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Research Article

AN ANALYSIS OF JUDICIAL TREND AND ATTITUDE TOWARDS EXECUTIVE LEGISLATION (ARTICLE 123/213) OF INDIAN CONSTITUTION

Dharmendra Kumar Singh*

Department of Law, Bareilly College, Bareilly (U.P.)-India

A R T I C L E I N F O

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A B S T R A C T

This study aims to provide in brief the evolution and the development of Article 123/213 ordinance related provision of Constitution of India. It also puts forward the various governments' attitude towards ordinance making power since enforcement of the Constitution of India. This paper describes in detail the judicial trend and attitude of the Legislative power of the Executive and also emphasizes on the judicial journey of one of the most controversial articles of the constitution of India. The paper focuses on the disease of re-promulgation of ordinances and gives a critical approach by analysing the various judicial pronouncements. The main feature of this paper is that the recent judgment in ***Krishna Kumar Singh and Ors. Vs. State of Bihar and Ors*** is presented in the paper in detail which provides a complete picture of Article 123/213 and re-promulgation of ordinances.

INTRODUCTION

The history of Ordinances stretches back to 1861 when it was inducted in Section 23 of the Indian Council Act-1861 and after being passed into various versions of Government of India Act (namely of 1915, 1919 and 1935) ; it became a part of the Constitution of India. And that legacy cast its spell on the Constituent Assembly. By the time the provision on ordinances came up for debate in the Constituent Assembly, it had been part of India's legislative architecture for nearly 90 years. A lot of discussion on this act took place in the Constituent Assembly of India and in the end, it was deemed as 'a necessary evil' that has to be in the Constitution of India. Till the time India got independence, under the British Rule, 380 ordinances were promulgated since its commencement in 1861[1]. Initially, less than 10 ordinances had been issued in the first five decades since 1861 and thereafter, the use of Ordinance making power has multiplied rapidly.

Even after India attained independence, the work of making laws by means of issuing ordinances was carried forward from the British Rule. Pt. Jawaharlal Nehru, during his tenure of 14 years, promulgated 70 ordinances. Smt. Indira Gandhi in the years 1971-77, issued 77 ordinances. Her son Rajiv Gandhi in his 5 year term issued 35 ordinances. P.V. Narsimha Rao promulgated a record 77 ordinances which was quite worthy of criticism. The Left- Back United Front Government under H.D. Dev Gowda an Indra Kumar Gujral issued record 77 ordinances. Atal Bihari Vajpayee led NDA Government promulgated 58 ordinances during its tenure. UPA- I and UPA II during 2004 to 2014, headed by Dr. Manmohan Singh promulgated 36 and 25 ordinances respectively[2]. The present Modi Government, to this date, has issued more than 25 ordinances during its three years term. Enemy Property and The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment), are the two Ordinances that have been re-promulgated. This implies that the present Government has issued these ordinances more than once, Enemy Property for about 5 times and Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement (Amendment) for about 3 times. It is clear from the above analysis of facts that Governments after 1990 developed a tendency to take the route of making laws by means of using the Ordinances. This was due to the reason that they didn't have a majority in the Upper House or promulgating an ordinance is an easy way of stamping authority.

India does not follow the principle of separation of powers of the three organs of state, viz executive, legislature and judiciary in strict sense. The Executive in India performs varied and broad functions to deal with vagaries of a vast country like India. It is thus bound to exercise functions that fall broadly in the executive realm but also cast a shadow in the legislative and judicial sphere. The legislative power conferred on the President 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.[3]

Corresponding author:* **Dharmendra Kumar Singh
Department of Law, Bareilly College, Bareilly (U.P.)-India

Article 123 provides that an Ordinance issued under it, '*shall have the same force and effect as an Act of Parliament*.' Thus, there is hardly any difference between a regular Act and an Ordinance. An Ordinance made by the President is not an executive, but a legislative act. Hence, it is a 'law' within the meaning of Constitution. The power of the President to legislate by Ordinance during recess of the Union Parliament is co-extensive with the legislative power of the Parliament itself. An Ordinance, therefore, cannot be promulgated with respect to a subject which is beyond the legislative competence of Parliament. The same provision applies for the states under article 213 of the Constitution of India. An Ordinance may amend or repeal not only another Ordinance but also any law passed by the Legislature itself, subject to the limitation as to its own duration[4]. The intense mechanism of Law making is bypassed in case of an Ordinance as during an emergent situation, an Ordinance needs only an Executive sanction.

Ordinances can be promulgated only in the interregnum when the legislature is not in session, and there is urgency to make a law. This is an emergency power, and should not be considered as a power to bypass the legislature. An Ordinance is on an equal footing with a law passed by the Legislature. This means that an Ordinance can be promulgated on any subject matter as an ordinary law. Further, the growing field of legislative sphere also reflects in the diverse Ordinances being promulgated by Government's today.

The objective of this study is to perceive the judicial attitude and trends towards one of the most controversial articles 123/213 of Indian Constitution in detail, particularly the legal trends of re-promulgation of ordinances. This paper also bears the weight of critically analysing the judicial pronouncement in the cases of D.C.Wadhwa (1987), S, R. Bommai (1994) and the recent Krishna Kumar Singh (2017.)

Attitude of Judiciary

In ***State of Orissa*** *v.* ***Bhupendra Kumar Bose***[5], on account of defect in the electoral roll, the Government of Orissa set aside the municipality elections. The Governor of Orissa promulgated an ordinance for the validation of electoral roll. A Bill was moved in the state legislature for enacting a law in terms of the provisions of the ordinance but was defeated by a majority of votes. The State of Orissa filed an appeal before Supreme Court against the decision of the High Court striking down material provisions of the ordinance. Before the Supreme Court, it was urged on behalf of the Respondent that the ordinance was in the nature of a temporary statute which was bound to lapse after the expiration of the prescribed period. It was urged that after the ordinance had lapsed, the invalidity of the elections which it had cured stood revived. It was in the above background that Supreme Court addressed the question as to whether a lapse of the ordinance affected the validation of the elections under it.

Justice Gajendragadkar, writing the opinion of a Constitution Bench held that the general rule in regard to a temporary statute is that in the absence of a special provision, to the contrary, proceedings taken against a person under it will terminate when the statute expires. That is why the legislature adopts a savings provision similar to Section 6 of the General Clauses Act. But in the view of the court, it would not to be open to the ordinance making authority to adopt such a course because of the limitation imposed by Article 213(2) (a). The Constitution Bench relied upon three English judgments [6-8]. The 'enduring rights' theory which had been applied in English decisions to temporary statutes-was thus brought in while construing the effect of an ordinance which has ceased to operate. In the view of the Constitution Bench:

"Therefore, in considering the effect of the expiration of a temporary statute, it would be unsafe to lay down any inflexible rule. If the right created by the statute is of an enduring character and has vested in the person that right cannot be taken away because the statute by which it was created has expired. The court held that the validation of the municipal elections was not intended to be temporary in character which would last only during the lifetime of the ordinance. The rights created by it were held to endure and last even after the expiry of the ordinance. Consequently, the lapsing of the ordinance would not result in the revival of the invalidity of the election which the ordinance had validated."

In *The Barium Chemicals Ltd. V. The Company Law Board*[9], it was held by the Supreme Court that judicial review is not completely ousted in cases where the Legislature empowered an authority to act on its 'subjective satisfaction' when the need arose. The Court held that since subjective satisfaction was a condition precedent, "*No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable*" So the authority has to establish a prima facie case that the circumstance did exist or "*the action might be exposed to interference*"

The Supreme Court *in R. C Cooper v. Union of India* [10] related to Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969. Justice Shah writing for the majority (10:1) held:

"*The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction. The President is under the Constitution not the repository of the legislative power of the Union, but with a view to meet extraordinary situations demanding immediate enactment of laws, provision is made in the Constitution investing the President with power to legislate by promulgating Ordinances.*"[11]

Thus, the Apex Court explained the entire scope of the exercise of power of the President under *Article 123* in promulgating an Ordinance. The majority in the case however forbore to express any final opinion on this question as the Ordinance had been replaced by the Act by the time the case was taken up. Ray, J. dissenting, felt that the Article 123 related to policy and it was to be used in cases of emergency when immediate action was considered necessary and held that the satisfaction of the President is subjective.

In brief, the Court clearly held that an Ordinance could be challenged on grounds of mala fide intention or corrupt motive. However the fact that an Ordinance was issued just a few days before the scheduled session of Parliament did not show any mala fide intention and was not sufficient for setting it aside. Supreme Court also held that governments are the

sole judge of "necessity"; and that the courts will not get into this question. It was outside the scope of judicial review.

In ***M/S. S. K. G. Sugar Ltd vs State Of Bihar And Ors***[12] it was held by Sarkaria, J.,

"*It is however well-settled that the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole Judge as to the existence of the circumstances necessitating the making of an Ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on ground of error of judgment or otherwise in court.*"

This judgement negated the scope of judicial intervention and adhered to the traditional view.

38th Amendment to the Constitution stalled judicial scrutiny and 44th Amendment paved way for Judicial Review

To overcome the roadblock that the judiciary suggested in form of judicial review of Ordinance promulgated by the President in *R. C Cooper* case, the Government reacted by inserting *Clause(4)* in *Article 123* vide 38th Amendment Act, 1975. This Clause expressly forbade judicial intervention on the ground of Presidential satisfaction. It read, "*Notwithstanding anything in the Constitution the satisfaction mentioned in clause (1) shall be final and conclusive and shall not questioned in any court on any ground*". The 'satisfaction' was thus made final, conclusive and beyond judicial scrutiny regarding the existence of circumstances necessary for taking immediate action in the promulgation of an Ordinance by the President of India on the aid and advice of Council of Ministers. Further, Clause (4) was added retrospectively and grounds of interference by judiciary e.g. mala fide or colourable of the Executive to circumvent judicial decisions.

The *44th Amendment Act, 1978* of the Constitution was enacted by the Janata Government to make wide scale changes to the Indian Constitution to make the Indian polity more democratic. The statement of object and reasons of 44th Amendment Act read:

"*Recent experience has shown that the fundamental rights, including those of life and liberty, granted to citizens by the Constitution are capable of being taken away by a transient majority. It is, therefore, necessary to provide adequate safeguards against the recurrence of such a contingency in the future and to ensure to the people themselves an effective voice in determining the form of government under which they are to live.*"[13]

The 44th Amendment omitted Clause (4) and reinstated the position at the date of the judgment of *R. C. Cooper Case* (1970). It was observed in '*A.K. Roy*'[14] case that the effect of this deletion is to open the door of judicial review in a case under *Article 123*. It was argued that the deletion of the particular clause is a positive indication that the Parliament did not consider it safe or proper to entrust untrammelled powers to the executive to issue ordinances.

Cases after 44th Amendment, 1978

In ***A.K. Roy v. Union of India***[15], the National Security Ordinance, 1980 was in question. It was passed, "*to provide for preventive detention in certain cases end for matters connected therewith.*" The National Security Ordinance empowered the administration to detain any person on the ground that he was indulging in activities prejudicial to public order. The Petitioner was detained by the district administration of Dhanbad under this Ordinance. A five-judge Constitution bench heard the matter during which time Parliament had regularised the Ordinance into a formal enactment. Chief Justice Y. V. Chandrachud, writing on behalf of the majority (3:2) held as follows:

"*the Constitution makes no distinction in principle between a law made by the legislature and an ordinance issued by the President. Both, equally, are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power.*"[16]

Essentially, like an Act of the Parliament an Ordinance promulgated by the President or the Governors be the case cannot violate the Fundamental Rights guaranteed by the Constitution or can not violate the Constitution. Thus all the Entries in the Legislative List which are available to the Parliament can be applied to uphold the validity of an Ordinance made by the President.[17] The Court then moved on to elaborate on the reason for giving the Executive power to legislate and observed:

"*The mechanics of the President's legislative power was devised evidently in order to take care of urgent situations which cannot brook delay. The Parliamentary process of legislation is comparatively tardy and can conceivably be time-consuming. It is true that it is not easy to accept with equanimity the proposition that the executive can indulge in legislative activity but the Constitution is what it says and not what one would like it to be.*"[18]

It was observed that the doctrine of 'political question is not followed in India to put a self imposed restrain on judiciary and even in the United States where it had evolved, it faces adverse criticism'[19] The Court refused to go into the justiciability of the President's action of promulgating the Ordinance on the grounds that: a) it was merely academic in nature as the Ordinance had been replaced by a law enacted by Parliament; and b) enough material was not placed before the Court to look into the claims made regarding the circumstances that necessitated the promulgation of the Ordinance.

However, the Court clearly left the avenue open for a Petitioner to mount a challenge to an Ordinance if he/she made out a prima facie case to show that there were no circumstances necessitating the Ordinance. The Court would not however entertain casual challenges to the validity of Ordinances. The Court also refused to examine the submission of the Attorney General that the President's judgement (read satisfaction) was not justiciable because the materials that formed the basis of such judgement could not be disclosed in public interest. At this point of history the Government could refuse to place such materials before the Court by taking recourse to *Article 74(2)* of the *Constitution* and *Sections 123-124* of the Indian *Evidence Act* relating to public interest immunity from disclosing unpublished official papers (often called 'Government privilege') in court. How under such circumstances would a Petitioner show prima facie facts that circumstances did not exist requiring promulgation of the Ordinance was a moot point then.

In *R.K. Garg v. Union of India*[20], the Supreme Court again had the opportunity to give its opinion on the executive power to legislate. The Petitioner had challenged the validity of the Special Bearer Bonds (Immunities and Exemptions) Ordinance, 1981. The Court took the argument taken by Dr. Ambedkar in the Constituent Assembly Debates defending the incorporation of Ordinance in the Constitution. It was said that, an Ordinance of limited duration and it is not a parallel legislation and "*it has been conferred ex-necessitate in order enabling the executive to meet an emergent situation.*" In the present case by holding that the contents of the Ordinance were policy matters that the Court would not inquire into, the scope for judicial review of the President's exercise of the Ordinance-making power was somewhat curtailed.

In the case of *K. Nagaraj v. State of Andhra Pradesh*[21]it was held by *Chandrachud, C.J.*

"*It is impossible to accept the submission that the Ordinance can be invalidated on the ground of non application of mind. The power to issue an ordinance is not an executive power but is the power of the executive to legislate. The power of the Governor to promulgate an ordinance is contained in Article 213 which occurs in Chapter IV of Part VI of the Constitution. The heading of that Chapter is ' Legislative Power of the Governor". This power is plenary within its field like the power of the State Legislature to pass laws and there are no limitations upon that power except those to which the legislative power of the State Legislature is subject Therefore, though an ordinance call be invalidated for contravention of the constitutional limitations which exist upon the power of the State Legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any more than any other law can be. An executive act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature.*"

The governor of the state of Andhra Pradesh promulgated an ordinance reducing the retirement age of public sector employees from fifty-eight to fifty-five. The ordinance was challenged, among other reasons, on the basis that the governor wrongly and perhaps with improper motives came to the conclusion that it was necessary. The Court rebuffed that argument. A president/ governor's decision to promulgate an ordinance, it said, was immune from judicial review.[22] The Court reached that conclusion in three steps. First, an ordinance is identical to an Act[23]. Second, when Parliament enacts legislation, it cannot be accused of having done so "*for an extraneous purpose*."[24] Even if the executive, in a given case, has an ulterior motive in introducing a piece of legislation, "that motive cannot render the passing of the law mala fide." This kind of "transferred malice" was "unknown in the field of legislation.

Supreme Court 5 Judges Constitutional bench in ***T Venkata Reddy v. State of Andhra Pradesh***[25]dealt, with both R.K. Garg and A.K. Roy case were cited with approval in this case as both the decisions firmly established that an Ordinance was law. Further, the language of both Article 123 and 213 clarify it even more. An ordinance promulgated under either of these two articles has the same force and effect as an Act of Parliament or an Act of the State Legislature, as the case may be. The court cited its earlier judgment in *K. Nagaraj* v. *State of Andhra Pradesh*[26] held:

"*whether it is permissible to strike down an ordinance on the ground of non-application of mind or mala fides or that the prevailing circumstances did not warrant the issue of the Ordinance. In other words, the question is whether the validity of an ordinance can be tested on grounds similar to those on which an executive or judicial action is tested.*"[27]

The legislative action under our Constitution is subject only to the limitations prescribed by the Constitution and to no other. Any law made by their legislature, which it is not competent to pass, which is violative of the provisions in Part III of the Constitution or any other constitutional provision is ineffective. It is a settled rule of constitutional law that the question whether a statute is constitutional or not is always a question of power of the legislature concerned, dependent upon the subject matter of the statute, the manner in which it is accomplished and the mode of enacting it. While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised. The motives of the legislature in passing a statute are beyond the scrutiny of courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. 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. An ordinance passed either under Article 123 or under Article 213 of the Constitution stands on the same footing. When the Constitution says that the ordinance making power is legislative power and an ordinance shall have the same force as an Act, an ordinance should be clothed with all the attributes of an Act of legislature carrying with it all its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision.

In 1986 a five-judge Constitution Bench in *D.C. Wadhwa v. State of Bihar*[28] was called upon to decide the validity of the action of the Governor/State Government of Bihar in re-promulgating Ordinances frequently between sessions of the Legislature without bringing them before it for approval. The Bihar Government was promulgating and re-promulgating Ordinances without approaching the State Legislature. At the expiry of an Ordinance, it would promulgate another, reproducing the contents of the defunct Ordinance. It re-promulgated as many as 256 Ordinances between 1967 and 1981. One particular Ordinance was re-promulgated continuously for 13 years without approaching the State legislature for regular enactment. This practice was resorted to without even considering whether circumstances existed which rendered it necessary to take immediate action by way of re-promulgation of expiring Ordinances. Chief Justice P N Bhagwati speaking for the Bench, held as follows:

".... The Constitution makers expected that if the provisions of the Ordinance are to be continued in force, this time should be sufficient for the Legislature to pass the necessary Act. But if within this tune the Legislature does not pass such an Act, the Ordinance must come to an end. The Executive cannot continue the provisions of the Ordinance in force without going to the Legislature. The law-making function is entrusted by the Constitution to the Legislature consisting of the

representatives of the people and if the Executive were permitted to continue the provisions of an Ordinance in force by adopting the methodology of repromulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-making function of the Legislature. ..."

D C Wadhwa case made it crystal clear that the Ordinance-making power could be used for fraudulent purposes by an elected Government acting through a pliant Governor. Usurpation of the power of the Legislature in this manner is anathema to the concept and practice of rule of law. However the Court only recognized re-promulgation in the manner described in this case as a ground for justiciability of the exercise of the Governor's power to promulgate Ordinances. The Court refused to accept that *R C Cooper case* had any bearing on this case as the question of the satisfaction of the Governor had not been raised in this case by the Petitioners. The Supreme Court laid down the following propositions:

1. The power to promulgate an Ordinance is an emergency power which may be used where immediate action may be necessary at a time when the legislature is not in session. It is contrary to all democratic norms that the Executive should have the power to make a law; hence such emergency power must, of necessity, be limited in point of time.
2. A constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the authority to do an act, to avoid that limitation by resorting to a subterfuge would be a fraud on the constitutional provision.
3. While the satisfaction of the President as to the existence of circumstances necessitating immediate action by issuing an Ordinance cannot be examined by Court, it is competent for the Court to inquire whether he has exceeded the limits imposed by the Constitution. He would be usurping the function of the Legislature if he, in disregard of the constitutional limitations, goes on re-promulgating the same Ordinance successively, for years together, without bringing it before the legislature. Though, in general the motive behind issuing an Ordinance cannot be questioned, the Court cannot allow it to be 'perverted for political ends.'

Further in the case of ***S.R. Bommai v. Union of India***[29] the Supreme Court appointed a 9 judges constitutional Bench while dealing with the misuse of Article 356. In this case the scope of Judicial Review was expanded and it provoked the constitutional expert, legal luminaries and advocates to think with a novel outlook towards Article 123/213. The Supreme Court held that the exercise of power by the President under the Article 356(1) to issue proclamation is Justiciable and subject to Judicial Review to challenge on the ground of mala fide. In Bommai case, the observations in A K Roy case have found a specific reference. The court while construing the provisions of Article 356 noted that Clause 5 which expressly barred the jurisdiction of the courts to examine the validity of a proclamation had been deleted by the forty-fourth amendment to the Constitution. Any observation of the court on the basis of the 38th amendment does not any longer hold good.

Land mark judgement of Krishna Kumar Singh and Ors.Vs. State of Bihar and Ors[30]

In case of ***Krishna Kumar Singh and Ors.Vs. State of Bihar and Ors***[30], the Governor of Bihar promulgated the first of the Ordinances which is in issue in the present case, 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 were placed before the state legislature as mandated. The state legislature did not enact a law in terms of the Ordinances. The last of them was allowed to lapse.

Writ proceedings were initiated before the High Court by the staff of the Sanskrit schools for the payment of salaries. An 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 wherein, 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. The difference of opinion between the two judges was in their assessment of the constitutional validity of the first Ordinance; one of them holding that it was invalid while the other held it to be unconstitutional. When the case came before a Bench of three judges, it was referred to a Bench of five judges on the ground that it raised substantial questions relating to the Constitution. The proceedings therein resulted in a reference to a larger Bench of seven Judges. The majority judgment, delivered by Justices S. A. Bobde, Adarsh K. Goel, Uday U. Lalit, D. Y. Chandrachud and L. Nageswara Rao, Chief Justice of India T. S. Thakur and Justice Madan B. Lokur differed from the majority view. The three decisions of Constitution Benches, namely- State of Orissa v. Bhupendra Kumar Bose[31], T. Venkata Reddy and Ors. v. State of Andhra Pradesh[32] and State of Punjab v. Sat Pal Dang and Ors.[33] have been noticed. The court relied on D.C. Wadhwa v. State of Bihar[34] and S.R. Bommai and Ors. v. Union of India[35]. The judgment for majority was authored by Justice D. Y. Chandrachud, held:

"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 has 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 givers under the Constitution. Open legislative debate and discussion provides sunshine which separates secrecy of ordinance making from transparent and accountable governance through law making"[36].

The court further held:

"The Constitution has not made a specific provision with regard to a situation where an ordinance is not placed before a legislature at all. Such an eventuality cannot be equated to a situation where an ordinance lapses after the prescribed period or is disapproved. The mandate that the ordinance will cease to operate applies to those two situations. 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 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. In the present case, none of the ordinances promulgated by the Governor of Bihar were placed before the state legislature. This constituted a fraud on the constitutional power. Constitutionally, none of the ordinances had any force and effect. The noticeable pattern was to avoid the legislature and to obviate legislative control. This is a serious abuse of the constitutional process. It will not give rise to any legally binding consequences."[37]

In summation[38], the conclusions in this judgment are as follows:

1. The power which has been conferred upon the President under Article 123 and the Governor under Article 213 is legislative in character. The power is conditional in nature: it can be exercised only when the legislature is not in session and subject to the satisfaction of the President or, as the case may be, of the Governor that circumstances exist which render it necessary to take immediate action;
2. An Ordinance which is promulgated Under Article 123 or Article 213 has the same force and effect as a law enacted by the legislature but it must (i) be laid before the legislature; and (ii) it will cease to operate six weeks after the legislature has reassembled or, even earlier if a resolution disapproving it is passed. Moreover, an Ordinance may also be withdrawn;
3. The constitutional fiction, attributing to an Ordinance the same force and effect as a law enacted by the legislature comes into being if the Ordinance has been validly promulgated and complies with the requirements of Articles 123 and 213;
4. The Ordinance making power does not constitute the President or the Governor into a parallel source of law making or an independent legislative authority;
5. Consistent with the principle of legislative supremacy, the power to promulgate ordinances is subject to legislative control. The President or, as the case may be, the Governor acts on the aid and advice of the Council of Ministers which owes collective responsibility to the legislature;
6. The requirement of laying an Ordinance before Parliament or the state legislature is a mandatory constitutional obligation cast upon the government. Laying of the ordinance before the legislature is mandatory because the legislature has to determine: (a) The need for, validity of and expediency to promulgate an ordinance; (b) Whether the Ordinance ought to be approved or disapproved; (c) Whether an Act incorporating the provisions of the ordinance should be enacted (with or without amendments);
7. The failure to comply with the requirement of laying an ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process;
8. Re-promulgation of ordinances is a fraud on the Constitution and a sub-version of democratic legislative processes, as laid down in the judgment of the Constitution Bench in D C Wadhwa;
9. Article 213(2)(a) provides that an ordinance promulgated under that 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 these expressions has a 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 of the reassembling of the legislature or upon a resolution of disapproval being passed, the ordinance is rendered void ab initio. Both Articles 123 and 213 contain a distinct provision setting out the circumstances in which an ordinance shall be void. An ordinance is void in a situation where it makes a provision which Parliament would not be competent to enact (Article 123(3)) or which makes a provision which would not be a valid if enacted in an act of the legislature of the state assented to by the Governor (Article 213(3)). The framers having used the expressions "cease to operate" and "void" separately in the same provision, they cannot convey the same meaning;
10. The theory of enduring rights which has been laid down in the judgment in Bhupendra Kumar Bose and followed in T Venkata Reddy by the Constitution Bench is based on the analogy of a temporary enactment. There is a basic difference between an ordinance and a temporary enactment. These decisions of the Constitution Bench which have accepted the notion of enduring rights which will survive an ordinance which has ceased to operate do not lay down the correct position. The judgments are also no longer good law in view of the decision in S.R. Bommai;
11. No express provision has been made in Article 123 and Article 213 for saving of 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, however, not conclusive and the issue is essentially one of construction; of giving content to the 'force and effect' Clause
12. The question as to whether 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 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 the Ordinance have assumed an irreversible character. In a suitable case, it would be open to the court to mould the relief; and

13. The satisfaction of the President under Article 123 and of the Governor under Article 213 is not immune from judicial review particularly after the amendment brought about by the forty-fourth amendment to the Constitution by the deletion of Clause 4 in both the articles. The test is whether the satisfaction is based on some relevant material. The court in the exercise of its power of judicial review will not determine the sufficiency or adequacy of the material. The court will scrutinize whether the satisfaction in a particular case constitutes a fraud on power or was actuated by an oblique motive. Judicial review in other words would enquire into whether there was no satisfaction at all.

The judgment in *Krishna Kumar Singh and Ors. Vs. State of Bihar and Ors*[39] displays a complete picture of Article 123/213 and provides a binding law to curb the misuse of legislation by the Executive. This judgment will prove to be a milestone judgment in the future and will act as a check to the executive power of legislation without proper justification. After this judgment, the requirement of laying an Ordinance before Parliament or the state legislature is a mandatory constitutional obligation cast upon the government. The court pronounced that failure to comply with the requirement of laying an ordinance before the legislature is a serious constitutional infraction and abuse of the constitutional process. Re-promulgation of ordinances is held to be a fraud on the constitution. These binding observations in this case will definitely have a widespread and amending effect on the unfettered legislative power of the Executive.

CONCLUSIONS

Article 123/213 of the Constitution of India was a colonial provision which was passed on through the line of the Government of India Act, 1935 and later into the Indian legal scenario. All the governments from Nehru to Modi have frequently misused this provision in the Constitution to their benefits by making laws at their own will. This provision was inducted in the Constitution of India in the name of 'necessary evil' but has gone on to become a political sword for the Union Governments, down the years. This Article permitted the governments to make laws at will, thereby, debilitating the major characteristics of an ideal democracy viz. the power of the opposition in the legislature and the value of public opinions. This article was designed for exigencies when Parliament/ State Legislatures are not in session for a limited time frame. Yet, what we observe is that after Article 356, this provision stands as one of the most misused article of the Constitution of India.

If we study the judicial attitude and trend towards this article, we'll come to the conclusion that most of the early cases, the Supreme Court of India was in favor of the colonial law and the legal interpretations in those cases were in favor of the Government by stating that the Executive was the sole judge of the 'satisfaction' of promulgating the ordinances and that the provisions were beyond the judicial review. In cases of R.C. Cooper(1970) and A.K. Roy(1982), a gleam of optimism concerning this provision was provided. But, in later years, the Supreme Court reached a damaging conclusion in the cases of *Venkata Reddy (1985)* and *K. Nagaraj and Ors. (1985)*, thereby neglecting any hope of checking the misuse of Executive legislation. The case of D.C Wadhwa (1987) gave a positive direction to this Article as it deemed the misuse of Article as a constitutional fraud and provided several directions for checking the misuse. But this judgment didn't give any straight forward and binding directions on the disease of re-promulgation. But, recently the landmark Krishna Kumar judgment (2017) provides a clear scenario of all the aspects of Article 123/ 217 and will hopefully act as a check to the executive power of legislation without proper justification. The researcher hopes that the positive impact, the historical S.R. Bommai case has had on Article 356, likewise, the same positive effect will be observed after the landmark judgment in the case of Krishna Kumar on Article 123/213 in the coming years. Furthermore, the researcher also hopes that the Krishna Kumar case will check the unfettered power of Executive legislation.

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