expires. In case the Ordinance is not laid before the legislature, its effect of being treated as law from its inception shall be nugatory. Brilliantly espoused, Chandrachud J carved out a distinction between void and ceased to have the effect, in case of later, it seems validity of action undertaken stands vindicated but not in the case of the former.

⁶⁵ *ibid* 13.

⁶⁶ *Kitrosser* (n. 63).

⁶⁷ *Krishna Kumar Singh* (n. 36) 13.

⁶⁸ *ibid*.

⁶⁹ *Article 213* (n. 49).

In other words, all the Ordinances (including those which are withdrawn before the House resumes its sitting) shall be laid before the House. The breach thereof, will entail constitutional disfavour results in vitiating its character of being law even during its operation. The minority found absurdities in such reasoning, on the basis that after the promulgation of an Ordinance by the Governor of the State, the Constitution visualizes the following three possible scenarios.

Firstly, despite the seemingly mandatory language of Article 213(2)(a) of the Constitution, the executive may not lay an Ordinance before the legislative assembly of the State legislature. Secondly, the executive may, because of Article 213(2)(b) of the Constitution, advise the Governor of the State to withdraw an Ordinance at any time, before reassembly of the State legislature or even after reassembly. In this scenario, is it still mandatory that the Ordinance be laid before the legislative assembly? Thirdly, the executive may, in accordance with Article 213(2)(a) of the Constitution, lay an Ordinance before the legislative assembly of the State legislature. What would happen after that?⁷⁰

Dissenting with Chandrachud J dictum of mandatory laying in the first and second scenario, Lokur J is of the opinion that on a textual interpretation of Article 213(2)(a)⁷¹ of the Constitution, not laying an Ordinance before the legislative assembly has only one consequence. It will cease to operate at the expiration of six weeks of reassembly of the State legislature.⁷² While Lokur J agreed that not laying an Ordinance before the State legislature on its reassembly would be extremely unfortunate, morally and ethically, but that does not make it mandatory for the Ordinance to be so laid.⁷³

Further, the view that the force and effect of an Ordinance as a law is dependent on the happening of a future uncertain event. Therefore, the laying of the Ordinance before the legislative assembly and the consequence of a breach of it, makes the character of Ordinance being nugatory as expounded by the majority was not subscribed. The dissenting opinion is clear that an Ordinance on its promulgation either has the force and effect of a law, or it does not. There is no half-way the House dependent upon what steps the executive might or might not take under Article 213(2)⁷⁴ of the Constitution. If the Constitution does not make an un-laid Ordinance as void ab initio, the same cannot be provided by the interpretation.

⁷⁰ *Krishna Kumar Singh* (n. 36) 15.

⁷¹ *Article 123* (n. 48).

⁷² *Krishna Kumar Singh* (n. 36)13.

⁷³ *Krishna Kumar Singh* (n. 36)16.

⁷⁴ *Article 213* (n. 49).

In the second scenario, the laying of Ordinance after its withdrawal is viewed by the minority to be a mere empty formality. Lokur J opined that the Constitution had not been drafted for the sake of completing empty formalities.⁷⁵ In so far as the third scenario is concerned, where an Ordinance is laid before the House, three possible situations may arise:⁷⁶

- 1) an Ordinance may be ignored as no resolution of disapproval is brought or,
- 2) even if such resolution of disapproval is brought, but it fails.

Then, in both cases, the Ordinance will run its natural life and cease to operate after the expiration of six weeks of reassembly of the legislature.

- 3) In case such resolution for disapproval of the Ordinance is accepted, and the Ordinance is disapproved, the Ordinance will cease to operate by virtue of the provision of Article 213(1)(a) of the Constitution on the resolution being passed by the legislative assembly and legislative council (if exists), agreeing with it.⁷⁷

Therefore, an Ordinance duly laid before will cease to operate either after the expiry of its natural course or immediately after a resolution of disapproval. However, in none of the cases, the Ordinance will be treated as void. Without making the value judgment on the correctness of divergent views, it is submitted that the discordant note struck by Lokur J appears to be sounder and reasoned than the law declared by the majority opinion.

If the consequence of laying-being a mechanism devised for legislative scrutiny can at most make the Ordinance cease to operate, how can non-laying render the same Ordinance void. Notably, Chandrachud J did not use the term void for such Ordinance, but the consequence of non-laying which he attributes to it, “in effect rendering it void”.

4.3. Is DC Wadhwa v State of Bihar overruled?

Another issue crops up in the debates is “whether the *Bihar* case overrules the *Wadhwa* case or not?”. The genesis of this issue is the language used in the *Bihar* case. The use of language in the *Bihar* case is that “these Ordinances which were never placed before the state legislature and were re-promulgated in violation of the binding judgment of this Court in DC Wadhwa are bereft of any legal effects”. This statement appears to resuscitate confusion in mind as to whether the *Bihar* case impliedly overruled the *Wadhwa* case or not or?

It was argued that as the SCI reiterated the same set of principles as stated in the *Wadhwa* case and only appears to substantially add to what it has already held in the *Wadhwa*

⁷⁵ *Krishna Kumar Singh* (n. 36) 16.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

case, therefore, concerning the practice of re-promulgation, the law remains the same.⁷⁸ Thus, the *Bihar* case did not overrule the *Wadhwa* case. However, the natural corollary of the majority opinion suggests that the answer to both the questions posed above becomes redundant. Therefore, the *Bihar* case impliedly overruled the *Wadhwa* case.

5. Effect of Enduring Rights under the Ordinance

Notably, a written Constitution premised upon the theory of limited government. The vesting of legislative powers in the executive may sound enigmatic and opposed to the separation of powers and Constitutionalism. However, the existence of such powers under the Indian Constitution has colonial transcendence inherited from the Indian Councils Act, 1861, and the subsequent Government of India Acts. Although, such powers being removed in England by the Bill of Rights in 1689, or in any event, by 1714. Since an Ordinance shall have the same force and effect as an Act of the legislature of the State assented to by the Governor, the legal status of such Ordinance whose (re) promulgation is legally unsustainable, mainly the consequence of an action undertaken under such Ordinances.

To the question of “enduring rights”⁷⁹, “whether Ordinances issued by the executive exercising its powers under Article 213 or for that matter Article 123 can create enduring rights in favor of individuals affected thereby”⁸⁰. The SCI unanimously held that “the nature of power invoked for issuing ordinances does not create enduring rights in favor of those affected by such ordinances”⁸¹. Otherwise, there would be a situation “where the exercise of power by the Governor would survive in terms of the creation of rights and privileges, obligations and liabilities on the hypothesis that these are of an enduring character”⁸². In that scenario, “the legislature may not have had an opportunity to even discuss or debate the Ordinance”⁸³, which would be in “derogation of parliamentary control and supremacy”⁸⁴ and “reverses the constitutional ordering in the regard to the exercise of legislative power”⁸⁵. The SCI, in its earlier rulings, has wrongly “equated Ordinances with the temporary Act”⁸⁶. Therefore, the resultant effect of the *Bihar* case culminated in over-

⁷⁸ *Chatterjee* (n. 47) 333.

⁷⁹ The effects and consequences arising under a ceased Ordinance.

⁸⁰ *Krishna Kumar Singh* (n. 36) 18

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ *ibid* 55.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid* 54.

ruling the decisions of the *State of Orissa v Bhupendra Kumar Bose*⁸⁷ and *T. Venkata Reddy v State of Andhra*⁸⁸ as far as the creation of enduring rights in Ordinances are concerned.

Having said that, the consequence of concluded transactions under the Ordinance before it ceased to operate perplexed the SCI. On this issue, the previous Constitution benches have ruled that “if the right created by the statute is of an enduring character and has vested in the person, then that right cannot be taken away because the statute by which it was created has expired”⁸⁹. In doing so, the status of the Ordinance was treated as that of a temporary statute. Unanimously, the Court in *Bihar case* ruled that equating the Ordinance as a temporary statute is a bad law, and there is a fundamental fallacy in equating an Ordinance with a temporary Act. A temporary Act is a law, which is enacted by the legislature – Parliament or the State legislature – in the exercise of its plenary powers, while the Ordinance is not the legislative act, rather an executive act in the exercise of legislative power. The privilege of the legislature to convey the legislative intent of the creation of enduring rights for the future under the temporary Act is not conditioned, the legislature being plenary.

In this backdrop, the question as to whether the rights, privileges, obligations, and liabilities would survive an Ordinance, which has ceased to operate must be determined as a matter of construction. The appropriate test, according to the SCI, to be applied, is the test of “public interest” and “constitutional necessity”. This would include the issue of whether the consequences, which have taken place under the Ordinance have assumed an irreversible character. In a suitable case, it would be open to the SCI to mould the relief.

6. Conclusion

It is the travesty of Indian democracy that extraordinary power, such as “Ordinance making” bestowed upon the executive to utilize it for urgent necessity has been over-employed by it to gain political mileage, despite the existence of adequate constitutional safeguards. In this case, the SCI has rightly curtailed such arbitrary exercise of power as it goes against the constitutional ethos. Although the seven-judge bench decision in the *Bihar case* has extended the principle laid down in the *Wadhwa case* to make the laying of Ordinance before the legislature a compulsory exercise and to a larger extent, this may reduce the unmindful promulgation of Ordinances. However, to what extent reading of the

⁸⁷ *State of Orissa v Bhupendra Kumar Bose* MANU/SC/0220/196.

⁸⁸ *T. Venkata Reddy* (n. 34).

⁸⁹ *Krishna Kumar Singh* (n. 36) 12.

constitutional provision as prescribed, will effectively curb the arbitrary re-promulgation is yet to be ascertained by the efflux of time. Further, in what way the constitutional Courts will work out the appropriate tests, of “public interest” and “constitutional necessity”, for the continuation of actions after the death of the Ordinance is another constitutional enigma to witness in the future.

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