



DUPERY OVER ORDINANCE MAKING POWER

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Abstract

Article 123 and 213 of the Indian Constitution confer upon the President and the Governor of the State, respectively, the power to promulgate ordinances. This power is a temporary fix, to be used only in emergency situations, where there is urgency and the Legislature (Central or State, as the case may be) is not in session. Such an ordinance lapses after 6 weeks once the legislature comes in session. With the decline in the productivity of the Parliament the ordinances became a parallel method of legislation. For about a decade and half the state of Bihar was run on the ordinances. The law making power is vested to the legislature by the constitution and re-promulgation of such ordinances circumvents the legislature's primacy. It was widely held that the promulgation of ordinances was not subject to judicial review, unless of course they violated the fundamental rights. This has been the position in pre-independence Indian law and continued to be so after Independence until 2017 when the practice of re-promulgation of ordinances was labelled as a fraud upon the Constitution and barring the exceptional cases re-promulgation of the ordinances would be void. The paper illuminates the background of the ordinance making power. It elucidates the necessity of the ordinance making provision under the constitution and

it analyzes the extent to which the judgment succeeded in hooding the loopholes of the previous judgment.

Introduction

In India, there is a division of powers and functions among the three organs of the Constitution. The central and state legislatures are responsible for lawmaking, the central and state executives are responsible for the implementation of laws and the judiciary (Supreme Court, High Courts, and lower courts) interpret these laws. However, practically complete separation can never be achieved and the overlapping cannot be avoided. The power to issue ordinance conferred upon the President under Article 123 and to the Governor of States under Article 213 is one such example. Chapter IV of Part VI of The Indian Constitution, titled as the "Legislative Power of The Governor", contains the only constitutional provision, Article 213. The marginal note of 213 provides the description as the "Power of the Governor to Promulgate the Ordinances during recess of Legislature". The lawmaking power under the constitution rests with the legislature and only legislature. However, this power has been provided to the executive in the form of the right to promulgate the ordinances whenever the urgency arises. The ordinance making power of the State Executive is in *pari materia* to Article 123, which is enjoyed by the Central Executive with similar powers. The ordinance making power conferred upon the Governor is subject to certain requirements. The Governor can issue an ordinance only when:



- i) the legislature is not in session, and;
- ii) the Governor of the State is satisfied that immediate action is needed for the existing circumstances.

The first requirement establishes the time, at which an ordinance can be promulgated:

The Governor of the State can issue an ordinance only when the legislative assembly and the legislative council, if any, ie. both the houses are not in session and not at all, when in session. Article 174 of the Indian Constitution provides that the Governor of the State shall summon the House or Houses of the Legislature, as the case may be, from time to time and that the intervention between the last meeting and the date scheduled for the next meeting shall not be more than 6months.¹

The Governor cannot promulgate an ordinance during the time of the legislative session. This is because the lawmaking power is vested in the Legislature and laws can be enacted through the procedure only by the legislature and not through the ordinances while it is in session. Thus, an ordinance made when both the houses are in session is void. It may, however, be made when only one house is in session, the reason being that a law can be passed by both the Houses and not by one House alone, and thus, it cannot meet a situation calling for immediate legislation² and recourse to the ordinance making power becomes necessary.

¹ Art. 174 (1), The Constitution of India, 1950.

² M P Jain, Indian Constitutional Law, 179 (8th ed., 2018).

The second requirement demands the ‘satisfaction of the Governor’ regarding the persisting situation:

An Ordinance can be promulgated if the Governor is satisfied that the circumstances exist which render it necessary for him to take immediate action.³ The satisfaction of the Governor is not meant by mere ‘desirability’ which is distinguished from the ‘necessity’. The existence of the circumstances is an objective fact and the term ‘necessity’ coupled with ‘immediate action’ displays the sense of essentiality to promulgate an ordinance in existing circumstances. The power of the Governor to promulgate Ordinances under Article 213 has been held to be absolute,⁴ and no limitation on the legislative power of the executive can be read. The power, however, is to be used in circumstances where immediate action is necessary. Moreover, this exceptional power of ordinance making cannot be used as a substitute for the lawmaking power of the State Legislature. The power conferred upon the Governor is not in nature and does not make him a parallel lawmaking authority; this is because the lawmaking power rests in the duly elected legislatures which are the constitutional repository of the power to enact laws.

Apart from this, there are certain occasions on which the Governor cannot promulgate the ordinance without the instructions from the President-⁵

³ Art. 174(1), The Constitution of India, 1950.

⁴ AK Roy v. Union of India, (1982) 1 SCC 271.

⁵ Proviso to Art. 213 (1), The Constitution of India.



i) Where a Bill containing the same provisions requires the earlier sanction of the President, for its introduction into the legislature;
Eg. Under Article 304 (b) of the Constitution, the State Legislature is permitted to impose reasonable restrictions on the freedom of trade commerce and intercourse with or within that state, in the public interest. The proviso requires the previous sanction of the President before the Bill or amendment for the purpose is introduced in the State Legislature.

ii) Where a Bill containing the same provisions would be deemed necessary by the Governor for being reserved for the consideration of the President;
Eg. Under Article 200 of the Constitution, the Governor is required to reserve the Bill for the consideration of the President, which in his opinion would derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill if it became law; and,

iii) Where a law enacted by the state legislature containing the same provisions would require the assent of the President, failing which it would be invalid.
Eg. Under Article 254, if any law made by the State Legislature, with respect to any matter enumerated in the Concurrent List⁶, is repugnant to the law made by the Parliament in that matter then the state law will prevail only if and to the extent of which it has received the assent of the President.

The Ordinance passed by the executive, Article 213(2)⁷ provides, shall have the same force and effect as an Act of the Legislature of the State, however, such an ordinance necessarily needs to be laid down before the legislature when it reassembles or otherwise the ordinance 'ceases to operate'. An Ordinance ceases to operate in three instances⁸:

i) if the ordinance is not laid down before the legislature then, at the expiration of 6 weeks from the date of reassembly of the Legislature⁹, (where the Houses of the Legislature of a State having Legislative Council are summoned to reassemble on different dates, the period of 6 weeks shall be reckoned from the later of those dates, for the purpose).¹⁰

ii) before the expiration of that period when a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any¹¹; or'

iii) It may be withdrawn at any time by the Governor¹².

But there have been a number of instances where the ordinance making power has been wrongfully used by the executive bodies to enact laws, bypassing the legislature, in the name of the urgent situations. Such ordinances were promulgated and re-promulgated a number of times, neither were they laid down before the Legislature on its reassembly,

⁷ The Constitution of India, 1950.

⁸ Art. 213 (2), The Constitution of India, 1950.

⁹ Art. 213 (2) (a), The Constitution of India, 1950.

¹⁰ Explanation to Art. 213 (2), The Constitution of India, 1950.

¹¹ *Ibid.*

¹² Art. 213 (2) (b), The Constitution of India, 1950.

⁶ List III, Schedule VII, The Constitution of India, 1950.



therefore not transforming them into an Act nor were they withdrawn by the Governor. When these ordinances ceased to operate on expiry of 6 weeks from the date of reassembly they were re-promulgated with the changes as required or no change. Such Re-promulgation of ordinances circumvents the legislature's primacy. The pre-independence position of the Courts continued till now, the power was held to be out of the ambit of the judicial review unless they violated any fundamental right. So does it mean that the Governor may promulgate ordinances on his 'satisfaction' and there is no check on his power? Does it mean that the Governor may promulgate and re-promulgate the ordinances on his discretion circumventing the legislature's primacy and there is nothing to curb his actions? The issues by far were dealt by the Apex Court in **D C Wadhwa v. State of Bihar**¹³ and the loopholes were covered by the same court recently in **Krishna Kumar Singh v. State of Bihar**.¹⁴

Historical Background of the Ordinance Making Power

England

The Law of England is divided into three parts: common law, statutory law and customs, and the proclamations of the King were held to be none of these. In the Case of Proclamations, Sir Edward Coke opined:¹⁵

"The King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm."

Monarchs continued making Ordinances (of the unlawful kind) and enforced them too. Only with the establishment of parliamentary supremacy towards the end of the seventeenth century did the law and practice of Ordinances finally become inconsistent; from then on, it would always be a subordinate legislative power. By the close of the seventeenth century, statutes represented parliament's ultimate authority to enact legislation whereas Ordinances, generally speaking, came to represent the executive's more limited authority to make narrow and specific regulations¹⁶.

British India

The British government as a 'colonial power' felt the need and urge to arm their chief executive with the legislative power that he could invoke in emergent situations at will without having any risk of its refusal or without having any openly to account for it in order that he may fulfill his mission with the minimum of delay of protecting British interest and reign.¹⁷ It was on August 1st, 1861 that first time the 'extraordinary power' of legislation was conferred upon the Governor General to issue ordinances by Section 23, subject to two conditions: (i) the

¹³ D C Wadhwa v. State of Bihar, AIR 1987 SC 579.

¹⁴ Krishna Kumar Singh v. State of Bihar, (2017) 3 SCC 1.

¹⁵ In Re: The Case of Proclamation, (1611) 12 Co Rep 74.

¹⁶ Subhankar Dam, Presidential Legislation in India: The Law and Practice of Ordinances, 144, Cambridge University Press.

¹⁷ A P Pandey, "Hundred years of Ordinance in India: 1861-1961", 10 Journal of Indian Law Institute, 259 (1960).



power could be exercised in cases of emergency; and (ii) an Ordinance would remain in force for a period of not more than six months from its promulgation. This Act continued to be in force till December 31st, 1915 and was repealed by Government of India Act, 1915. During this period the power has been used for fifteen times.

On July 20th, 1915, the British government enacted The Government of India Act 1915. The Act came into operation on January 1st, 1916 and repealed *inter alia* the epoch-making British statute, the Indian Councils Act, 1861, but it re-enacted Section 23 thereof, relating to the powers of Governor General to make ordinances in case of an emergency as Section 72. The period witnessed the First World War which necessitated taking of prompt actions and various ordinances were promulgated for the purpose.

The scheme of Government of India Act, 1935 was not acceptable to the political parties and princely states and consequently the provisions vesting the ordinance-making power to Governor General both, during the recess of legislature¹⁸ and at anytime with respect to certain subjects¹⁹ contained in the

federal part of the Government of India Act, 1935 never came into force and therefore, could not be invoked. Instead, the Governor General continued to exercise his power, as hitherto, under Section 72 of the Government of India Act, 1915 as set out in the ninth schedule by the virtue of Section 312 read with Section 317 of the Act.

The position continued until the British Parliament passed the Indian Independence Act, 1947 and India became an Independent Dominion along with Pakistan. The Indian Constituent Assembly continued and was further empowered to enact the constitution. Meanwhile, the Government of India Act, 1935 was adopted by the India (Provisional Constitution) Order, 1947, to provide for a provisional Constitution conforming to the status of India as an Independent Dominion. The ninth schedule was omitted and with it Section 72 and the provision empowering the Governor-General to promulgate the ordinances in case of emergency during the recess of Legislature was made in Section 42 as adapted.

Constituent Assembly

The Union Constitution Committee was appointed by the Constituent Assembly on 30 April 1947 to report on the 'main principles of the Constitution'. The memorandum which was prepared by B N Rau, the constitutional advisor envisaged a constitutional power for making ordinances. He acknowledged that ordinances were the subject of great criticism under colonial rule but sought to allay the apprehensions which were expressed on the ground that the President would normally act on the aid and advice of ministers responsible to

¹⁸S. 42, The Government of India Act, 1935 (contains general power exercisable when immediate action is necessary and the legislature is not in session, with provision for the control of the power by the legislature.).

¹⁹S. 43, The Government of India Act, 1935 (limited power exercisable at any time when immediate action is necessary to enable the Governor-General to satisfactorily discharge his functions in so far as he is in so far as under the Act required to act in his discretion or to exercise his individual judgement without any provision for the control by the legislature.).



Parliament and was not likely to abuse the ordinance making power.

Ordinances *per se* are against the spirit of democracy and not conducive of development of the best Parliamentary traditions. However, the issuance of Ordinances has been held desirable to deal with an unforeseen and urgent situation. Justifying the provision in Constituent Assembly, Dr. B. R. Ambedkar said:²⁰

The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the power to promulgate a law which will enable the executive to deal with the particular situation because it cannot resort to the ordinary process of law because... the legislation is not in session.

The ordinance-making power of the Governor, although, is co-extensive with the power of the Legislature to make laws and no limitation can be read into this legislative power. However, it is clear that this extraordinary power was conferred upon the Executive Head to enable, to deal with any unforeseen or urgent matters which might well include a situation created by a law being declared void by a court of law.

The power to promulgate ordinances is meant to be used sparingly and only in an emergent situation and when the State Legislature is in recess. An Ordinance has only a limited life and no ordinance can remain in force for more than **7½ months** without being approved by the State Legislature and enacted into an Act. The Ordinance lapses if not passed by the

Legislature within six weeks from re-assembly of the Legislature. The assembly has to meet within six months of its last session;²¹ in effect, the maximum life of an ordinance can thus be seven and a half months.

Precedents

Act and Ordinance lie on the same footing

An Ordinance “shall have the same force and effect” as a law enacted by the state legislature indicates that in terms of its operation and consequence, the Ordinance making power is placed on the same basis as lawmaking power. So the President or the Governor is subject to the same constitutional limitations as the Parliament.

- i) fundamental rights contained in Part III;
- ii) distribution of legislative powers between the Union and the States, and;
- iii) express constitutional limitations.

The Constitution Bench in two cases laid down the similar observations that, “there is no qualitative difference between an Ordinance issued by the President and an Act passed by Parliament”²² and that, “the exact equation, for all practical purposes, between a law made by the Parliament and an ordinance issued by the President.”²³

²⁰ CAD VIII, B Shiva Rao, The Framing of India’s Constitution”, Vol. 2, 477 (2nd ed., 2006).

²¹Art. 174 (1), The Constitution of India, 1950.

²² (1981) 4 SCC 675.

²³ (1982) 1 SCC 271.



The Governor while promulgating an Ordinance does not constitute an independent legislature, but acts on the aid and advice of the Council of Ministers under Article 163 of the Constitution of India. The Council is collectively responsible to the Legislative body.

The executive is clearly answerable to the legislature and if the President, on the aid and advice of the executive, promulgates an Ordinance in misuse or abuse of this power, the legislature can not only pass a resolution disapproving the Ordinance but can also pass a vote of no confidence in the executive. There is in the theory of constitutional law complete control of the legislature over the executive, because if the executive misbehaves or forfeits the confidence of the legislature, it can be thrown out by the legislature²⁴ and the same limitations and initiations apply to the Governor, empowered under Article 213 of the Constitution.

‘Satisfaction’ of the Governor is subject to Judicial Review

An Ordinance is to be promulgated when the Governor or rather than the Executive, is satisfied that circumstances exist which render it necessary to take immediate action. Whether or not the circumstances exist, making such promulgation necessary is a matter to be decided by the Executive in its subjective satisfaction. Is that ‘satisfaction’ non-justifiable or subject to judicial review? In various cases, the Supreme Court too far immunized ‘the satisfaction of the Governor’ while exercising the ordinance making power.

²⁴ *R K Garg v. Union of India*, (1981) 4 SCC 675.

However, the court while construing the provisions of Article 356 in *S R Bommai v. Union of India*²⁵ elucidated the approach of the Court when the proclamation under Article 356 of the Constitution is questioned. The standard of judicial review was formulated in the following observation:

“....the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court would still not interfere so long as there is some relevant material sustaining the action. The ground of malafides takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power, or what is sometimes called fraud on power — cases where this power is invoked for achieving oblique ends.”

In *Indra Sawhney v. Union of India*²⁶ the court observed that the extent and scope of judicial scrutiny depend upon the nature of the subject matter, the nature of the right affected, the character of the legal and constitutional provisions involved and such factors. Since the duty to arrive at the satisfaction rests in the President and the Governors (though it is exercisable on the aid and advice of the Council of Ministers), the Court must act with circumspection when the satisfaction under Article 123 or

²⁵ *S R Bommai v. Union of India*, (1994) 3 SCC 1.

²⁶ *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217.



Article 213 is challenged..... it is only where the court finds that the exercise of power is based on extraneous grounds and amounts to no satisfaction at all that the interference of the court may be warranted in a rare case. However, absolute immunity from the judicial review cannot be supported as a matter of the first principle or on the basis of constitutional history.

Case Analysis

D C Wadhwa v. State of Bihar²⁷

An objectionable practice arose in the State of Bihar, of not placing the ordinances before the Legislature for approval when once they were promulgated. These ordinances were promulgated and re-promulgated word to word after the prorogation of the Legislature. This practice was aided by the fact that the Assembly always met for the period of fewer than 6 weeks and thus, the re-promulgation continued for years on a massive scale as common parlance. The State Government proceeded as if, laying down the ordinance on the table of the State Legislature on its' summon was a discretionary act of the Executive rather than a necessary provision. The Government by having ordinances re-promulgated from time to time by the Governor created an Ordinance Raj, surpassing the function of the State Legislature and thus, cheated upon the Constitution. This practice of mass re-promulgation of ordinances on prorogation of the session of the State Legislature continued unabated for long and was

resorted to methodologically and with the sense of deliberateness.²⁸

A writ petition was filed in the Supreme Court as a matter of Public Interest Litigation on January 16th,1984, challenging such a practice as unconstitutional. The Court delivered its opinion in the matter in December 1986. The Court observed the following:

- Every ordinance promulgated by the Governor of a State under Article 213, must be placed before the State Legislature, and the Executive by resorting to the emergency provision cannot usurp the law-making function of the legislature.
- The power to promulgate ordinances is essentially a power to be used to meet an extra ordinary situation and it cannot be allowed to be perverted to serve the political ends.
- The law-making authority is the legislature and not the executive and therefore, cannot take over the law-making procedure of the legislature by resorting to the urgencies. This would be clearly subverting the democratic process.
- The Court sets its face against the Ordinance Raj in the country.

The re-promulgation of the ordinances was held to be a colorable exercise of the power. It constitutes the fraud upon the constitution.

However, the limitation of the decision in **D C Wadhwa** was that having spelled out the constitutional doctrine, the Constitution Bench ended only with a '*hope and trust*' that lawmaking through re-promulgated ordinances would not become the norm'.

²⁷ *Ibid.*

²⁸ *Supra 2, at 392.*



That trust has been belied by the succession of re-promulgated ordinances in the case of **Krishna Kumar Singh v. State of Bihar**²⁹

Krishna Kumar Singh v. State of Bihar

The Governor of Bihar promulgated the first of the Ordinances providing for the taking over of four hundred and twenty-nine Sanskrit schools in the state. The services of teachers and other employees of the school were to stand transferred to the state government subject to certain conditions. The first Ordinance was followed by a succession of Ordinances. None of the Ordinances, which were issued in exercise of the power of the Governor under Article 213 of the Constitution, were placed before the state legislature as mandated. The state legislature did not enact a law in terms of the Ordinances.

The first Ordinance, called The Bihar Non-Government Sanskrit Schools (Taking over of Management and Control) Ordinance, 1989 was promulgated by the Governor of Bihar on 18 December 1989³⁰ and was published in the Bihar Gazette Extraordinary on December 16th, 1989. The Ordinance contains a recital of the satisfaction of the Governor that:

“44....circumstances exist which render it necessary for him to take immediate action for the taking over of non-government Sanskrit schools for management and control by the State Government for improvement,

²⁹ Krishna Kumar Singh v. Union of India, (1998) 5SCC 643.

³⁰ Ordinance 32 of 1989.

better organization and development of Sanskrit education in the State of Bihar.”

The life of the First Ordinance³¹ was for a period of two months and two weeks since by virtue of the provisions of Article 213(2)(a) it ceased to operate at the expiration of six weeks from the reassembling of the legislature. The session of the Legislative Assembly concluded on 25 January 1990.

On 28 January 1990, the second in the succession of Ordinances was promulgated. The next session of the Legislative Assembly was held between 16 March 1990 and 30 March 1990. On 2 May 1990, the third in the succession of Ordinances³² was promulgated. The next session of the Legislative Assembly took place between 22 June 1990 and 9 August 1990, as a result of which the life of the Ordinance was about three months. The first, second and third Ordinances were in similar terms.

On 13 August 1990, the Governor promulgated a fresh Ordinance³³ with some clauses materially different from the earlier ordinances. Since the next session of the Legislative Assembly commenced on 22 November 1990 the life of the Ordinance was about four months and two weeks.

The fifth in the series of Ordinances³⁴ was promulgated on 8 March 1991. The session

³¹ The Legislative Assembly was convened for its 11th session which lasted from 29 June 1989 to 3 August 1989 after the Ordinance was promulgated, the 12th Session of the Legislative Assembly commenced on 18 January 1990.

³² Ordinance 14 of 1990.

³³ Ordinance 21 of 1990.

³⁴ Ordinance 10 of 1991.



of the Legislative Assembly took place between 21 June 1991 and 2 August 1991. Soon after the conclusion of the session the sixth in the series of Ordinances was promulgated on 8 August 1991.³⁵ The next session of the Legislative Assembly took place from 1 December 1991 to 18 December 1991. Upon the conclusion of the session, the seventh of the Ordinances was promulgated on 21 January 1992.³⁶ The session of the Legislative Assembly took place between 20 March 1992 and 27 March 1992. The Ordinance lapsed on 30 April 1992.

The Ordinances promulgated by the Governor followed a congruous pattern. None of the Ordinances were laid before the legislature. Each one of them lapsed with the termination of the period of six weeks after the conglomeration of the session of legislative assembly. When the previous Ordinance ceased to operate, a fresh Ordinance was issued when the legislative assembly was not in session. The legislative assembly had no occasion to consider whether any of the Ordinances should be approved or disapproved. No motion was moved by the Government in the Legislative Assembly to enact a law alongside the lines of the Ordinance. The last of the Ordinances, like its predecessors, cease to operate as a result of the constitutional limitation contained in Article 213 (2) (a).

This case came to the light barely three years after the judgement where the Supreme Court regarded such practice of promulgation and re-promulgation as a fraud

on the Constitution in **D C Wadhwa v. State of Bihar**.³⁷

Writ proceedings were initiated before the Patna High Court by the staff of the Sanskrit schools for the payment of salaries. Those proceedings resulted in a judgment of the Patna High Court.

When the appeal against the decision of the High Court came up before a Bench of two judges of this Court in *Krishna Kumar Singh v. State of Bihar*, both the judges – Justice Sujata Manohar and Justice D P Wadhwa - agreed in holding that all the Ordinances, commencing with the second, were invalid since their promulgation was contrary to the constitutional position established in the judgment of the Constitution Bench. Justice Sujata Manohar held that the first Ordinance was also invalid being a part of the chain of Ordinances whereas Justice Wadhwa, however, held that the first Ordinance is valid and that its effect would endure until it is reversed by specific legislation. The difference of opinion between the two judges was in their assessment of the constitutional validity of the first Ordinance. Thus, the case came up before a Bench of three judges.

The case was then referred to a Bench of five judges on the ground that it raised substantial questions relating to the Constitution. However, the three decisions of Constitution Benches which have been noticed are those in **Bhupendra Kumar Bose**³⁸, **T Venkata Reddy**³⁹ and, **Satpal**

³⁷ D C Wadhwa v. Union of India, AIR 1987 SC 579.

³⁸ State of Orissa v. Bhupendra Kumar Bose, AIR 1962 SC 945.

³⁹ T Venkata Reddy v. State of Andhra Pradesh, (1985) 3 SCC 198.

³⁵ Ordinance 31 of 1991.

³⁶ Ordinance 2 of 1992.



Dang⁴⁰ and on another hand the nine judge Bench decision in **Bomma**i was relied upon, by counsel for the State. Thus, the matters call for hearing by a 7-Judge Bench of the Apex Court.

However, the major things that have already been cleared by the judgment in *D C Wadhwa*, the judgment of the Court in *Krishna Kumar* stands important on the points on which the prior judgment left lose its ambit.

No Justification for Re-promulgation of the Ordinance

The Government comes up with the excuses that there were such circumstances that the executive failed to present the ordinance before the Legislature and therefore, were compelled to re-promulgate the same.

The Ordinance making power does not constitute a parallel source of power in the hands of the President or the Governor as an independent legislative authority. It is mandatory requirement to lay down the ordinance before the parliament or the state legislature (as the case may be) and is not at all an optional move as the legislature needs to determine:

- (a) the need for, the validity of and an expediency to promulgate an ordinance;
- (b) the ordinance needs to be approved or disapproved;
- (c) an Act incorporating the provisions of the ordinance needs to be enacted (with or without amendments);

The re-promulgation of the ordinance bypassing the procedure of placing the ordinance before the parliament is a serious

constitutional infraction and abuse of the constitutional process. Article 213(2)(a) clearly provides that an ordinance promulgated under the said article shall “**cease to operate**” six weeks after the reassembling of the legislature or even earlier, if a resolution disapproving it is passed in the legislature.

The Constitution has used different expressions such as “repeal” (Articles 252, 254, 357, 372 and 395); “void” (Articles 13, 245, 255 and 276); “cease to have effect” (Articles 358 and 372); and “cease to operate” (Articles 123, 213 and 352), each of the expression having distinct connotation. The expression “cease to operate” in Articles 123 and 213 does not mean that upon the expiry of a period of six weeks after the legislature reassembles or passes the resolution disapproving it the ordinance is rendered *void ab initio* rather it stands to be ceased where it makes a provision which the Parliament would not be competent to enact (Article 123(3)) or if it makes a provision which would be invalid if enacted in the Act of legislature of the state assented to by the Governor (Article 213(3)). The framers have used two different expressions “cease to operate” and “void” separately within the same provision, are not meant to convey the same meaning.

Therefore, there is no justification for the re-promulgation of the ordinances, not even the hectic schedule; as it is upon the discretion of the Governor for how long period he would opine to call the House(s) for summon. Moreover, if the ordinance is not so important to be tabled during the session then there does not seem to be any urgent situation that requires the ordinance to be re-promulgated, therefore failing to meet the

⁴⁰ State of Punjab v. Satpal Dang, AIR 1969 SC 903.



requirement of urgency. Such re-promulgation constitutes the fraud upon the constitution.

The Survival of the Rights, Obligations, Liabilities and Privileges is to be decided as a Matter of Construction.

The theory of enduring rights has been laid down in **Bhupendra Kumar Bose**⁴¹ and followed in **T Venkata Reddy**⁴² by the Constitutional Bench is based on the analogy of a temporary enactment. There is a basic difference between an ordinance and a temporary enactment, the prior is not a law in itself whereas the later is the proper law passed by the legislature for a particular duration or in order to meet certain measure and ceases to operate the fulfillment of the objective. These decisions do not lay down the correct position of the moreover these judgments are ruled out as 'not a good law' in view of the decision in **S R Bommai**⁴³; There is no express provision in Article 123 and Article 213 for saving the rights, privileges, obligations and liabilities which have arisen under an ordinance which has ceased to operate. Such provisions are however specifically contained in other articles of the Constitution such as Articles 249(3), 250(2), 357(2), 358 and 359(1A). This is not conclusive and the issue is essentially one of the construction of giving content to the 'force and effect' clause while prescribing legislative supremacy and the rule of law; The appropriate test to be applied is the test of public interest and constitutional necessity. This would include the issue as to whether the consequences

which have taken place under such an Ordinance have assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief as would be in favour of the public at large.

Conclusion

There are many laws and judicial rulings meant for the better functioning of the democratic system, however still, the system is corrupted within the roots as the implementation of those laws and rulings lack. The ordinance making power though casts a shadow over the powers of the legislature is still required and necessary as there may be and have been such situations where the legislature is not in session and legal implementations are required to be imposed in order to control the situation. However, no circumstances are so convincing that any ordinance could be re-promulgated and if there is any such situation then it would be convincing enough for tabling such ordinance before the legislature. Promulgation of the ordinance is a necessary evil but the re-promulgation of such an ordinance is a fraud upon the Constitution and a sub-version of democratic legislative processes.

⁴¹ *Supra note 38.*

⁴² *Supra 39.*

⁴³ *Supra 35.*