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Understanding Re-promulgation of Ordinances under Articles 123 and 213 of the Indian Constitution and its Direct Challenge to Parliament's Supremacy in the Area of Law Making

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ABSTRACT

The doctrine of 'Separation of powers' ensures that the three branches – Legislature, Executive and Judiciary have their functions, duties and powers distinctly established. The law – making process exclusively rests with the Legislature. However, there lies an exception to this wherein the Executive can step in and pass an Ordinance. This phenomenon is called 'Presidential legislation' and the same is done by the Governor at the state level under article 213 of the Indian Constitution. In India, the legislature makes laws but in certain conditions, let's say during the existence of any exigency issue, the President and Governor who are only the head of the nation and states respectively, are conferred with law-making powers. Article 123 in the Indian Constitution talks about the power of the President to promulgate an Ordinance and an Ordinance has the same effect of a law passed by the legislature. There are three ways to check if an Ordinance has been re-promulgated – first is to see the title of the both the Ordinances; second is by analysing the contents of both the Ordinances, if the context and the contents are similar then it's the same Ordinance being re-promulgated; third is tracing the legislative entries of the original and latter version of the Ordinance, if they belong to the same legislative entry, then it's a re-promulgation. Let's have a look below to understand this stance better.

Keywords: *Separation of Powers, Promulgation and Re-promulgation of Ordinances, Article 123, Article 213.*

I. INTRODUCTION

The main conditions under which article 123 works is that an ordinance can only be promulgated when one house of the Parliament is not in session, and that circumstances require immediate action by the President of the country. Apart from this, the Ordinance is to be laid before the Houses of Parliament and would cease to operate in six weeks' time, if it is further

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not made into a law.[2] Hence, the maximum an ordinance can be in force is for 7.5 months (minimally, a session has to take place once in 6 months plus article 123(2) specifies the 6 weeks' duration, therefore the actual term of 7.5 months). An Ordinance can be done away with before the stipulated time of 6 weeks, if both the Houses pass a resolution disapproving the ordinance. Also, an Ordinance once promulgated can be withdrawn at any time by the President as per section 123(3). An important feature to note is that, no Ordinance would be valid, if it makes any provision which Parliament is not under the Constitution competent to enact – for example, subjects in the State list, laws having extra-territorial operations and fundamental rights.

Likewise, article 213 of the Constitution grants similar powers to the Governor, though the governor cannot promulgate any Ordinance without the instructions of the President if -

i) there already exists a bill containing the same provisions as in the proposed ordinance of the governor.

ii) he deems it necessary to reserve a Bill containing the same provisions for the consideration of the President

iii) those subjects in which normally the state doesn't have the authority to make laws on, but the state has either taken the consent of the President or is awaiting an approval by the President.

II. PROBLEM ASSOCIATED WITH ORDINANCE MAKING

Though Articles 123 and 213 are constitutionally valid articles, there does exist controversies around them as they have given rise to something called an 'Ordinance Raj'. The problem with Ordinance making is that, in conventional formulation, the President does not exercise legislative discretion but merely promulgates the Ordinance, in reality it's the Council of Ministers which decides if an ordinance is necessary.[3]

Secondly, the article places no cap on Ordinances. The president may promulgate as many Ordinances as he desires if the two conditions of - at least one House of Parliament not being in session and the necessity of an immediate action, are met.

Thirdly, whether re-promulgation is legal and a morally correct practice is a question that will be discussed in the latter half of this article, it is a common practice to re-promulgate an ordinance based on the interest of the government (since, essentially it is the Council of

[2]INDIA CONST. art. 123, cl. 2.
[3]Shubhankar Dam, Making Parliament Irrelevant: A Postcard from India, The Theory and Practice of Legislation 65, 66 (2016).

Ministers who are behind making an ordinance). While Article 123 compromises Parliament's relevance, re-promulgation effectively renders it irrelevant.[4] This gives the Executive, a means to alchemise temporary ordinances into permanent laws simply by re-promulgating them. If re-promulgation takes place repeatedly, such practice would keep an Ordinance in effect without subjecting it to a parliamentary vote.

Eg. – In 2014, the BJP Government promulgated the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) Ordinance 2014 [LARRO 2014] in which certain unfavourable changes were made to the law on land acquisition which was enacted with bipartisan support in 2013. Ideally, the two Houses should have voted on the ordinance after their reassembly in February of 2015. But since, the BJP government didn't have a majority in the upper house, it decided against bringing the Ordinance to a vote.[5] In such a scenario, LARRO 2014 should have ideally lapsed, showing consistency with Article 123. But the Council of Ministers persisted with the Ordinance, and re-promulgated it on 31 March 2015, days after the Parliament broke for recess (LARRO 2015). However, still unable to gather a majority in the second chamber, the government re-promulgated the Ordinance for a third time on 15 May 2015.[6]

Such a practice of re-promulgation is rather detrimental and mischievous on the part of the ruling government. Additionally, in the history of Indian governance, several minority governments have also misused and re-promulgated ordinances for their ulterior motives.

III. RE-PROMULGATION: IS IT LEGAL?

To re-promulgate simply means to effectively extend the life of an Ordinance. An Ordinance 'ceases to operate' 6 weeks after the two Houses reassemble, except if it is converted into an Act by then. Re-promulgation sidesteps this limitation. Moreover, article 123 is silent on the practice of re-promulgation and since there isn't an explicit provision prohibiting it, the reuse of an Ordinance isn't explicitly barred.[7]

While, in ***D.C. Wadhwa v. State of Bihar,***[8] the SC concluded that re-promulgation is unlawful and a fraud on the constitution, it gave out a rather dangerous exception that 'if a government is unable to introduce and push through a Bill to convert an Ordinance, then the re-

[4]Shubhankar Dam, Making Parliament Irrelevant: A Postcard from India, The Theory and Practice of Legislation 65, 67 (2016).
[5]*Id.*
[6]*Id.*
[7]Shubhankar Dam, Making Parliament Irrelevant: A Postcard from India, The Theory and Practice of Legislation 65, 71 (2016).
[8]D.C. Wadhwa v. State of Bihar, 1987 AIR 579.

promulgation of such an Ordinance would be legal'. In other words, if the legislature is too busy or a session is too short, the re-promulgation is justified.[9] The D.C. Wadhwa judgment hence, began a series of re-promulgation of Ordinances due to blatant misuse of this exception. For example, in ***Gyanendra Kumar v. Union of India,*** [10] the Narasimha Rao government re-promulgated 10 Ordinances and took refuge by stating that the Bills could not be debated upon due to heavy and urgent workload. The court, satisfied by this reason clubbed it under the exception principle laid down in the D.C. Wadhwa judgment and ruled in the State's favour without testing the veracity of those claims.[11]

Apart from that, re-promulgation also disrupts the doctrine of separation of power. However, the case of ***Krishna Kumar Singh v. State of Bihar*** [12] attempted to clear the question of the challenge which re-promulgation places on the Parliament's supremacy in terms of law making. The Supreme Court in this case, asserted Parliamentary supremacy and emphasised on the principle that 'ordinances are only meant to be used in exceptional situations'.[13]

It did so by laying down two important propositions of law:

Firstly, it held that the validity of an Ordinance was subject to judicial review. Widening the scope of judicial review, the judgment stated that the court has the authority to exercise such powers to verify the actions undertaken by both President and the Governor so as to assess whether an Ordinance was necessary or not. The satisfaction of the President under article 123 and of the Governor under article 213 is not immune from judicial review especially after the 44th Constitutional Amendment which brought about the deletion of clause 4 in both the articles.[14]

The judicial standard to be applied broadly resembled the standards governing judicial review of administrative action: while the Court could not substitute its *judgment* for that of the Executive, it could nevertheless examine the *material* on the basis of which the Executive had reached its judgment and set it aside if the material was non-existent or irrelevant. At the

[9]Shubhankar Dam, Making Parliament Irrelevant: A Postcard from India, The Theory and Practice of Legislation 65, 75 (2016).
[10]Gyanendra Kumar v. Union of India, AIR 1997 Delhi 58.
[11]Shubhankar Dam, Making Parliament Irrelevant: A Postcard from India, The Theory and Practice of Legislation 65, 76 (2016).
[12]Krishna Kumar Singh v. State of Bihar, AIR 1998 SC 2288.
[13]Gautam Bhatia, Executive Legislation and the Separation of Powers in India (Oct. 25, 2020, 8:00 pm), https://adminlawblog.org/2017/03/23/gautam-bhatia-executive-legislation-the-separation-of-powers-and-the-indian-supreme-court/.
[14]Tanuka De, Re-Promulgation of Ordinance Is A Fraud On The Constitution – Analysis In Light Of Krishna Kumar Singh V. State Of Bihar, (Oct. 24, 2020, 07:45 pm), https://www.mondaq.com/india/constitutional-administrative-law/742420/re-promulgation-of-ordinance-is-a-fraud-on-the-constitution-analysis-in-light-of-krishna-kumar-singh-v-state-of-bihar.

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minimum, this would require the Executive to justify the existence of an Ordinance by showing that an emergency surely existed.[15]

The case concluded that 're-promulgation is at odds with the principal of parliamentary supremacy'. Article 123 of the Constitution spells out the requirements before resorting to the extraordinary measure of promulgating an Ordinance. The government cannot convert the emergent power under Article 123 into a source of parallel law-making as that is unethical to the scheme of the Constitution.[16]

Secondly, it was adjudicated if an Ordinance 'ceased to operate', because it wasn't laid before the legislature on its reconvening, then acts done during the lifetime of the Ordinance would also come to an end. Hence, the two holdings that an ordinance is subject to judicial review and that they do not create enduring effects beyond their lifetime, together reaffirm the basic principle of separation of powers in a parliamentary democracy.[17]

However, this case is not without controversies as well. Scholars such a Gautam Bhatia, have critiqued the majority opinion of Justice D.Y. Chandrachud, *citing that the latter only adjudged that re-promulgation of Ordinances is constitutionally impermissible but didn't expressly hold that there could be no exceptional circumstances*. Additionally, for him another point of criticism was that though, Krishna Kumar Singh v. State of Bihar had relied on D.C. Wadhwa case, whether the latter stands overruled remains unclear. With respect to the criticism of the 'exception clause' given in D.C. Wadhwa, the SC only noted the criticism of the exception but didn't discuss it further as it deemed it irrelevant to the present case. Therefore, for Bhatia, Krishna Kumar Singh is a rather ambiguous judgement as it did not declare re-promulgation to be unconstitutional per se.[18]

IV. CONCLUSION

Legally, laws can only be enacted by the Legislative body at both Centre and State level. However, the Indian Constitution does provide an exception to this procedure by introducing Articles 123 and 213, thereby making promulgation of ordinances lawful. Hence, India does not follow the principle of separation of powers of the three organs of state in strict sense. The Executive performs certain functions that fall broadly in the executive realm but also cast a shadow on the legislative and judicial sphere. The legislative power conferred on the President

[15] *Id.* at 9.
[16] *Id.* at 14.
[17] *Id.* at 9.
[18] Gautam Bhatia, The Supreme Court's Ordinance Judgment – II: Two Debates, Indian Constitutional Law and Philosophy (Oct. 25, 2020, 09:30 pm), https://indconlawphil.wordpress.com/2017/01/03/the-supreme-courts-ordinance-judgment-ii-two-debates/.

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is not a parallel power of legislation. On the contrary, it has been conferred *ex necessitate* so as enabling the executive to meet any unforeseen and emergent situation.[19]

The actual bone of contention though lies in the act of re-promulgation of Ordinances. While the Constitution never permitted it, it has been a practice since years with Ordinances being re-promulgated multiple times.

What is unfortunate though, is that while Ordinances are a matter of judicial review, the Judiciary itself has failed to put a definite end to the practice of re-promulgation. Through the decisions of D.C. Wadhwa and Krishna Kumar Singh, the Courts have only brought the ills of re-promulgation and that as a practice, it doesn't go well with articles 123 and 213. The courts have not clarified the 'exceptional circumstances - escape clause', which invariably allows the re-issuance of Ordinances once promulgated.

Lastly, the way forward is to wait for a more nuanced judgment which will discuss the exception clause and its legality comprehensively. Till then, the executive body should be kept in check so that Ordinances having vested interest of the government are not passed.

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[19]Dharmendra Kumar Singh, *An Analysis of Judicial Trend and Attitude Towards Executive Legislation (Article 123/213) of Indian Constitution*, IJCAR 4167, 4167 (2017).

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