

# Endangered Constitutionalism:

## Documents of a Supreme Court Case

### D. C. Wadhwa

In remarkably well-organized and well-argued written submissions, pp. 75-135 and 161-239 (which should be compulsory reading for all lawyers for its method of presentation), Dr. Wadhwa argues ... . Without doubt this learned book exposes the underbelly of Indian constitutionalism and even of activist judicial action. *Endangered Constitutionalism* testifies to a scholar's epic, impassioned, and yet reflexive commitment to expose and combat the subversion of Indian constitutionalism and to place erudite knowledge at the service of restoration of constitutional legality in India in ways which benefit the hapless Indian citizens.

This archival work is also quite exceptional because it narrates the story of the ways in which India's foremost and gifted activist justices frustrate in the end result the integrity of the cause which Professor Wadhwa brought to their notice. The Epilogue subjects the Supreme Court judgment to a searching exegetical and doctrinal analysis. Professor Wadhwa is an eminent agrarian economist but lawyers and judges, I suggest, have much to learn from him in terms of legal analysis and the ways of deciphering the original critical intent of the Indian constitutionalism.

Dr. Upendra Baxi,

Professor of Law, University of Warwick (U.K.)

(Former Professor of Law, Vice-Chancellor, Delhi University & Director of Indian Law Institute, New Delhi)

Gokhale Institute of Politics & Economics  
(Deemed to be a University),  
Pune 411 004

## About the Book

It is unusual to bring out a book containing documents submitted in litigation. Generally, such documents do not have any utility beyond the narrow boundaries of the particular litigation. When the litigation ends, the documents on the file lose their utility and are sent to the record room. However, the documents included in the present book were regarded by many, including the judiciary, as of more than temporary value and, therefore, accepting their advice, the author persuaded himself to prepare the present book of petitions, affidavits, written submissions and other documents, filed in a case which has now become well known. It also contains the judgment of the Supreme Court and the Epilogue.

As the subject matter of this petition was considered by the Supreme Court to be of great constitutional importance, the Court directed all the parties (the Government of Bihar, the Union of India and the petitioners) to file their written submissions in support of their respective contentions. All the parties filed their written submissions. After seeing the written submissions of the petitioners, the Government of Bihar requested the Court, after the hearing was over, to allow them to file additional written submissions. Though unusual, the Court allowed them to do so and asked the petitioners also to file additional written submissions, if necessary, which they did.

The written submissions of the Union of India were drafted by an Advocate, settled by a Senior Advocate and filed by an Advocate on Record. In the case of the petitioners, the author himself, the petitioner, wrote the written submissions and the additional written submissions which were not settled by their Senior Advocates. However, all those from the legal profession who went through the same were of the opinion that these written submissions should be published because they will serve as a model for all lawyers in the future, will be useful to law students in their legal education and to others who may be interested in public interest litigation.

The litigation served the purpose of throwing light on some dark corners of public life in India and also performed the function of enabling the judiciary to re-affirm certain democratic values enshrined in our Constitution. The judgments are regarded as sources of law. But no judgment can be fully understood without looking at the factual background and the documentary material that formed the basis of the judgment. It is hoped that the present book will be viewed by the readers in that light.

It is obvious from the counter affidavit and written submissions filed by the State of Bihar that affidavits and written submissions in India are not always prepared satisfactorily, or in such detail as would meet the requirements of the case. There are several sentences and quotations in the counter affidavit and the written submissions, filed by the State of Bihar, which are incomplete or are unintelligible. Besides, there are numerous spelling mistakes, grammatical mistakes and other mistakes which have been pointed out in the foot-notes in their respective places.

It is likely that the written submissions drawn by the author, the petitioner, included in this book may provide some assistance to those members of the legal profession who might have occasion to pursue litigation in the nature of writs.

Certain controversies have a habit of recurring. If that happens, the material presented herein will be of additional historical value. There is every possibility that the book gets included in the reading material for law students of different levels in different universities for their legal education. It will, of course, be of great use to the lawyers, judges, students of law and political science, policy makers, politicians, social scientists and the enlightened public. It will also be of great interest to all those who are interested in the rule of law, constitutional morality and parliamentary democracy in the country. Persons interested in public administration will find the book highly useful to them as well.

## About the Author

Dr. D.C. Wadhwa is Emeritus Professor, Formerly Professor and Director, Gokhale Institute of Politics and Economics (Deemed to be a University), Pune. He was a member of the research staff in the Dept. of History, South Asia Institute of Heidelberg University, Germany, for three and a half years. He has also taught in the Dept. of Sociology at the University of Konstanz, Germany, as a Visiting Professor.

He has participated and presented papers at conferences and symposia and delivered lectures at several institutions in India and abroad.

He has worked as a Chairman/Member of several committees constituted by the Planning Commission, U.G.C., I.C.S.S.R., Central and State Governments, etc.

His earlier books include, *inter alia*, *Agrarian Legislation in India (1793-1966)*, Vol. I, *Zamindars, Mines and Peasants* (jointly edited with Professor Dietmar Rothermund), *Re-promulgation of Ordinances: A Fraud on the Constitution of India* and *Guaranteeing Title to Land: A Preliminary Study*.

He has received from the Indian International Friendship Society (IIFS), their most coveted institutional and globally reputed presentation of *Rashtriya Gaurav Award* for his "outstanding services, achievements and contributions". According to IIFS, this "Award is given to a selected few most extraordinary men and women from the field of science, technology, education, industry, fine arts, politics and social work, who have done something special for their country and have attained great excellence in their respective fields of work". Professor Wadhwa is the first and the only academic so far to receive this Award.

*Gokhale Institute Studies No.73*

**Endangered Constitutionalism:**

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**D. C. Wadhwa**

**Gokhale Institute of Politics and Economics**  
(Deemed to be a University),  
Pune 411 004



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**Dedicated  
to the memory of  
my father**

# ABBREVIATIONS OF LAW REPORTS USED

- A.C.** : The Law Reports, House of Lords, Judicial Committee of the Privy Council and Peerage Cases (known as Law Reports, Appeal Cases, House of Lords and Privy Council), since 1890.
- A.I.R.** : All India Reporter, Since 1914.
- Add.** : Reports of cases argued and determined in the Ecclesiastical Courts by J. Addams (known as Addams' Ecclesiastical Reports), 3 Volumes, 1822-1826.
- All E.R.** : English Reports, 178 Volumes, 1220-1850.  
(Eng.Rep.)
- App.Cas.** : Appeal Cases before the House of Lords, reported by Charles Clark, John Fraser Macqueens and Herbert Cowell (known as Law Reports, Appeal Cases, House of Lords), 15 Volumes, 1875-1890.
- B.&C.** : Reports of cases argued and determined in the Court of King's Bench by Richard Vaughan Barnewall and Cresswell (known as Barnewall & Cresswell's Reports, King's Bench), 10 Volumes, 1822-1830.
- C.L.R.** : Commonwealth Law Reports: Cases decided in the High Court of Australia.
- Cl. & Fin.** : Reports of Cases heard and decided in the House of Lords on Appeals and Writs of Error and Claims of Peerage, by C.Clark and W. Finnely (known as Clark and Finnely's Reports, House of Lords), 12 Volumes, 1831-1846.
- Co. Rep.** : The Reports of Sir Edward Coke (known as Coke's Reports), 13 Parts, 1572-1616 - A New Edition by John Henry Thomas and John Farquhar Fraser, 6 Volumes, 1826.

- F 2d : Federal Reporter, Second series (U.S.A.),1924-(Current).
- H.L.Cas : The House of Lords Cases, on Appeals and Writs of Error and Claims of Peerage, by Charles Clark (known as Clark's Reports, House of Lords), 11 Volumes, 1847-1866.
- I.A. : Indian Appeals.
- K.B. : The Law Reports, King's Bench Division and on appeal therefrom in the Court of Appeal (known as Law Reports, King's Bench Division), 1900-1952.
- L. Ed. 2d : United States Supreme Court Reports: Lawyers' Edition, Second Series.
- Man. & Ry. K.B. : Reports of Cases argued and determined in the Court of King's Bench by James Manning and Archer Ryland (known as Manning and Ryland's Reports, King's Bench), 5 Volumes, 1827-1830
- Plowd. : The Commentaries; or Reports of Edmund Plowden (known as Plowden's Reports), 2 Volumes, 1550-1580, 1816.
- Q.B.D. : The Law Reports cases determined in the Queen's Bench Division and on Appeal therefrom in the Court of Appeal , 25 Volume, 1875-1890.
- S.C.R. : Supreme Court Reports.
- S Ct : Supereme Court Reporter (U.S.A.), 1882- (Current).
- Tax L.R. : Taxation Law Reports.
- Wall. : Wallace's Supereme Court Reports 1863-1874
- Wils. : Reports of cases argued and adjudged in the King's Court at Westminster by George Wilson (known as G. Wilson's Reports, King's Bench and Common Pleas), 3 Volumes, 742-1774, Third Edition, 1799.

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## FOREWORD

It is a great pleasure and pride to be able to write on behalf of the Gokhale Institute of Politics and Economics the foreword to *Endangered Constitutionalism: Documents of a Supreme Court Case* by D.C. Wadhwa, Professor Emeritus and former Director of the Institute. This monograph, published as the Gokhale Institute Studies No. 73, deserves a special applause as it breaks more than a decade-long pause of the Institute's publication under this renowned Studies series. I am doubtless that this monograph would rejuvenate and enliven greatly the long-standing distinction and tradition of our Institute as an eminent workhouse for socially useful and meticulous academic research, training, and publication on India's key economic, social, and political issues and policies. Professor Wadhwa clearly deserves warm greetings and deep gratitude for his extraordinary and inspiring academic zeal and dedication that could overwhelm even the inevitable distractions and debilitations consequent upon human aging. Indeed this present monograph is a sequel to Professor Wadhwa's earlier widely acclaimed *Repromulgation of Ordinances: A Fraud on the Constitution of India* published by the Institute under its Studies series about a quarter century ago.

Although India's relative performance in all-round material and human development since Independence is rather murky, if not entirely unimpressive, its strength and resilience in upholding democracy and rule of law has been almost indisputable. Clearly, the Constitution of India has served almost as bedrock of such remarkable democratic potency and vigour of the country. Alas, the formal democracy and constitutional sovereignty as such could neither guarantee an equitable and adequate prosperity and growth, nor has it been, somewhat inter-relatedly, free of potential danger and threat to its very vibrancy and sanctity. The present monograph is a sharp pointer, or more appropriately, a forceful reminder, to the persisting potential forces and deviant practices towards fracturing constitutional and democratic fabric and vitality.

This book marshals a formidable volume of legal documents, records, judicial arguments and judgments, ordinances, written legal submissions and representations pertaining to what Professor Wadhwa called in his earlier book 'a fraud on the Constitution of India' – a 'fraud' which results from repeated re-promulgations of state 'ordinances' kept in force but thereby left

devoid of democratic sanctity and constitutional legitimacy without enactment in the people's parliament. Indeed Professor Wadhwa's painstaking and profound research exposing and challenging this longstanding practice with special reference to the Bihar state government was submitted long back (in 1984) as a writ petition to the Supreme Court of India, which in turn delivered its judgment at the end of 1986.

This present book consolidates and presents systematically the details of the proceedings, written submissions, representations, arguments, huge mass of evidence and finally, the judgment on this writ petition in the Supreme Court. Professor Wadhwa has of course offered in his epilogue what could be called an incisive rejoinder to the Supreme Court's judgment by dissecting concisely its wider ramifications and subtle constitutional underpinnings.

The functioning of the democratic institutions premised on a country's constitution generally has profound bearings on the nature of economic activities, processes, and performance, especially in polities like India. Thus, while the book dwells and draws heavily on the constitutional/legal discourse and jargons, it would be of great value and insights not only to the students, professionals, and academics of India's constitutionalism and its functioning, but also to the vastly larger community of social scientists, economists, political scientists, and indeed all those seriously concerned and caring for India's democratic functioning and values. I am immensely happy that by bringing out Professor Wadhwa's present book pertaining to the issues of such fundamental importance as the constitutional efficacy, the Gokhale Institute would reaffirm its abiding social commitments, particularly through its support for the cultivation and dissemination of meticulous and penetrating research on problems, predicaments, and policies relevant to social transformation, economic development, and democratic vitality in India and, of course, much beyond.

Gokhale Institute of Politics and Economics  
(Deemed to be a University),

Pune 411 004

September 18, 2008

Arup Maharatna  
Professor and Officiating Director

# PREFACE

## Accidental Incursion

In 1979, I started working on a book on agrarian structure in Bihar since 1793, the year in which the Permanent Settlement was introduced in the Presidency of Bengal of which the present states of Bihar and Jharkhand were then a part. As a part of that study I started working on the Chota Nagpur Tenancy Act of 1908<sup>1</sup>. It was at that time that I stumbled upon a peculiar fact. That was for the first time that I found that the same amendment to the Chota Nagpur Tenancy Act was being made again and again three to four times in a year through Ordinances. I collected all the amending Ordinances, compared them and found that they all were identical. I was confused because I had never seen till then the same amendment being made to an Act again, again and again. I talked to the officers of the Law Department. They told me that as the life of an Ordinance was limited, the said amending Ordinance was being re-promulgated again and again to keep the amendment alive. I got more confused because the phenomenon appeared to me as astonishing. While working on my book on agrarian legislation in India<sup>2</sup>, I had seen that all the amending Ordinances were invariably either replaced by the Acts or allowed to lapse all over the country. I decided to pursue the matter, although what I had discovered was beyond my discipline. I read, re-read and re-read Article 213 of the Constitution which empowers the Governors of the states to promulgate Ordinances. I also read the other connected material. The deeper I delved, the more shocking the phenomenon appeared to me. I was convinced that the re-promulgation of Ordinances was unconstitutional. It became obvious to me that the Governors of Bihar had been committing a fraud on the Constitution of India since 1967 when they started re-promulgating Ordinances, sometimes with the prior permission of the President of India. It was a rude shock to me. Since I considered the subject serious enough to be brought to the notice of the public, I kept aside my work on agrarian structure in Bihar and started working on this subject. It took me about two years to collect all the relevant material and write a book on it, a subject which was altogether a new field of research for me.

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<sup>1</sup> Bengal Act 6 of 1908

<sup>2</sup> Wadhwa, D.C., *Agrarian Legislation in India (1793-1966)*, Vol. 1

### Publication of Book

2. On August 15, 1983, this book, entitled *Re-promulgation of Ordinances: A Fraud on the Constitution of India*, was published by the Gokhale Institute of Politics and Economics, Pune. As the subject matter of the book was of considerable importance for the functioning of democracy in the country, its appeal to the enlightened public, the Parliament and the Supreme Court was inevitable.

### Early Comments on Book

3. On August 19, 1983, three days after the publication of the abovementioned book, the *Maharashtra Times*, a Marathi language daily from Bombay, carried an editorial on the book describing it as a “piercing eye-opener” and demanding that “the Supreme Court must give a decision on the violation of the Constitution in Bihar through the re-promulgation of Ordinances. ... All those interested in the rule of law must make the Supreme Court take a clear stand on this question.”

4. On August 21, 1983, that is, five days after the publication of the book, a full-page article appeared on the book in *Sunday Observer*, an English language weekly from Bombay, describing it as an extremely important book.

### Enthusiastic Upsurge

5. These were the first two of more than 200 – odd write-ups in the form of editorials, book reviews and review articles on this book in all parts of the country in English and regional languages dailies, weeklies, fortnightlies and monthlies, amounting to a national debate on the issue regarding the constitutionality of re-promulgation of the Ordinances. There were review articles published in almost all the journals (law as well as others) published in India and some journals published abroad. There was a debate on this book in the Parliament (*Rajya Sabha*).

### Filing of Writ Petition in Supreme Court

6. On January 16, 1984, impelled by the enthusiastic upsurge till then, I filed a writ petition in the Supreme Court of India under Article 32 of the Constitution

of India, challenging the practice of re-promulgation of Ordinances<sup>3</sup>. I annexed my abovementioned book as Annexure 'A' to the writ petition.

### The issues and Related Questions

7. The issues and related questions were broadly classified in two groups. In group A, a search for the following queries was pertinent:

(A)

- (a) Whether the Governor or the legislature of a state can extend the life of one Ordinance by another Ordinance.
- (b) Whether the re-promulgation of an Ordinance by the Governor of a state can satisfy the preconditions of urgency, emergency and the need for immediate action stipulated in the Constitution as essential conditions precedent to the exercise of power under Article 213 of the Constitution of India.
- (c) Whether the emergent circumstances necessitating the promulgation of an Ordinance within the contemplation of Article 213 can include the circumstances arising out of the expiry of an exactly identical Ordinance in accordance with the provisions of the Constitution, especially when before the expiry of an Ordinance the session of the legislature was held but a Bill to replace the existing Ordinance was not brought before the legislature.
- (d) Whether Article 213 envisaged the repeal of an existing Ordinance by another identical Ordinance to create a situation of the non-existence of law to meet an emergent situation and then invoke the power under Article 213 to resuscitate at the same time the repealed Ordinance in exactly identical terms by the repealing Ordinance.
- (e) Whether the extraordinary limited legislative power of the Governor of a state under Article 213 can be converted into an unlimited ordinary legislative power to promulgate and re-promulgate the same Ordinances again and again as a matter of routine and thereby make permanent laws.
- (f) Whether the Executive can get rid of the limitation on its emergency legislative powers by any means.

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<sup>3</sup>Document No. 1, pp. 1-29



- (g) Whether want of disapproval by the legislature of a re-promulgated Ordinance had any relevance for determining the legality of the re-promulgated Ordinance and whether such want of disapproval was conclusive of its constitutional validity.
- (h) Whether the recommendation of the Council of Ministers for promulgating an Ordinance was a *carte blanche* to the Governor to re-promulgate the same Ordinance again and again for indefinite number of times for a number of years without fresh advice of his Council of Ministers.
- (i) Whether the facts on which the satisfaction of the Governor was purported to be based in this case in promulgating Ordinances existed at all.
- (j) Whether the facts were such as could lead any reasonable person to come to the satisfaction which was arrived at.
- (k) Whether Ordinances had perpetual duration.
- (l) Whether the present writ petition raised a political question or an academic or hypothetical question.

8. A thoughtful consideration of each and every question yielded a negative reply. This signified that the re-promulgation of Ordinances was an act forbidden by the Constitution of India.

(B)

9. In Group B were included the following questions:

- (a) If the promulgation of an Ordinance for continuing the life of an earlier Ordinance was illegal, will the re-promulgation of the same Ordinance as a device for achieving the same purpose not be illegal?
- (b) Whether once the emergent circumstances having been utilised by promulgating an Ordinance and there having been a session of the state legislature after its promulgation, the power to deal with the situation by an Ordinance exhausted itself.
- (c) Whether the period of operation of an Ordinance specified in Article 213 (2) (a) of the Constitution of India read with the requirements of Article 174 (1) of the Constitution of India restricted the power of the Governor of a state to resuscitate an expiring Ordinance by re-promulgating it after the expiry of a period of six weeks from the reassembly of the legislature.

- (d) Whether successive repeal and re-promulgation of the same Ordinance before its date of expiry, with the intention of keeping it alive, was a mere device to circumvent the limitation as to the duration of an Ordinance imposed under the Constitution of India and whether the re-promulgation of an Ordinance was colourable legislation and hence a fraud on the Constitution of India.
- (e) Whether the re-promulgation of Ordinances resulted in the enlargement of the limited emergency legislative power of the Executive under Article 213 into an unlimited legislative power and whether this enlargement was violative of the basic structure of the Constitution of India.
- (f) Whether the re-promulgation of Ordinances destroyed the separation of powers among the three organs of the state and whether it violated the basic structure of the Constitution of India.
- (g) Whether the re-promulgation of Ordinances upset the balance of power among the three organs of the state and whether it destroyed the basis of democratic functioning which was the basic structure of the Constitution of India.
- (h) Whether the re-promulgation of Ordinances resulted in the Executive exercising the functions of the legislature in a manner not contemplated in the Constitution of India and whether by re-promulgation of Ordinances the Executive assumed the normal legislative power of the state into its own hands and thereby encroached upon the domain of the legislature.
- (i) Whether the re-promulgation of Ordinances resulted in the Governor's functioning as a parallel legislature of the state.
- (j) Whether lack of aid and advice of the Council of Ministers while re-promulgating Ordinances was fatal to the validity of the re-promulgated Ordinances.
- (k) Whether the satisfaction of the Governor in re-promulgating Ordinances was *mala fide* or was absurd or perverse or was based on wholly extraneous and irrelevant grounds and therefore amounted to no satisfaction at all in regard to the matter on which he was required to be satisfied and which satisfaction was a condition precedent to the exercise of power under Article 213.

- (l) Whether the material presented in this case established the fact that there did not exist or could not have existed any constitutionally and legally valid circumstances necessitating the promulgation of 50 Ordinances or so on different subjects on a single day for years together and whether the material given in the book laid down an acceptable foundation for the Supreme Court to hold that no circumstances existed or could have existed which rendered it necessary for the Governor to promulgate so many Ordinances on different subjects on a single day for all these years.
- (m) Whether the satisfaction of the Governor in re-promulgating Ordinances under Article 213 was justiciable.

10. The affirmative answers which the above questions yielded supported the conclusion arrived at in (A) above about the illegal and unconstitutional behaviour of re-promulgating Ordinances in law-making. This behaviour was under challenge.

### **Application for Interim Stay**

11. On January 28, 1984, I filed an application in the Supreme Court of India for an interim stay against the re-promulgation of eight Ordinances mentioned in the writ petition.<sup>4</sup>

### **Writ Petition Admitted**

12. On February 9, 1984, a Division Bench of three judges of the Supreme Court, realising the gravity of the matter, straightaway admitted my writ petition without any oral hearing. While admitting my writ petition, the Supreme Court issued notices to the State of Bihar, the Governor of Bihar and the Union of India, returnable in three weeks, on my application seeking a stay on the re-promulgation of Ordinances. The Order of the Supreme Court ran as under:

*“Rule Nisi. Issue notice on the stay application returnable in three weeks. CMPs are allowed<sup>5</sup>.”*

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<sup>4</sup>Document No. 2, pp. 30-33

<sup>5</sup>Document No. 4, p. 38

### **No Reply from State of Bihar and Union of India**

13. Neither the State of Bihar nor the Union of India cared to either reply to that notice of the Supreme Court within three weeks as required under the abovementioned Order of the Supreme Court or ask for an extension of that time.

14. As the State of Bihar and the Union of India did not file their replies to the notice of the Supreme Court of India within three weeks, I felt extremely happy because I presumed that the Supreme Court will grant me *ex-parte* stay. I further presumed that as the State of Bihar and the Union of India had not filed their counter affidavits within three weeks, they had accepted my contention that the re-promulgation of Ordinances was unconstitutional and had decided not to contest my application and therefore I shall get a declaration to that effect by the Supreme Court immediately. But my happiness was shortlived because nothing of that sort happened. It became obvious to me that there was no sanctity of the words 'three weeks' in the order of the Supreme Court.

### **Stay Application Not Pressed**

15. On April 6, 1984, my application for stay came up for hearing. The State of Bihar and the Union of India had not filed their replies to the notice of the Supreme Court, dated February 9, 1984 (returnable in three weeks), till then. The State of Bihar asked for some more time for filing their reply. I did not press for the stay on the assurance that the final hearing will take place soon. The Supreme Court made the following Order:

“Stay application is not pressed at present. This is predicated on the condition that the State of Bihar shall file full comprehensive counter affidavit to the main petition by May 30, 1984. Any rejoinder will be filed within two weeks thereafter. The WPs will be listed on second Tuesday in August 1984 for final hearing subject to overnight part-heard.”<sup>6</sup>

### **Counter Affidavits and Rejoinders Filed**

16. After that the State of Bihar and the Union of India filed their counter affidavits though not full and comprehensive as directed by the Supreme

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<sup>6</sup>Document No. 5, p. 39

Court<sup>7-8</sup> and I filed my rejoinders to those counter affidavits of the State Of Bihar and the Union of India.<sup>9-10</sup>

### **Case Did Not Come up for Hearing for Two Years**

17. Pursuant to the Order dated April 6, 1984, of the Supreme Court, on August 14, 1984 (which was second Tuesday in August), my case was listed in the Weekly List of the Supreme Court as item No. 8. I presumed that after the conclusion of hearing of seven cases listed before my case, my case will be taken up. But my presumption was not borne out by subsequent events. Not only my case did not come up for hearing during that week, it did not come up for hearing for about two years. The serial number of my case in the subsequent Weekly Lists kept on going down and down progressively week after week till it reached case No. 41 on November 27, 1984, instead of coming up for final disposal. From the next week, it regained some ground moving upwards to 35, 31 and 28 but the petition was not taken up for hearing.<sup>11</sup>

### **Allahabad High Court Declared Re-promulgation Unconstitutional**

18. On April 6, 1984, the Lucknow Bench of the Allahabad High Court declared the re-promulgation of Ordinances as unconstitutional during the pendency of my case in the Supreme Court. Thus, I got encouraged when one High Court in the country declared the re-promulgation of ordinances as unconstitutional. The State of Uttar Pradesh filed a Special Leave Petition before the Supreme Court and also filed an application for the stay of operation of the abovementioned judgment of the Lucknow Bench of the Allahabad High Court.<sup>12</sup>

### **Supreme Court Refused Stay of Operation of Allahabad High Court Judgment**

19. On September 20, 1984, a Division Bench of three judges of the Supreme Court dismissed the stay application of the Government of Uttar Pradesh and directed that the appeal of the State Government be heard along with my writ petition. I was encouraged by the dismissal by the Supreme Court of the stay

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<sup>7</sup> Document No. 6, pp. 40-45

<sup>8</sup> Document No. 8, pp. 55-57

<sup>9</sup> Document No. 7, pp. 46-54

<sup>10</sup> Document No. 10, pp. 60-62

<sup>11</sup> Document No. 11, p. 64

<sup>12</sup> Document No. 9, pp. 58-59



application of the Government of Uttar Pradesh against the judgment of the Allahabad High Court. The said Bench also referred the matter to the Constitution Bench for hearing at a very early date. The Order passed by the abovementioned Division Bench of the Supreme Court was as under:<sup>13</sup>

“Stay application dismissed. Tag this matter with the writ petition No. 412-415 of 1984. These matters raise important Constitutional issues which we consider are sufficient to be placed before a Constitution Bench. We therefore direct that these matters be listed before a Constitution Bench at a very early date.”

20. In spite of the transfer of my case from a Division Bench on September 20, 1984, to the Constitution Bench, my case continued to be listed before the same Division Bench, which had transferred this case to the Constitution Bench, till the end of the year.

### **Mentioning Before the Constitution Bench**

21. As the Order for the transfer of my case from the Division Bench to the Constitution Bench was passed in my absence and as it was not communicated to me, I was not aware of it till I heard about it from the advocate of the Respondent in the appeal filed by the Government of Uttar Pradesh. As soon as I came to know about it, I mentioned about it, through my counsel, before the Constitution Bench of the Supreme Court and after that it was listed in the Weekly List No. 2 of 1985 dated January 15-18, 1985, as item No. 12 before the Constitution Bench. In the Weekly List No. 3 of 1985, dated January 22-25, 1985, it was listed as item No. 11. But after this it was mysteriously taken off the list for about two months. On March 26, 1985, it was again listed in the Weekly List No. 11 as item No. 10. After this the Constitution Bench was broken and my matter did not come up for hearing before the Constitution Bench.

### **Application for Grant of Stay Filed Again**

22. On July 12, 1985, I filed an application for the grant of stay restraining the State of Bihar from re-promulgating Ordinances.<sup>14</sup> I pointed out in my said application that the Lucknow Bench of the Allahabad High Court had held, on April 6, 1984, re-promulgation of Ordinances as unconstitutional. The State of Uttar Pradesh had filed a Special Leave Petition before the Supreme Court and

<sup>13</sup> ibid

<sup>14</sup> Documnet No. 11, pp.63-68

also had filed an application for the stay of operation of the aforesaid judgment of the Allahabad High Court (Lucknow Bench). I further pointed out that a Division Bench of the Supreme Court had dismissed on September 20, 1984, the stay application of the Government of Uttar Pradesh and had directed that the appeal of the Government of Uttar Pradesh be heard along with my writ petition. The Division Bench of the Supreme Court had also referred the matter to the Constitution Bench for hearing at a very early date. I stated in my application that the delay in taking up my matter for hearing was leading to different practices being followed in different states of the country. As a result of the decision of the Lucknow Bench of the Allahabad High Court and as a result of the dismissal by the Supreme Court of the stay application filed before it by the State of Uttar Pradesh, the aforesaid decision of the Allahabad High Court (Lucknow Bench) prevailed and was operative in the State of Uttar Pradesh. Thus, in the State of Uttar Pradesh, the Ordinances could not be re-promulgated. However, in view of the fact that no stay was granted in my case, the State of Bihar was continuing to re-promulgate Ordinances. By refusing to grant stay application of the Government of Uttar Pradesh against the judgment of the Allahabad High Court (Lucknow Bench), the Supreme Court had in effect prohibited the Government of Uttar Pradesh from re-promulgating Ordinances till the disposal of my case. On the other hand, as stated hereinabove, the State of Bihar continued to re-promulgate Ordinances (even after the admission of my writ petition by the Supreme Court against this practice). I, therefore, submitted that it would be in the interest of justice if the Supreme Court removed the anomaly (created as a result of divergent practices being followed in two different states in India) by restraining the State of Bihar from following the illegal and unconstitutional practice of re-promulgation of Ordinances instead of getting them enacted into Acts of the legislature.

### **Supreme Court Orders Priority Hearing**

23. On July 29, 1985, when the Constitution Bench was not sitting, the Supreme Court directed that my matter should be taken up for hearing as the first matter before the Constitution Bench as soon as it is constituted. The directions were given by the Chief Justice Mr. P.N. Bhagwati and Justice Mr. A.N. Sen ... This order was reported widely in English and regional languages newspapers and magazines. I give below the news as it appeared in some of the English language daily newspapers. As all the newspapers published the same Order of the Supreme Court, there is naturally a repetition in reporting. In spite of the repetition in reporting, the reporting is done to show the interest the press

took in the matter in the country. The reporting of the Order in the regional languages newspapers could not be given because the translation from those newspapers into English could not be done :

- (a) *The Daily* from Bombay wrote as under:<sup>15</sup>

“The Supreme Court has announced that the writ petition of Dr. D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune, challenging the constitutional validity of repromulgation of ordinances (which is still being widely practised in Bihar) would be taken up for the hearing as the first matter before the Constitution Bench as soon as the Bench was set up. A directive to this effect was issued today by a Bench comprising Chief Justice P.N. Bhagwati and Justice A.N.Sen ... .”

- (b) *The Indian Express* published a UNI news item as under:<sup>16</sup>

“The Supreme Court directed today that the writ petition of Dr D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune, challenging the constitutional validity of re-promulgation of ordinances, should be taken up for hearing as the first matter before the Constitution bench as soon as it is constituted.

The directions were given by a bench consisting of Chief Justice P. N. Bhagwati and Justice A.N.Sen ... . Dr Wadhwa has challenged the practice being followed in the [*sic*]<sup>17</sup> Bihar, of re-promulgating ordinances for years together instead of getting them converted into acts of the legislature. There have been instances of ordinances remaining in force for more than 14 years.”

- (c) A Legal Correspondent of *The Statesman* from New Delhi reported as under:<sup>18</sup>

“The Supreme Court on Monday directed that Dr D.C. Wadhwa’s writ petition challenging the constitutional validity of repromulgation of ordinances in Bihar should be taken up for hearing as the first matter before the Constitution Bench as soon as it is constituted. The directions were given by a Bench consisting of the Chief Justice, Mr P.N. Bhagwati and Mr Justice A.N. Sen ... .

<sup>15</sup> *Daily* dated July 30, 1985

<sup>16</sup> *The Indian Express* dated July 30, 1985

<sup>17</sup> State of, added by the author

<sup>18</sup> *The Statesman* dated July 30, 1985

Dr Wadhwa has challenged Bihar's practice of repromulgating ordinances for years together instead of getting them converted into Acts of the Legislature and there have been instances of ordinances remaining in force for more than 14 years.

The writ petition is based on an extensive research, done by Dr Wadhwa, on the practice of repromulgation of ordinances in the State of Bihar. His findings were published in his book entitled "*repromulgation of ordinances: a fraud on the Constitution of India*". The book has been annexed to the writ petition."

- (d) A Correspondent of *The Telegraph* from Calcutta wrote as under:<sup>19</sup>

"The Supreme Court today directed that a writ petition challenging the Constitutional validity of repromulgation of ordinances should be taken up for hearing as the first matter before the Constitutional Bench as soon as it is constituted. The writ petition, filed by Dr D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune, came up before a bench consisting of Chief Justice, Mr P.N. Bhagwati and Justice A.N. Sen. Dr Wadhwa's petition is based on his extensive research on the practice of repromulgation of ordinances in the State of Bihar."

- (e) *The Indian Nation* from Patna wrote as under:<sup>20</sup>

"The Supreme Court directed on Monday that the writ petition of Dr D C Wadhwa of the Gokhale Institute of Politics and Economics, Pune, challenging the constitutional validity of repromulgation of ordinances should be taken up for hearing as the first matter before the constitution bench as soon as it is constituted. The directions were given by a bench consisting of the Chief Justice P N Bhagwati and Mr Justice A N Sen . . . . It may be recalled that Dr Wadhwa had challenged the practice being followed in the State of Bihar of repromulgating ordinances for years together instead of getting them converted into acts of the legislature and that there have been instances of ordinances remaining in force for more than 14 years. The writ petition is based on an extensive research done by Dr Wadhwa on the practice of re-promulgation of ordinances in the State of Bihar. His findings were published in his book entitled *Re-*

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<sup>19</sup> *The Telegraph* dated July 30, 1985

<sup>20</sup> *The Indian Nation* dated August 2, 1985

*promulgation of Ordinances: A Fraud on the Constitution of India.* The book has been annexed to the writ petition.

Dr Wadhwa contends that the practice of repromulgation of ordinances is *ultra vires* Article 213 of the Constitution which gives power to the governors to promulgate ordinances only in emergent situations which require immediate legislation when the legislature is not in session and the enactment of law cannot be delayed till the legislature re-assembles.”

- (f) Shri Kuldeep Kumar reported in *The Sunday Observer*, a weekly from Bombay, as under:<sup>21</sup>

“Even though the Chief Justice had directed, on July 29, 1985, that Dr Wadhwa’s writ petition be taken up for hearing as the first matter before the Constitution Bench, it could only come up for hearing on November 19, 1986.”

- (g) Shri Minoo Masani, formerly a member of the Constituent Assembly and a member of the Parliament wrote in his weekly column entitled “As I See It” in *The Statesman* as under:<sup>22</sup>

“..., it must be pointed out that even though Chief Justice, Mr Bhagwati had ordered this petition to be placed at the head of the list it has taken so many months for the matter to come to a hearing.”

- (h) Shri Shreekant Khandekar wrote in his article entitled “In the Balance” in *India Today* as under:<sup>23</sup>

“On July 29, 1985, a bench consisting of Chief Justice P.N. Bhagwati and Justice A.N. Sen directed that the case be the first one to be taken up after the formation of the constitution bench. In spite of this, today 14 months later the case is yet to be heard.”

24. As my matter was not being taken up for hearing by the Supreme Court, there were a large number of write-ups in the English and regional languages newspapers and magazines about the delay in taking up this matter. I give below extracts from some of those write-ups to show the concern, anguish and frustration of the press in the delay:

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<sup>21</sup> *The Sunday Observer* dated December 21, 1986

<sup>22</sup> *The Statesman* dated January 11, 1987

<sup>23</sup> *India Today* dated October 15, 1986

- (a) Smt. Neena Vyas wrote in her article entitled "A petition gathering dust" in *The Sunday Statesman* as under:<sup>24</sup>

"... although the matter was considered important enough for the Supreme Court to direct that the petition be placed before a Constitution Bench and be listed at "a very early date", the Court has not yet found the time to take up the petition. The Supreme Court clock stands still and refuses to tick, much like Brer Rabbit's watch in Alice in Wonderland. ... Is there a very definite method in this madness of delay and more delays?"

- (b) Shri Dev Dutt wrote in his article entitled "States Make Merry While SC Sits Over Plea," in *Onlooker* as under:<sup>25</sup>

"A writ petition against the practice of re-promulgation of ordinances for years together is pending before the Supreme Court for well over two years. The democratic public as well as legal profession are baffled by the delay in giving a verdict on an issue which is affecting the very fabric of the nation. ... The verdict of the Supreme Court will be a landmark in the domain of India's democratic polity. ... it directly deals with the gaping hole which the executive in India has made in the democratic structure and thus opened the floodgates of authoritarianism, ... **The democratic public opinion in India, and the world over, is eagerly looking forward to the judgment of the Supreme Court ... . The issues brook no further delay. Dr Wadhwa's writ was listed more than two years ago for hearing. During this long period, the writ vacillated between Case No. 8 and Case No. 41 in 1984. However in 1985, Justice Bhagwati, ... directed on July 29, 1985, that Dr. Wadhwa's matter should be taken up for hearing as first matter by the Constitution Bench. But so far, unfortunately, it has not come up for hearing... . It is believed that the constitutional cases of lesser significance to Indian democracy and society have had precedence over Dr. Wadhwa's writ. This itself has caused much pain and frustration in the public, and knowledgeable well-wishers of freedom and democracy have been dismayed and perplexed by the delay. Moreover, the disease which Dr.**

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<sup>24</sup> *The Sunday Statesman* dated October 26, 1986

<sup>25</sup> *Onlooker* dated October 31, 1986, pp. 46-47

Wadhwa's writ sought to cure has spread during the period of the delay. ... For example, the government of Kerala re-promulgated 25 Ordinances after the prorogation of the tenth session of the seventh Kerala Assembly in October 1985, 32 Ordinances just after the eleventh session in April 1986 and it re-promulgated 29 ordinances in August 1986. The government of Gujarat, infected by this disease, re-promulgated five ... ordinances in 1985. Whether this pernicious mini-epedemic of re-promulgation of ordinances in utter disregard of the Indian Constitution will be checked or it will spread to other states depends upon the Supreme Court judgment on Dr. Wadhwa's writ ... ."

- (c) Shri Shreekant Khandekar wrote in his article entitled "In the Balance" in *India Today* as under:<sup>26</sup>

"THREE years ago, D.C. Wadhwa of Pune's Gokhale Institute of Politics and Economics was the focus of nationwide attention: his book on the re-promulgation of ordinances in Bihar created a media sensation, lavish praise was heaped on it by eminent constitutional law expert H.M. Seervai and the issues it raised led to an opposition walk-out in the *Rajya Sabha*. But two years and eight months after the Supreme Court admitted his writ seeking a stop to the practice of re-promulgating ordinances, the highest court in the land oddly cannot find the time to hear the case.

Wadhwa's writ petition against the re-promulgation of ordinances has been hanging fire in the Supreme Court for 32 months even as more states follow this practice. ... The judgment, if and when it comes, could well alter the face of Indian politics."

- (d) Shri P. Sainath wrote in his article entitled "Is the Supreme Court sleeping?" in *Blitz*, a weekly from Bombay, as under:<sup>27</sup>

"ALMOST three years after the publication of D.C. Wadhwa's incredible book, *Re-promulgation of Ordinances: A Fraud on the Constitution of India*", the illegal and anti-constitutional practice of "re-promulgating" Ordinances issued by the Executive continues unabated in Bihar and Kerala.

<sup>26</sup> *India Today* dated October 15, 1986, p. 172

<sup>27</sup> *Blitz* dated April 19, 1986

And a peculiar situation has arisen where the practice has been declared unconstitutional in Uttar Pradesh, but remains constitutional in Bihar and in Kerala, where Chief Minister Karunakaran deems the practice to be for the good of the people! ... But, as Wadhwa's devastating book demonstrated, with irrefutable evidence, successive Governors of Bihar had been artificially prolonging hundreds of ordinances by resorting to a device politely termed as "Re-promulgation", which enables evasion of the constitutional limitations on the duration of such Ordinances. In effect, what applied to Ordinances, under the Constitution of India, did not apply in Bihar state, to take just one example.

Since that time, over 150 newspaper and journals have reviewed the book in glowing terms, besides drawing attention to its finding in editorials. At least one governor has refused to re-promulgate Ordinances submitted to him by a state government, at least one High Court has condemned the practice.

On April 6, 1984, the High Court of Allahabad (Lucknow Bench) held that the practice of re-promulgating Ordinances was unconstitutional. By that time, the Union Government thoroughly embarrassed by Wadhwa's book had already attempted to distance itself from what it recognised was an indefensible and illegal practice. On December 22, 1983, P. Venkatasubbiah, the then Minister of State in the Home Ministry, declared in the *Rajya Sabha* that:

*"... I am not here to defend any aberrations which have been committed by any State Government. I am not here to defend them ..."* ... On September 18, 1985, the speaker of the Kerala Legislative Assembly, M.V. Sudheeran, made a scathing attack on the government of his own state for abusing its Ordinance-making power. He condemned the approach of the Karunakaran government which, he said, "will, in effect, deprive the Legislature's rights and opportunities to make legislation. We cannot, on any account, afford to make the legislature a rubber-stamp."

It would seem then, that apart from the undistinguished exception of Kerala's Karunakaran, nobody has expressed himself explicitly in favour of the "Re-promulgation" of Ordinances. Governors and Speakers have condemned it and the Union Government, too, has declined to defend the practice. And yet, it continues! ... But



Wadhwa, who works at the prestigious Gokhale Institute of Politics and Economics in Pune (which, in fact, Published his book), is nothing if not a fighter. For over two years now, he has waged a one-man crusade to fight this subversion of the Constitution and systematic amputation of the importance of the Legislature. It is a battle he has waged at some personal cost, since his crusade was entirely self-funded, was over and above his normal full-time work at the institute, and required his constant shuttling between Pune and Delhi.

Among his mind-boggling findings: ... As Governor of Bihar, Jagannath Kaushal – a man with an eminent background as a lawyer and a judge – promulgated 56 entirely different Ordinances on a single day on 56 different subjects! ... Left to follow up on his own findings, Wadhwa filed a writ petition, in the Supreme Court (admitted on February 9, 1984), challenging Bihar's practice of "Re-promulgating" Ordinances for years together, instead of having them converted into Acts of the Legislature as required by the Constitution.

His case received a boost when the Allahabad High Court in the case of Uttar Pradesh Sahitya Sammelan Vs. Govt. of Uttar Pradesh, ruled the practice of "Re-promulgation" as being unconstitutional. He was further encouraged by the Supreme Court's dismissal of a stay application moved by the Government of U.P. against the Allahabad High Court Judgment.

Since then, however, Wadhwa's petition in the Supreme Court has been tossed about in a game of snakes and ladders; this, despite a directive of a Supreme Court Bench, itself, that the matter be taken up at the earliest. The Bench, consisting of Chief Justice P.N. Bhagwati and Justice A.N. Sen, issued this direction as early as July 1985, when it said that the issue should be taken up for hearing as the first matter before the Constitution Bench, as soon as it was constituted. ...

Surely, the highest Court of the land needs to put an end to this systematic subversion of the Indian Constitution. Until such time as the Supreme Court, which is today headed by one who enjoys a reputation for judicial activism, acts decisively on the matter, Indians (living in states other than Uttar Pradesh!) seem doomed to a continuance of the Ordinance Raj."

- (e) The Indian Correspondent of the *Asiaweek* from Hongkong wrote in his article entitled "A Test for India's Constitution" as under:<sup>28</sup>

Diwan Chand Wadhwa is a man with a mission. For years, the white-haired, bearded academic in home-spun clothes has campaigned against what he believes are unconstitutional practices in India's northeastern State of Bihar. Wadhwa ... has taken his case as high as the country's Supreme Court, where it has languished for the past year. Last week it seemed that his battle was approaching final climax. The Court's new chief justice, P. N. Bhagwati, had agreed to convene a constitutional bench, which requires a minimum of five Supreme Court Judges, to consider Wadhwa's case. **The affair is being watched closely by hundreds of jurists, journalists and academics ...** There were still disappointments for the ascetic crusader, however. Week after week he saw the case drop lower and lower on the court's docket ... leading Wadhwa to wonder if the judiciary was intent on shifting the issue to the back-burner.

### Constitution Bench Starts Sitting

25. On September 3, 1985, the Constitution Bench started sitting. In spite of the clear instructions by the Chief Justice of the Supreme Court of India that my matter should be taken up as the first matter by the Constitution Bench as soon as it is constituted, as widely reported in the press, the matter was not only not taken up as item No. 1 (Escorts case was taken up as item No. 1),<sup>29</sup> it was not even included in Weekly Lists till February 11, 1986, when it was listed as item No. 9. On February 25, 1986, it was listed as item No.7.<sup>30</sup> From March 4, 1986, the Constitution Bench did not sit. On August 12, 19, 26 and

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<sup>28</sup> *Asiaweek* dated August 16, 1985

<sup>29</sup> *Indian Express* dated September 4, 1985

<sup>30</sup> I understand that the listing of matters before the Constitution Bench of the Supreme Court is decided by the Chief Justice himself. If it is so, then how is it that in spite of the clear instructions by the Chief Justice of the Supreme Court himself on July 29, 1985, that my matter should be taken up for hearing as the first matter as soon as the Constitution Bench is constituted, it was not taken up when the Constitution Bench was constituted? Did it amount to the contempt of the Supreme Court by the Chief Justice of that court? Even if the listing of cases before the Constitution Bench is not done by Chief Justice of the Supreme Court himself, the person responsible for listing of the cases before the Constitution Bench cannot ignore the order of the Chief Justice in this regard. In that case, did it amount to the

September 2, 1986, my matter was listed as item No. 4 in the Weekly Lists but from September 9, 1986, it was removed from the Weekly Lists. Thereafter the Constitution Bench did not sit. On November 18, 1986, my matter was listed as item No. 3 before the Constitution Bench.

26. On November 17, 1986, the Chief Justice of the Supreme Court directed that my case will be taken up for hearing on November 19, 1986, as the first matter. *The Statesman* from New Delhi reported this direction of the Chief Justice as under:<sup>31</sup>

“The Chief Justice, Mr P.N. Bhagwati directed on Monday that the writ petition of Dr D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune, challenging the constitutional validity of the practice of repromulgation of Ordinances will be taken up for hearing on Wednesday as the first matter.

Dr. Wadhwa has challenged the practice, being followed in Bihar, of repromulgating Ordinances for years instead of getting them converted into Acts of the legislature. There have been instances of Ordinances remaining in force for more than 14 years.

The writ petition is based on research, done by Dr Wadhwa, on the practice of re-promulgation of Ordinances in Bihar. His findings were published in his book, *Re-promulgation of Ordinances: A Fraud on the Constitution of India*. The book has been annexed to the writ petition.”

### Hearing Begins

27. Finally, on November 19, 1986, my case was taken up for hearing as item No. 1. The hearing lasted for less than two days. It closed at 3 p.m. on November 20, 1986. The judgment was reserved.

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contempt of the Supreme Court by that person who did not list my case as the first matter before the Constitution Bench when it was constituted in spite of the clear instructions by the Chief Justice of that court in that regard? If it amounted to the contempt of the Supreme Court either by Chief Justice of that court himself or by a person responsible for listing the matters before the Constitution Bench, where should one file contempt proceedings against either the Chief Justice of the Supreme Court or the person ignoring the order of the Chief Justice in listing the matter before the Constitution Bench, as the case may be?

<sup>31</sup> *The Statesman* dated November 19, 1986

### Judgment Delivered<sup>32</sup>

28. The judgment was delivered on December 20, 1986. The operative part of the judgment was read by Mr Justice P.N. Bhagwati, Chief Justice of the Supreme Court, on the day on which he retired. The Advocates and the democratic public opinion in India were eagerly looking forward to the judgment of the Supreme Court.

### Reporting of Judgment

29. On December 21, 1986, the operative part of the judgment was reported all over the country in English and regional languages newspapers. There were even editorials written on the basis of the operative part of the judgment in many newspapers. Though it was a holiday, the Chief Justice of the Supreme Court had convened a special sitting of the Constitution Bench of the Supreme Court, that had heard the case, to pronounce the judgment. In spite of the holiday, the court room was packed with lawyers, representatives of the press (Indian and foreign) and the public to hear the judgment. Most of the newspapers had sent their legal correspondents or staff correspondents for reporting the judgment. Others reported the Press Trust of India's news item. I give below the extracts from the news that appeared in some of the English language newspapers to show the continued interest and satisfaction of the press at the result of the case. As foreign newspapers were not available, their reporting of the judgment could not be given. Similarly, the reporting of the judgement in the regional languages newspapers could not be given because the translation from those newspapers into English could not be done. Secondly, as the reporting by different newspapers is of the same judgment, readers may find that there is a repetition. The reporting of the judgment by different newspapers is given, in spite of the repetition of the judgment, to show the interest the press took in the case in the country:

- (a) The Legal Correspondent of *The Times of India* reported as under:<sup>33</sup>

“A CONSTITUTION bench of the Supreme Court today held that the Bihar government's systematic practice to promulgate and repromulgate ordinances for years was unconstitutional and a “fraud” on the Constitution.

A five judge constitution bench headed by outgoing Chief Justice, Mr P.N. Bhagwati, held that every ordinance promulgated by the

<sup>32</sup>(1987) 1 SCC 387

<sup>33</sup>*The Times of India* dated December 21, 1986

Governor must be placed before the legislature and the executive cannot, by taking recourse to an emergency provision of Article 213 of the Constitution, usurp the law-making function of the legislature.

The judges declared the Bihar Intermediate Educational Council Ordinance, 1985, which continued to be in operation as “unconstitutional.” ...

**In a packed court room on a holiday which was also Mr Bhagwati’s last day as the Chief Justice, the five judges unanimously observed that from facts in this case brought to them by Dr D.C. Wadhwa, it was clear that the power to promulgate ordinances was used on large scale by the Governor of Bihar. After the session of the state legislature was prorogued, the same ordinances which ceased to be [sic]<sup>34</sup> operate were repromulgated almost in routine manner.”**

- (b) The Legal Correspondent of the *Amrita Bazar Patrika* reported the news as under:<sup>35</sup>

“A constitution bench of the Supreme Court striking down the Bihar Intermediate Educational Council ordinance held that the systematic practice of repromulgation [sic]<sup>36</sup> ordinances by the Bihar government was unconstitutional and amounted to a fraud on the Constitution. ... Dr D C Wadhwa and others had challenged the repromulgation of ordinances by the Bihar government. According to the petitioner, through the device of repromulgation of [sic]<sup>37</sup> ordinance was kept alive up to a period of 14 years. He had submitted in the petition that often over 50 ordinances per day were issued.

The court said that from the fact [sic]<sup>38</sup> of the case it was clear that the power to promulgate ordinances was used by the Governor of Bihar on a large scale. After the session of the state legislature was prorogued the same ordinance which ceased to operate were [sic]<sup>39</sup> repromulgated containing the same provision.

The court held that every ordinance promulgated by the government must be placed before the legislature and the executive could not

<sup>34</sup> be, deleted by the author

<sup>36</sup> of, added by the author

<sup>38</sup> s, added by the author

<sup>35</sup> *Amrita Bazar Patrika* dated December 21, 1986

<sup>37</sup> an, corrected by the author

<sup>39</sup> was, corrected by the author

by taking report [*sic*]<sup>40</sup> to an emergency provision of Article 213 of the Constitution reserve [*sic*]<sup>41</sup> the law-making function of the legislature.”

- (c) A Staff Correspondent of the *Business Standard* reported the news as under:<sup>42</sup>

“A constitutional bench of the Supreme Court today delivered an embarrassing blow to the Bihar government by holding its practice of repromulgation of ordinances as unconstitutional. Striking down the Bihar Intermediate Educational Council Ordinance, 1985, which had been re-promulgated and was still in operation, the five-member bench headed by the Chief Justice, Mr P.N. Bhagwati, said the government could not usurp the powers of the legislature. This was a confirmation of the stand taken by Dr D.C. Wadhwa who had written a book on the Bihar government’s practice of re-promulgating ordinances. Dr Wadhwa had moved the Supreme Court to declare the practice as unconstitutional. ... The court said that from the facts placed on record in the case, it was clear that the power to promulgate ordinances was used by the Governor of Bihar on a large scale. After the session of the state legislature was prorogued, the same ordinances which ceased to operate were repromulgated.

The court held that every ordinance promulgated by the Governor must be placed before the legislature and the executive could not take recourse to usurping the law-making function of the legislature.”

- (d) The Legal Correspondent of *The Hindu* reported the news as under:<sup>43</sup>

“In what is known as the Bihar re-promulgation of ordinances case, a Constitution Bench of the Supreme Court today held that every ordinance promulgated by a Governor of a State under Article 213 must be placed before the State Legislature and “the executive cannot, by taking recourse to emergency position [*sic*]<sup>44</sup> of Article 213 (ordinance-making power), usurp the law-making function of the Legislature”.

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<sup>40</sup> resort, corrected by the author

<sup>41</sup> usurp, corrected by the author

<sup>42</sup> *Business Standard* dated December 21, 1986

<sup>43</sup> *The Hindu* dated December 21, 1986

<sup>44</sup> provision, corrected by the author

That could [sic]<sup>45</sup> be “subverting the democratic process”, the Bench said.

The retiring Chief justice, Mr. P.N. Bhagwati, who delivered the judgment, ruled that the systematic practice of the Bihar Government in repromulgating ordinances successively without enacting them through the Legislature was “clearly unconstitutional” and amounted “to a fraud on the constitution.”

The Bench, which consisted of Mr. Justice Ranganath Misra, Mr. Justice G.L. Oza, Mr. Justice M.M. Dutt and Mr. Justice K.N. Singh, was allowing a writ petition from Dr. D.C. Wadhwa, a research professor – who has done a research thesis on the unconstitutionality of repromulgating ordinances by the Bihar Government – challenging the constitutionality of the practice of the Bihar Governor in repromulgating ordinances without having the original ordinance cancelled or enacted into an Act of Legislature.

The Bench declared as unconstitutional the Bihar Intermediate Education Council Ordinance, 1985 – “which has been repromulgated and which is still operational.”

- (e) The Legal Correspondent of the *Indian Express* reported the news as under:<sup>46</sup>

“A CONSTITUTION Bench of the Supreme Court on Saturday ruled that repromulgation of ordinance [sic]<sup>47</sup> by the Bihar Government was clearly unconstitutional and amounted to a fraud on the Constitution. ... Dr D.C. Wadhwa and others had challenged the validity of re-promulgation of Ordinances by the Governor of Bihar as violative of the basic structure of the Constitution. Dr Wadhwa had filed the petition on the basis of his research work. He had pointed out how with the device of re-promulgation of Ordinances, an Ordinance was kept alive up to 14 years where as the Constitution limits the life of an Ordinance only up to seven and half months. He had stated that often more than 50 Ordinances were issued in a day by the Governor of Bihar.

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<sup>45</sup> would, corrected by the author

<sup>46</sup> *Indian Express* dated December 21, 1986

<sup>47</sup> s, added by the author

The Court held that every Ordinance promulgated by the Governor must be placed before the legislature and the executive could not by taking recourse to an emergency provision of Article 213 of the Constitution usurp the law-making function of the legislature. "That would be subverting the democratic process", the Court observed.

Holding that systematic practice of repromulgation of Ordinances was unconstitutional, the court declared the Bihar Intermediate Educational Council Ordinance, 1985, which had been repromulgated and which was still in operation as unconstitutional ... ."

- (f) Shri Kuldeep Kumar, a Staff Correspondent of *The Sunday Observer*, a weekly from Bombay, reported as under:<sup>48</sup>

"In a historic judgment, the Supreme Court today ruled that every ordinance promulgated by a state governor must be placed before legislature, and the executive cannot, by taking recourse to an emergency provision of Article 213 of the Constitution, usurp the law-making function of the legislature.

The strongly-worded judgment which happened to be the last under Chief Justice P N Bhagwati severely indicted the Bihar government and held that "the systematic practice followed by the Bihar Government of repromulgating ordinances successively without enacting the provisions of the ordinance [*sic*]<sup>49</sup> into acts of the legislature, is clearly unconstitutional and amounts to a fraud on the constitution."

The judgment was delivered by a five-member constitution bench headed by Chief Justice P N Bhagwati. ... The bench paid a rare tribute to the petitioner, Dr D C Wadhwa, saying "he had made enormous research and brought the reprehensible practice of the government of Bihar to the notice of the Supreme Court." ...

The filing of the writ petition followed the publication of a well-documented study by Dr Wadhwa titled "*Repromulgation of Ordinances: a Fraud on the Constitution of India*", which he annexed to his petition."

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<sup>48</sup> *The Sunday Observer* dated December 21, 1986

<sup>49</sup> s, added by the author



- (g) *Northern India Patrika* from Allahabad reported the Press Trust of India report as under:<sup>50</sup>

“A Constitution Bench of the Supreme Court today held that every ordinance promulgated [*sic*]<sup>51</sup> by the Government must be placed before the legislature and the executive cannot, by taking recourse to an emergency provision of Article 213 of the Constitution, usurp the law making function of the legislature, reports PTI.

“If the executive does it, it would be subverting the democratic process”, the court observed.

The bench ... gave the verdict while allowing a petition by Dr D C Wadhwa of the Gokhale Institute of Politics and Economics, Pune. The petition [*sic*]<sup>52</sup> challenged the validity of the practice of promulgation of ordinances by the Bihar Government.

The Judges observed that from the facts placed on the record it was clear that the power to promulgate ordinances was used by the Governor of Bihar on a large-scale.

They directed the Bihar Government to pay a sum of Rs.10,000 as and by way of costs to Dr Wadhwa who they said had done enormous research and brought the “reprehensible practice” of the Bihar Government to the notice of the Supreme Court.

The Judges noted that after the session of the state legislature was prorogued, the same ordinances which ceased to operate were repromulgated, containing the same provisions, almost in a routine manner.

The systematic practice followed by the Bihar Government of repromulgating ordinances successfully [*sic*]<sup>53</sup> without enacting the provisions of the ordinances into acts of the legislature was clearly unconstitutional and amounted to a “fraud” on the constitution.

The court held as “unconstitutional” the Bihar Intermediate Educational Council Ordinance, 1985 which has been repromulgated and which was still in operation.”

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<sup>50</sup> *Northern India Patrika* dated December 21, 1986

<sup>51</sup> promulgated, corrected by the author

<sup>52</sup> petition, corrected by the author

<sup>53</sup> successively, corrected by the author

- (h) *Deccan Herald* from Bangalore reported the Press Trust of India report as under:<sup>54</sup>

“A Constitution bench of the Supreme Court today held that every ordinance promulgated by the Government must be placed before the legislature. The executive cannot, by taking recourse to an emergency provision of Article 213 of the Constitution, usurp the law-making function of the legislature.

“If the executive does it, it would be subverting the democratic process,” the Court observed.

The bench ... gave the verdict while allowing the petition by Dr D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune. The petition challenged the validity of the practice of repromulgation of ordinances by the Bihar Government.

The judges observed that from the facts placed on the record it was clear that the power to promulgate ordinances was used by the Governor of Bihar on a large scale. ... They directed the Bihar Government to pay a sum of Rs 10,000 as and by way of costs to Dr. Wadhwa who they said had done enormous research and brought the “reprehensible practice” of the Bihar Government to the notice of the Supreme Court.

The systematic practice followed by the Bihar Government of repromulgating ordinances successfully [*sic*]<sup>55</sup> without enacting the provisions of the ordinances into acts of the legislature was clearly unconstitutional and amounted to a “fraud” on the Constitution.”

- (i) *The Economic Times* reported the PTI news as under:<sup>56</sup>

“A Constitution bench of the Supreme Court today held that every ordinance promulgated by the Government must be placed before the legislature and the executive cannot, by taking recourse to an emergency provision of Article 213 of the Constitution, usurp the law-making function of the legislature, says PTI.

“If the executive does it, it would be subverting the democratic process,” the Court observed.

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<sup>54</sup> *Deccan Herald* dated December 21, 1986

<sup>55</sup> successively, corrected by the author

<sup>56</sup> *The Economic Times* dated December 21, 1986

The bench ... gave the verdict while allowing the petition by Dr D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune. The petition challenged the validity of the practice of repromulgation of ordinances by the Bihar government.”

- (j) *The Sunday Indian Nation* from Patna reported the UNI and PTI news as under:<sup>57</sup>

“The systematic practice of re-promulgating ordinances successively without enacting their provisions into Acts of the legislature by the Bihar Government clearly amounts to a fraud on the constitution, the Supreme Court today ruled.

**The ruling was given by a constitution bench ... at a special sitting in view of the retirement of Chief Justice Bhagwati at mid night tonight.**

The court thereby allowed a writ petition by Dr D C Wadhwa of the Gokhale Institute of Politics and Economic [sic]<sup>58</sup> Studies [sic]<sup>59</sup>, Pune and directed the Bihar Government to pay costs of Rs 10,000 for his unique services in loringing [sic]<sup>60</sup> the matter to the notice of the court.

The court ruled that every ordinance promulgated by the government must be placed before the legislature and the executive cannot, by taking recourse to an emergency provision of Article 213 of the constitution, usurp the law-making function of the legislature.

‘If the executive does it, it would be subverting the democratic process’, the court observed.

The Judges observed that from the facts placed on the record it was clear that the power to promulgate ordinances was used by the Governor of Bihar on a large scale.

While allowing cost to Dr Wadhwa the court said that he had made enormous research and brought the ‘reprehensible practice’ of the Bihar government to the notice of the Supreme Court.

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<sup>57</sup> *The Sunday Indian Nation* dated December 21, 1986

<sup>58</sup> s, added by the author

<sup>59</sup> Studies, deleted by the author

<sup>60</sup> bringing, corrected by the author

The judges noted that after the session of the state legislature was prorogued, the same ordinances which ceased to operate were repromulgated, containing the same provisions, almost in a routine manner.

The systematic practice followed by the Bihar government of repromulgating ordinances successively without enacting the provisions of the ordinances into Acts of the legislature was clearly unconstitutional and amounted to a 'fraud' on the constitution.

The court also held as 'unconstitutional' the Bihar Intermediate Educational Council Ordinance, 1985 which has been repromulgated and which was still in operation."

(k) *The Sunday Statesman* reported the PTI news as under:<sup>61</sup>

"A constitution bench of the Supreme Court on Saturday held that every ordinance promulgated by the Government must be placed before the legislature and the executive cannot, by taking recourse to an emergency provision under Article 213 of the Constitution, usurp the law-making powers of the legislature.

The systematic practice followed by the Bihar Government of repromulgating ordinances successively without enacting the provisions of the ordinances into Acts of the legislature was clearly unconstitutional and amounted to a "fraud" on the constitution, the court ruled.

"If the executive does it, it would be subverting the democratic process," the court observed.

The bench ... gave the verdict while allowing a petition by Dr D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune. The petition challenged the validity of the practice of repromulgation of ordinances by the Bihar Government.

The Judges observed that from the facts placed on the record it was clear that the power to promulgate ordinances was used by the Governor of Bihar on a large scale.

They directed the Bihar Government to pay a sum of Rs.10,000 costs to Dr Wadhwa for his unique services in bringing the matter to the court.

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<sup>61</sup> *The Sunday Statesman* dated December 21, 1986

The Judges noted that after the session of the state legislature was prorogued, the same ordinances which ceased to operate were re-promulgated, containing the same provisions, almost in a routine manner.”

- (i) The Staff Correspondent of *The Telegraph* from Calcutta reported the operative part of the judgment as under:<sup>62</sup>

“The Supreme Court today held that the Bihar Government’s practice of promulgating and re-promulgating ordinances without enacting their provisions into acts of legislature “is clearly unconstitutional and amounts to a fraud on the constitution.”

The Constitution bench ... also directed the Bihar government to pay Rs.10,000 to Dr. D.C. Wadhwa, the petitioner who cited several cases in which the state government had promulgated and re-promulgated the ordinances bypassing the legislature. It acknowledged Dr Wadhwa’s efforts in bringing the practice to the notice of the Supreme Court. Dr Wadhwa is from Pune’s Gokhale Institute.

The court held that from the facts placed on record, it was clear that the power to promulgate ordinances was frequently used by the governor of Bihar. After the session of the state legislature was prorogued, the same ordinances which ceased to operate were re-promulgated, containing the same provisions, almost in a routine manner.

It held that every ordinance promulgated by the governor must by [*sic*]<sup>63</sup> placed before the legislature and the executive cannot, by taking recourse to an emergency provision of Article 213 of the Constitution, usurp the law-making function of the legislature. That would be subverting the democratic process, the court added. ... Bihar, which has both the houses of the state legislature, is said to have promulgated a single ordinance upto 13 [*sic*]<sup>64</sup> times using the emergency provision of the Constitution never placing it before the state legislature.

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<sup>62</sup> *The Telegraph* dated December 21, 1986

<sup>63</sup> be, corrected by the author

<sup>64</sup> 39, corrected by the author

The court also held that one such ordinance – Bihar Intermediate Educational Council Ordinance, 1985, which was last re-promulgated last year and was still in operation was “unconstitutional” and struck it down. ...”

- (m) *Newstime* from Hyderabad reported the Press Trust of India news as under:<sup>65</sup>

“A Constitution Bench of the Supreme Court has held that every ordinance promulgated by the government must be placed before the legislature and the executive can not, by taking recourse to an emergency provision of Article 213 of the Constitution, usurp the law-making function of the legislature. “If the executive does it, it would be subverting the democratic process,” the court observed on Saturday.

The bench ... gave the verdict while allowing a petition by Dr D C Wadhwa of the Gokhale Institute of Politics and Economics, Pune. The petition challenged the validity of the practice of re-promulgation of ordinances by the Bihar Government.

The judges observed that from the facts placed on the record it was clear that the power to promulgate ordinances was used by the Governor of Bihar on a large scale. They directed the Bihar Government to pay Rs.10,000 as and by way of costs to Dr Wadhwa, who, they said, had made “enormous research” and brought the “reprehensible practice” of the Bihar Government to the notice of the Supreme Court. ...

The systematic practice followed by the Bihar Government in re-promulgating ordinances successively without enacting the provisions of the ordinances into acts of the legislature was clearly unconstitutional and amounted to a “fraud” on the Constitution.” ...

30. I also give below an editorial dated December 23, 1986, entitled “Fraud” on the Constitution that appeared in *The Tribune*, from Chandigarh, based on the operative part of the judgment.<sup>66</sup>

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<sup>65</sup> *Newstime* dated December 22, 1986

<sup>66</sup> *The Tribune* dated December 23, 1986

## “FRAUD” ON THE CONSTITUTION

“OVER the years Indian democracy has institutionalised many aberrations to enable the executive to usurp the law-making powers of the legislature. Brief sessions, debateless passage of Bills and measures and a steady devaluation of the committee system have all gone to make the legislatures of this country mere “talking shops”. But the most “reprehensible” of all has been the practice of successive Governments of Bihar to repromulgate ordinances to keep the State legislature out of the law-making process. A scholar from Pune, Dr. D.C. Wadhwa, brought to light this pernicious device to subvert democracy and has been fighting a relentless battle to stop this. Success has come to him in the form of the Supreme Court verdict on Saturday that a State Government had to place every ordinance passed under Article 213 of the Constitution before the legislature.

The Court found that the State’s Governor was using his ordinance-making power on a “very large scale.” The Bihar Government’s habit of repromulgating ordinances without “enacting their provisions into Acts of the legislature” was not only unconstitutional but a “fraud on the Constitution.”

It is doubtful whether the Supreme Court’s clear pronouncement of the law will have a chastening effect on the State Government which has not shown much regard for the statute or for norms of democratic conduct. There are ways of circumventing the judgment and doubtless the administration will explore these. In a sense the so-called representatives of the people are the prime culprits in this phenomenon of legislative default and the ascendancy of the executive over the Assembly [*sic*]<sup>67</sup> in the matter of law-making. State legislatures have ceased to be forums of meaningful debate of the people’s problems. Instead they are used by legislators as places for indulging in slanging matches. Governments also ensure that Assemblies [*sic*]<sup>68</sup> meet only twice a year and that too for very brief sessions. The nation spends a veritable fortune on the election and upkeep of its law-makers and the worst part of the bargain has been that they have ceased to make laws. The Supreme Court’s verdict on the Bihar ordinance case is a valiant and timely occurrence to reverse the tide of anti-democracy in the country.”

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<sup>67</sup> Legislature, corrected by the author

<sup>68</sup> Legislatures, corrected by the author

31. The copies of the judgment were made available to the press on December 23, 1986. Again, all the English language and the regional languages newspapers and magazines reported the judgment in detail. I give below extracts from a few reports and editorials that appeared in the English language newspapers to show the continued interest of the press in the case:

- (a) *Amrita Bazar Patrika* from Calcutta reported the PTI news as under:<sup>69</sup>

“A constitution bench of the Supreme Court has unanimously held that a governor cannot re-promulgate an ordinance strictly in excess of defined limits set out in the Constitution for then people would be governed not by laws made by the legislature but by laws made by the executive, reports PTI.

“The executive in Bihar has almost taken over the role of the legislature in making laws, not for a limited period, but for years together in disregard of the Constitution limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid”, the five-judge Bench held. ... The court gave its judgment while allowing writ petition moved by Dr D C Wadhwa, Professor of economics in the Gokhale Institute of Politics and Economics and three others challenging the power of the Bihar Governor, under Article 213 of the Constitution, to re-promulgate ordinances as violative of the basic structure of the Constitution. ... “There must not be ordinance-raj in the country”, the constitution bench observed and added that the executive could not by taking resort to an emergency power exercisable by it only when the legislature was not in session, take over the law-making function of the legislature.”

- (b) A Staff Correspondent of *The Daily* from Bombay reported the news as under:<sup>70</sup>

“A Constitution Bench of the Supreme Court has unanimously held that a governor cannot re-promulgate an ordinance strictly in excess of defined limits set out in the Constitution. For this would mean that people are governed not by laws made by the Legislature but by laws made by the Executive.

“The executive in Bihar has almost taken over the role of the

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<sup>69</sup> *Amrita Bazar Patrika* dated December 24, 1986

<sup>70</sup> *The Daily* dated December 24, 1986



Legislature in making laws, not for a limited period, but for years together in disregard of the Constitution limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid”, the five-judge Bench held.

“We hope and trust that such practice shall not be continued in the future and that whenever an ordinance is made and the Government wishes to continue the provisions of the ordinance in force after the assembling of the Legislature, a Bill will be brought before the Legislature for enacting those provisions into an act”, the Bench ruled. ... The court gave its judgment while allowing writ petition moved by Dr. D.C. Wadhwa.”

- (c) *Free Press Journal* reported the UNI and PTI news as under:<sup>71</sup>

“The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be “perverted to serve political ends”, the Supreme Court has ruled.

“It is contrary to all democratic norms that the Executive should have the power to make a law. But in order to meet an emergent situation, this power is conferred on the Governor and an ordinance issued by him, therefore, of necessity be limited in point of time,” the court added.

The ruling was handed down on December 20 by a Constitution bench ... while allowing four writ petitions by Dr. Wadhwa and others against the “unconstitutional practice of the Bihar Government in repromulgating ordinances year after year.”

“The executive in Bihar has almost taken over the role of the Legislature in making laws, not for a limited period, but for years together in disregard of the Constitution limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid”, the five-judge Bench held.” ...

The copies of the judgment were made available to the Press only today. ...

- (d) *Indian Express* reported the Express News Service report from New Delhi as under:<sup>72</sup>

“The executive in Bihar has almost taken over the rule [*sic*]<sup>73</sup> of the

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<sup>71</sup> *Free Press Journal* dated December 24, 1986    <sup>72</sup> *Indian Express* dated December 24, 1986

<sup>73</sup> role, corrected by the author

## ENDANGERED CONSTITUTIONALISM

legislature in making laws for years together in disregard of the Constitutional limitations, and this practice is “improper and invalid,” the constitutional bench of the Supreme Court held in the case of Mr D. C. Wadhwa.

Mr Wadhwa, a scholar from the Gokhale Institute of Politics and Economics, filed a writ petition challenging the repromulgation of ordinances by the Governor as a matter of routine for years. He based the challenge on the research he had published two years ago. ...

In resounding terms, the five judges declared: “There must not be Ordinance Raj in the country.”

The judgment said that the question raised in the petition was of great public importance. “It is in public interest that the executive should know what are the limitations on the power of the Governor in the matter of repromulgation of ordinances. If this question is not decided, the correct position will remain undetermined. The question must be decided by us on merits in order to afford guidance to the Governor in the exercise of his power to repromulgate ordinances from time to time.” ...

The ordinance making power is in the nature of an emergency power and the primary law making authority is the legislature. The maximum life of an ordinance under the Constitution is seven-and-a-half months unless it is replaced by an Act. This power cannot be “perverted to serve political ends,” the judgment asserted. Otherwise it would be usurpation of the lawmaking function of the legislature by the executive. This would be clearly subverting the democratic process, for the people would then be governed by the laws made by the executive and not by the legislature, the judgment said. ...

The judgment, written by Chief Justice P.N. Bhagwati, was unanimous. ...”

(e) *Patriot* reported the UNI news as under:<sup>74</sup>

“The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be “perverted to serve political ends”, the Supreme Court has ruled, reports UNI.

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<sup>74</sup> *Patriot* dated December 24, 1986

“It is contrary to all democratic norms that the Executive should have the power to make a law. But in order to meet an emergent situation, this power is conferred on the Governor and an ordinance issued by him, therefore, of necessity be limited in point of time,” the court added.

The ruling was handed down on 20 December by a Constitution bench ... while allowing four writ petitions by Dr. D C Wadhwa and others against the “unconstitutional practice of the Bihar Government in repromulgating ordinances year after year.”

The copies of the judgment were made available to the press on Tuesday.

The petitions raised a question of great constitutional importance relating to the power of the Governor under article 213 of the Constitution to re-promulgate ordinances from time to time without getting them replaced by acts of the legislature.

The question was whether the Governor of Bihar could go on repromulgating ordinances for an indefinite period of time and thus take over himself that power of the legislature. ... It was obvious, the court noted, that the maximum life of an ordinance could not exceed seven and a half months unless it was replaced by an Act of legislature or disapproved by a resolution of the legislature before the expiry of that period. At the expiry of that period the ordinance must end. ...

It would be a colourable exercise of power on the part of the executive to continue an ordinance with substantially the same provisions beyond the period limited by the constitution by adopting the methodology of repromulgation. That would be clearly a fraud on the constitutional provision, the court observed. ...

The startling facts in the case of the Bihar Government clearly showed that the executive there had almost taken over the role of the legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations, the court remarked.

This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid. We hope and trust that such practice shall not be continued in future, the judges observed while allowing the petitions.”

- (f) The Legal Correspondent of *The Times of India* reported the news as under:<sup>75</sup>

“A CONSTITUTION bench of the Supreme Court while denouncing the “Ordinance Raj” in Bihar held that power to promulgate ordinance [*sic*]<sup>76</sup> cannot be allowed to be “perverted” to serve political ends.

The then chief justice Mr P.N. Bhagwati, who delivered the unanimous verdict on Saturday, held that it is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly.

Although the governor was vested with power to promulgate [*sic*]<sup>77</sup> ordinance in emergency situation, but every ordinance promulgated by him must be placed before the legislature and it would cease to operate after six weeks from the reassembly of legislative assembly [*sic*]<sup>78</sup> or if the assembly [*sic*]<sup>79</sup> disapproves it before its expiry, observed the five judges while striking down the Bihar Intermediate Education Council Ordinance, 1985 as unconstitutional and void.

The then chief justice, Mr Bhagwati, ... while disposing of the writ petition filed by Dr D.C. Wadhwa against the large scale promulgation and re-promulgation of ordinances in Bihar, observed that the practice so far adopted by the Bihar government was “improper and invalid”. ... The judges observed that the power to promulgate ordinances by the Bihar government on “large scale” even after the legislative assembly [*sic*]<sup>80</sup> was prorogued that it [*sic*]<sup>81</sup> had become a routine affair. ... It was contrary to all democratic norms that the executive should have the power to make law as it cannot continue provisions of the ordinances in force without going to the legislature. The law making is entrusted to the legislature, and if the executive is permitted to further the provisions of an ordinance in force by adopting the methodology of repromulgation without caring for the people’s voice, it would be “nothing short of usurpation of the law making function of legislature”, observed the court.

<sup>75</sup> *The Times of India* dated December 24, 1986

<sup>77</sup> an, added by the author

<sup>79</sup> legislature, corrected by the author

<sup>81</sup> that it, deleted by the author

<sup>76</sup> s, added by the author

<sup>78</sup> legislature, corrected by the author

<sup>80</sup> legislature, corrected by the author

The government cannot bypass the legislature and without enacting the provisions of the ordinance into an Act, held the court adding that constitutional provision cannot be allowed to be defeated by adoption of any “subterfuge.”

### Some Editorials on Judgment

32. I give below extracts from some of the editorials that appeared in the English language dailies to show the satisfaction of the press on the outcome of the case:

- (a) The editorial entitled “Undoing A Fraud” in *The Times of India* read as under:<sup>82</sup>

#### Undoing a Fraud

“In one of his last acts as Chief Justice of India, Mr. P.N. Bhagwati, presided over a five-judge bench that declared as unconstitutional the practice in Bihar of re-promulgating ordinances which are not placed before the legislature. The Supreme Court was pronouncing its verdict in a case filed by Dr. D.C. Wadhwa and others who had challenged the constitutional validity of the way article 213 of the Constitution has been put to use in Bihar. Dr. Wadhwa managed to demonstrate that for nearly two decades successive governments in Patna had committed what he called a fraud on the Constitution by asking the governor to re-promulgate ordinances, i.e., the executive would wait for an ordinance to lapse and then the same ordinance would be re-issued the very next day. That on January 18, 1986, the governor signed as many as 56 ordinances could by no means be deemed consistent with the stipulation in article 213 that the power is to be exercised only when “the governor is satisfied that circumstances exist which render it necessary for him to take immediate action.” And whenever the prior consent of the President of India was needed, the Bihar government would resort to the misleading and fraudulent device of informing the Union Ministry of home affairs that the concerned ordinance could not be converted into an act, because the State legislature was pre-occupied with

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<sup>82</sup> *The Times of India* dated December 24, 1986

discussions on the governor's address, the budget or passing the appropriation bill. ... The single-mindedness with which this professor persevered in exposing this fraud deserves commendation. What added bite to Dr. Wadhwa's case was the way he fully documented the fact that the law department of the Bihar government had perfected a *modus operandi* for re-promulgating ordinances. The practice necessarily deprived the legislature of its powers to legislate; it spared the executive of the burden of having to explain the objectives behind any particular legislation. Whereas the intent of the framers of the Constitution in article 213 was to enable the executive to cope with entirely unforeseen situations, evidently the power has been misused in Bihar to elbow out the legislature from its domain. The Supreme Court's ruling that the practice is subversive of the democratic process is timely. One hopes that after this decisive and unambiguous verdict, politicians and bureaucrats can no longer mock the constitution – hopes because nothing is impossible in Bihar, not even a total disregard of the ruling of the Supreme Court."

- (b) The editorial entitled "A long wait for redress" in *Financial Express* read as under:<sup>83</sup>

### A long wait for redress

"Dr D.C. Wadhwa's long battle against re-promulgation of ordinances by the Bihar Government ended last week with a ruling by a five-judge constitution bench of the Supreme Court that such a practice was *ultra vires* of the constitution. The Court held that every ordinance promulgated must be placed before the legislature and that the executive cannot, by taking recourse to an emergency provision under article 213 of the constitution, usurp the law-making powers of the legislature. Dr. Wadhwa of the Gokhale Institute of Politics and Economics, Pune, discovered this fraudulent practice of the State Government almost by accident in 1974 [*sic*]<sup>84</sup> when he had an occasion to go through the Chota Nagpur Tenancy (Amendment) Ordinance of 1971 in the course of his research on a related subject. ... Data compiled painstakingly by Dr. Wadhwa

<sup>83</sup> *Financial Express* dated December 25, 1986

<sup>84</sup> 1969, corrected by the author

and given in his book “*re-promulgation of ordinances – a fraud on the constitution of India*” published in 1983 showed that, during 1971[sic]<sup>85</sup>-81, 256 ordinances were re-promulgated over and again. In this period, while state legislatures [sic]<sup>86</sup> enacted in all 169 acts, the governors promulgated a total of 1,958 ordinances. This gave for the first time a measure of the scandalous scale of executive usurpation of the powers of the legislature.

Dr. Wadhwa’s disclosures and the Supreme Court ruling last week are also an indictment of the Centre’s role in this abuse of the constitutional process. Sixty-nine out of the 256 re-promulgate [sic]<sup>87</sup> ordinances needed and readily received Presidential assent. Indeed, the ordinance with the longest tenure, the Bihar Sugarcane Regulation of Supply and Purchase Ordinance, 1968, which was not converted into law until December 1981, was kept alive for a period of 13 years, 11 months and 19 days through 38 [sic]<sup>88</sup> repromulgations with the President giving the requisite consent every time the re-promulgation was made. By its judgment last week, the Supreme Court has hopefully put an end to a practice that should not have been allowed in the first instance. Trusting in the constitutional faith of those who worked it, the constituent assembly had in June 1949 allowed greater freedom for ordinance-making, rejecting two amendments proposed by Pandit Kunzru and Professor Saksena to attach more stringent conditions. This faith had been grossly abused in the event. With its condemnation as fraudulent and subversive of the constitution by the highest Court in the land, it is to be hoped that this obnoxious practice will cease.”

- (c) The editorial entitled “Restoring the Balance” in *The Hindustan Times* read as under:<sup>89</sup>

### Restoring the Balance

“The judgment by the five-member constitution bench of the Supreme Court declaring the repromulgation of ordinances by the Bihar Governor as a usurpation of the powers of the legislature and thus clearly unconstitutional – in fact amounting to a fraud on the

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<sup>85</sup> 1967, corrected by the author

<sup>87</sup> d. added by the author

<sup>89</sup> *The Hindustan Times* dated December 25, 1986

<sup>86</sup> legislature, corrected by the author

<sup>88</sup> 39, corrected by the author

Constitution – will be welcomed by all citizens concerned with the increasing emasculation of the legislature by the executive in India. In fact the writ petition was filed by a concerned citizen who discovered the facts by accident when doing research on a completely different subject – the agrarian structure in Bihar. This was Dr D.C. Wadhwa, an economist, who was so struck by what he had unearthed that he wrote a book “*Repromulgation of Ordinances: A Fraud on the Constitution of India*” and latter, in January 1984, filed a writ petition in the Supreme Court. In this he quoted chapter and verse to show how the Bihar Government had kept ordinances alive up to fourteen years whereas the Constitution places a maximum limit of seven-and-a-half *months* on such a measure. ... The judgment, delivered by Justice P.N. Bhagwati on his last day as the Chief Justice of India, is of far-reaching significance as it will help to restore to the legislatures some of the powers the executive has arbitrarily snatched away.

For it is not only in Bihar that such practices prevail. This is clear from the recommendation made by the Kerala Chief Minister Mr K. Karunakaran that the Assembly should be reconvened later this month to convert ordinances into Acts. He had been reprimanded by the Speaker in the last session for his penchant for “ordinance raj”.

Another aspect of the ordinance, which the Supreme Court has said it could not examine, is the question of the need to satisfy the Governor while issuing an ordinance that an “emergent” situation exists which justifies bypassing the legislature. This is also an important matter, as Article 213 of the Constitution was intended to be used only in extraordinary situations which arose when the legislature was not in session. However, the executive in many States has been using the power in routine situations, where no emergency exists to enact laws that could well await a legislative session. This abuse too needs to be curbed. As the Supreme Court has expressed its helplessness, it is up to concerned citizens’ bodies to press for a reform of the Constitution to circumscribe the ordinance making power more closely.”

- (d) The editorial entitled “Landmark ruling” in *Indian Express* read as under:<sup>90</sup>

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<sup>90</sup> *Indian Express* dated December 25, 1986



### Landmark ruling

“THE Supreme Court’s strictures against the executive for indiscriminate resort to ordinances have come not a day too soon. It has struck down the repromulgated Bihar Intermediate Educational Council Ordinance as being unconstitutional. While giving this ruling, the Court did well to take serious note of the all-too-familiar practice of promulgating ordinances on the flimsiest of pretexts. The State Governments in particular have been guilty of surreptitious encroachment on the powers of the legislature in this way. There have been two forms of gross misuse by the executive of Article 213 of the Constitution which enables a State Governor or the President to issue ordinances, to meet an emergent situation. One form has been to take recourse to the provision in the absence of a truly extraordinary situation. There have been many instances of promulgation of ordinances either shortly before a scheduled commencement of a session of the legislature or shortly after the end of a session. This would not have been the case if the executive had a genuine regard for the legislature as the primary law-making institution. It is obvious that wanton bypassing of a legislature reduces parliamentary democracy to a mockery.

The second way in which Article 213 has been cynically violated is to repromulgate ordinances after they are in force for a maximum permissible period of seven and a half months. How serious such an infringement of the Constitution is should be clear from the strong words used by the Supreme Court in the present verdict. To continue the provisions of an ordinance without replacing it by an act of the legislature and through the device of repromulgation, the Court said, is a fraud on the Constitution. What really is shocking is that such subversion of the Constitution has gone on unchecked so long. According to Dr D.C. Wadhwa, a public-spirited academician from Pune who had approached the Supreme Court with a writ petition against the Bihar ordinance, it was kept alive for no less than 14 years through repromulgation. And often more than 50 ordinances were issued in a day by the Governor of Bihar! Dr Wadhwa and his colleagues indeed have rendered signal service to the country by bringing such an atrocious practice to the notice of the Supreme Court. It is befitting that the Court praised him for the initiative taken by him in this matter and ... .”

- (e) The editorial entitled “A Fraud on Constitution” in *Amrita Bazar Patrika* from Calcutta read as under:<sup>91</sup>

### A Fraud on Constitution

“One of his last acts as the Chief Justice of India, Mr Justice P N Bhagwati, has come down heavily on the abuse of the governor’s Ordinance-making power by the executive. Presiding over a five-judge constitution bench, whose verdict was unanimous, Mr Bhagwati allowed a petition by Dr D C Wadhwa of the Gokhale Institute of Politics and Economics challenging the validity of the practice of promulgation [*sic*]<sup>92</sup> of Ordinances by the Bihar government. The bench ruled that the “systematic practice” allowed by the Bihar government of repromulgating ordinances without enacting their provisions into Acts of the legislature was clearly “unconstitutional” and amounted to a “fraud on the Constitution.” The court warned that if the executive resorted to this practice, it would be subverting the democratic process. While there are many forms of abuse of the ordinance-making power of the governor, the Bihar government had kept alive an ordinance for 14 years by repromulgating it regularly when the legislature was not in session. The governor’s power to promulgate ordinances during recess of legislature under Article 213 of the Constitution is not questioned. But the Article also enjoins upon the government to place every such ordinance before the legislature for its approval. If the state government fails to do that the ordinance would automatically lapse at the expiration of six weeks from the re-assembly of the legislature. As the Constitution lays down that the time gap between two assembly sessions should not exceed six months, the life of an ordinance cannot exceed seven and a half months. The enormity of the circumvention in Bihar can be well imagined. ... ”

- (f) The editorial entitled “Well won, Dr. Wadhwa” in *Blitz*, a weekly from Bombay, read as under:<sup>93</sup>

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<sup>91</sup> *Amrita Bazar Patrika* dated December 29, 1986

<sup>92</sup> re-, added by the author

<sup>93</sup> *Blitz* dated January 3, 1987

### Well won, Dr. Wadhwa

“DR. D.C. WADHWA’S commendable one-man crusade against the reprehensible practice perfected by the Bihar Government of promulgating and re-promulgating Ordinances without enacting their provisions into laws by the legislature, has finally paid off. The Supreme Court has just ruled that this “is clearly unconstitutional and amounts to a fraud on the Constitution”.

THE bulk of Dr. Wadhwa’s arguments and evidence may be found in his book “*Re-promulgation of Ordinances: A Fraud on the Constitution of India*”, a book which this journal described, over three years ago, as one that “deserves to be translated (perhaps in simplified booklet form, for the benefit of the lay reader) into every Indian language there is” (BLITZ, Oct. 15, 1983).

BLITZ takes pride in the fact that, right from the outset of Dr. Wadhwa’s campaign, upto April this year when we felt constrained to question the manner in which the Supreme Court had delayed hearing the matter, we had wholly and unreservedly backed the Pune academic’s principled battle against the subversion of the Indian Constitution.

IT IS incredible but true that between 1971-81, the Government of Bihar promulgated close to 2,000 Ordinances. Steadily and surely, the Executive was usurping the powers of the legislature. Indeed, as we pointed out, the Governor of Bihar fully deserved to enter the Guinness Book of Records for promulgating – in the amazing timespan of 24 hours – a total of 58 [*sic*]<sup>94</sup> Ordinances! ... many Ordinances in Bihar have remained “in force” for several years at a stretch. Some [*sic*]<sup>95</sup> courtesy, the “re-promulgation” racket – a device by which the Executive evades constitutional requirements to prolong the life of an Ordinance – has been kept alive for as many as 14 years at a stretch!...

MEANWHILE, as we pointed out this year (April 19, 1986), the Bihar government, closely emulated by its counterpart in Kerala, had taken to curtailing legislative sessions to less than 42 days – a crude way of beating the six-week requirement! In short, what Dr.

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<sup>94</sup> 56, corrected by the author

<sup>95</sup> All, corrected by the author

Wadhwa's exposure highlighted was a government of organised anarchy, of concentrated mismanagement and the lawlessness of lawmakers. ...

The Supreme Court has categorically denounced the whole practice as one amounting to subversion of the democratic process, by undermining the law-making function of the legislature.

IT IS also fitting that the court should have ordered the Bihar government to pay Rs. 10,000 to Dr. Wadhwa (who works at Pune's Gokhale Institute) though it seems to those of us who have watched his travails that this amount is more symbolic than material in compensating him for his efforts, on behalf of the nation as a whole, to defend the Indian Constitution. We rejoice in his victory."

### Some extracts from Articles on Judgment

33. There were a number of articles and interviews that appeared in the English, Hindi and regional languages dailies, weeklies and monthlies. I give below extracts from some of the English language dailies and weeklies to show their appreciation of the cause for which I had been fighting:

- (a) Shri V.S. Maniam wrote in his article entitled "The Persistent Professor", as under:<sup>96</sup>

"... Dr Wadhwa says, with some intensity: "This is very simple, really. We cry ourselves hoarse that we are the largest functioning democracy. We duly hold elections every five years for a new legislature. Yet these Ordinances continue. I thought what happened in Bihar would be repeated in other States and, who knows, even at the Centre." ...

There was, actually, a debate in Parliament on it, with the *Rajya Sabha* discussing it on a call-attention motion on December 23, 1983. ... And the members saluted in so many words Dr Wadhwa for having unearthed that monstrous fraud on the Constitution.

However, Dr Wadhwa had not written his book for earning accolades for himself. A gentle crusader but a determined one who brings to mind men like Emile Zola he was keen that the abuse of the Constitution of the kind happening in Bihar must be ended. ... And

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<sup>96</sup>The *Sunday Statesman* dated December 28, 1986

on January 16, 1984 he filed a writ petition in the Supreme Court challenging the validity of repromulgation of ordinances by the Governor of Bihar as violation of the basic structure of the Constitution. It was admitted on February 9, 1984 without hearing, by a Bench presided over by Mr Justice D.A. Desai. (Mr Justice Desai was said to have commented later that the petition should, actually, have been allowed without hearing). On December 20 this year, the petition was duly allowed by a Constitution Bench of the Court headed by the Chief justice Mr P.N. Bhagwati.”

- (b) Shri Kuldeep Kumar wrote in his article entitled “Lone crusader wins”, as under:<sup>97</sup>

“WHEN one meets Prof DC Wadhwa, the man whose relentless efforts made the then Chief Justice of India, PN Bhagwati, declare last Saturday that repromulgation of ordinances by the Bihar government in a routine manner was nothing but a “fraud on the Constitution,” one’s faith in life gets reaffirmed. Always smiling, he can turn any cynic into a believer in the essential goodness of man. ... Men like Prof Wadhwa prove once again that it is not only bad news that makes the headlines, but that good news too has got a wide enough appeal. The only problem is that the number of those who provide such news has been on the decline over the years. No wonder that he was paid a rare tribute by the highest court in the land which said that he had “made enormous research and brought the reprehensible practice of the government of Bihar to the notice of the Supreme Court.” Not only this, the five-judge Constitution Bench also found the question raised in his writ petition of the “highest constitutional importance.” ... Even during the pendency of the petition before the Supreme Court, the Allahabad High Court, under the impact of Dr Wadhwa’s analysis, struck down as unconstitutional the UP Official Languages Ordinance which was promulgated five times ... Prof [*sic*]<sup>98</sup> notes that “even HM Seervai, who [*sic*]<sup>99</sup> Anglophilism’ has never permitted him to acknowledge, even in a footnote any serious Indian writing on law, now hails in his treatise Dr Wadhwa’s work as a ‘public service of the highest order.”<sup>100</sup>

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<sup>97</sup> *The Sunday Observer* dated December 28, 1986

<sup>98</sup> Upendra Baxi, added by the author

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<sup>100</sup> In *LEX ET JURIS* dated October 1986, added by the author

- (c) A special Correspondent of *The Forum Gazette* wrote in her article entitled “Academic Exposes Bihar Government’s Fraud on the Constitution” as under:<sup>101</sup>

“Sitting in the functional surroundings of the Indian Institute of Public Administration hostel a silver haired academician speaks unassumingly of his phenomenal achievement. Dr D C Wadhwa has recently won a historic ruling from the Supreme Court against legislative malpractice in the State of Bihar.

... The total lack of awareness among both the people and the judiciary made me to take up this litigation,” says Wadhwa of his three-year crusade.

He speaks with disbelief still at the basic apathy towards the constitutional rights allowed to the people of India. “We must question how in a democracy the President is himself approving re-promulgation without evaluating its constitutionality. But first we must be aware of our power and believe that we can effect change.” He adds with an intensity which rallies as the motivating force behind the man and his achievement. ... “My concern was specifically that such manipulative powers could well become the norm and be used in a more repressive way, possibly in the whole country, if not exposed.” And thus began Wadhwa’s important single-minded effort to first collect the relevant data.

His pains-taking research produced a comprehensively documented and cogently argued book titled ‘*Fraud on the Constitution*’. The book was his first milèstone; both clearly argued and statistically dense, it had the desired effect on the intellectuals and the judiciary.

“The next step of course was to move the Supreme Court,” ... On January 15 [*sic*]<sup>102</sup>, 1983, Wadhwa moved the SC against the State of Bihar, The Governor of Bihar and the Union of India.

Here another myth exploded for Wadhwa who found that the functioning of the SC court [*sic*]<sup>103</sup> was in itself a subject for further research. “I found to my dismay that the judiciary is even more arbitrary than the Executive” and goes on to explain how by an

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<sup>101</sup> *The Forum Gazette* dated 5 January-19 January, 1987

<sup>102</sup> 16, corrected by the author

<sup>103</sup> court, deleted by the author

interesting system of arbitrarily changing the order of listing of a case judgment can be deferred indefinitely.

Wadhwa's case was finally decided on December 20, 1986 by a Constitution Bench under Chief Justice P.N. Bhagwati. Yet another crusade lurks in his sombre eyes as he discusses the possibility of exposing the working of the SC. ... Reflecting on the present day lack of ideology he sums up the situation as being one where "the standard of living has gone up but not the standard of life." His five year crusade has concluded victoriously, "the Supreme Court has upheld my thesis and called it a 'fraud on the constitution.' ... The immediate effect of its importance is evident in many States as they are scrambling to reexamine their illegal ordinances.

Wadhwa's one man crusade has proved, more importantly that people are the true keepers of their democratic rights which are lost perhaps more due to apathy rather than repression. Palkhivala's tribute to Wadhwa waxes eloquently his major achievement as being one that reminded the people of India that it is the Constitution of this land which "is meant to hold the country together when the raucous and fractious voices of today are lost in the silence of the centuries."

- (d) Shri Ashok Gopal writes in his article entitled "The Courtroom Crusaders" in *Poona Digest* as under:<sup>104</sup>

"ON JANUARY 16, 1984, Dr. D.C. Wadhwa of the Gokhale Institute of Politics and Economics, Pune, stepped through the portals of the Supreme Court of India for the first time in his life. ... He had with him a copy of his book that had been published the previous year: *Re-promulgation of Ordinances: A Fraud On The Constitution Of India* ... The book, reviewed copiously by nearly 200 national and regional publications and considered to be amongst the finest of law books ever written in the country (*if not the finest*), was the result of pure accident. ...

The result of this mammoth three year-effort was the book that overnight became a sensation. ... *D.C. Wadhwa and others vs. State of Bihar* was amongst the most closely watched cases

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<sup>104</sup> *Poona Digest* dated April 1987

in the Supreme Court and when Bhagwati finally announced a decision in Wadhwa's favour on December 20, 1986 – the last day of the Chief Justice's tenure – the Gokhale Institute's Economics researcher became an instant celebrity.

What was the most remarkable about the case was that Wadhwa's written submission to the court was not prepared by some highly qualified – and highly paid – lawyer but by Wadhwa himself; in effect, the academic fought his own case and as noted a legal luminary as Upendra Baxi considers the written submission "compulsory reading for all lawyers for its method of presentation."

- (e) Shri S. Sahay, resident editor of *The Statesman*, New Delhi, wrote in his weekly column, *A Close Look*, in his article entitled "Ordinance Raj Is Out", as under:<sup>105</sup>

"ALREADY there has been a good deal of deserved praise for Dr Diwanchand Wadhwa who doggedly not only exposed the illegal Ordinance Raj in Bihar through a seminal study but also followed it up by challenging it in the Supreme Court. The successful outcome of the case shows what grit, determination and good homework, ... can achieve for a democracy.

This writer has personal knowledge that, in the tortuous time consumed before the case was heard, Dr Wadhwa was so dejected that he wondered whether it would not be a relief, both emotional and monetary, to withdraw from the case. Hope and despair alternated with the placement of the case on the Cause List, sometimes moving up, sometimes going down. It seemed touch and go as the time of the retirement of the Chief Justice, Mr P.N. Bhagwati, approached and Dr Wadhwa, in sheer desperation, barged into the Chief Justice's chamber to plead that his case be heard, especially because Mr Bhagwati himself had ordered priority hearing at one stage.

All is well that ends well. And the Constitution Bench, presided over by the Chief Justice himself, has declared in no uncertain terms that there must not be an Ordinance Raj in this country. It has held that what Bihar had been doing was patently unconstitutional."

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<sup>105</sup> *The Statesman* dated January 1, 1987



- (f) Shri Khushwant Singh wrote in his column 'Gossip Sweet and Sour' in his article entitled "What Constitution?" in *Sunday* as under:<sup>106</sup>

"Quite a lot has been written about the Supreme Court judgment on the writ petition filed by Diwan Chand Wadhwa against the Bihar government's practice of ruling by getting pliable Governors to repromulgate ordinances instead of taking the proposed legislation to the *Vidhan Sabha* [sic]<sup>107</sup> and getting its [sic]<sup>108</sup> approval. I wrote about it some years ago when Wadhwa's book *Re-promulgation of Ordinances: A Fraud on the Constitution of India* was first published and quoted it more than once in debates in the *Rajya Sabha*. The government remained absolutely indifferent to this scandalous misuse of constitutional provisions. For five years **Wadhwa fought the battle single-handed, with only the press to help him.** Finally, he took the matter to the Supreme Court. ...

I would like to narrate an incident connected with this case. About two years ago a young barrister, Salman Khurshed (son of the then minister Khurshid Alam Khan), organized a debate on the Constitution at the Imperial Hotel in Delhi. Ex-Justice Baharul Islam, MP, presided. Jagan Nath Kaushal, then law minister, was the keynote speaker. He delivered a splendid oration on how well our Constitution had been drafted and how it was the duty of all citizens to honour its provisions.

I got the opening I was waiting for. When my turn came to speak, I said there were two ways of destroying the Constitution: the crude one practiced by Akalis like Badal, who burnt a copy publicly (example recently imitated by members of the DMK party) and a more sophisticated one by praising it and then violating its spirit. This second way had been perfected by the Bihar government. Law minister Kaushal was then the Governor of Bihar.

I was surprised to note that Kaushal's name did not figure in the arguments nor appear in the judgment, because it was he who, more than any other Governor, flouted provisions of the Constitution meant entirely to meet emergencies. The Constitution required him to "be satisfied" that the proposed ordinance was necessary. Kaushal

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<sup>106</sup> *Sunday* dated January 25-31, 1987

<sup>107</sup> and *Vidhan Parishad*, added by the author

<sup>108</sup> their, corrected by the author

“satisfied” himself by revalidating at times 50 ordinances a day; on 18 January, 1976, he “satisfied” himself by revalidating 56 ordinances on 56 entirely different subjects. It was obvious that he could not even read all of them in one day, much less be “satisfied” that they were necessary.

The trouble with us as a people is not that we don’t know what we are doing is wrong but we acquiesce to wrong-doing to save ourselves from trouble.”

- (g) Shri S. Srinivasan wrote in his article entitled “The Usurpers” as under:<sup>109</sup>

“The Constitution has clearly defined the roles and powers of the executive, the legislature and the judiciary. But what if they transgress [*sic*]<sup>110</sup> into each other’s territory, if for instance, the executive starts taking over the most important function of the legislature – law-making?

This was what a Pune Professor, Dr D.C. Wadhwa, stumbled upon five years ago while conducting a study of agrarian reforms in Bihar. He discovered that the government there was running the State through ordinances and, in some cases, misusing this provision by repeatedly issuing them.

Wadhwa, a student of economics, is neither a constitutional lawyer nor a political scientist. But he displayed rare zeal and enthusiasm and pursued the subject, studied all the ordinances issued in Bihar since its formation and wrote a well-received and well-documented book *Re-promulgation of the[sic]*<sup>111</sup> *Ordinances: A Fraud on The Constitution Of India*.

He moved a writ petition in the Supreme Court challenging the practice. After a long and painful wait, the court’s constitutional bench took up the case and decided in his favour. The judgment, delivered on December 20<sup>th</sup> of last year, had at least one salutary effect, that of forcing Kerala Chief Minister Karunakaran, who was refusing to convene a meeting of the State’s Legislative Assembly on the pretext of lack of time, to call a special session for three

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<sup>109</sup> *Free Press Journal* dated January 4, 1987

<sup>110</sup> transgress, corrected by the author

<sup>111</sup> the, deleted by the author

days to convert some of the pending ordinances into bills [*sic*].<sup>112</sup> ... Another disturbing aspect highlighted is the declining average term of sessions: the politician in power is afraid to face Assemblies where the Opposition gets a chance to expose his inadequacies. Wadhwa feels that it is the fear of an outbreak of scandals in the House, facing criticism and little confidence in permitting healthy discussions that prompt legislators to opt for smaller sessions.

What has worried him the most is the lawmakers' lack of initiative in getting back their rights from the executive. It took a rank outsider to crusade for them and none associated himself with the fighter in the entire process."

- (h) Shri Minoo Masani, formerly a member of the Constituent Assembly and a member of the Parliament wrote in his weekly column entitled "As I See It" in *The Statesman* as under:<sup>113</sup>

"PROOF of the belief that "patience and perseverance [*sic*]<sup>114</sup> can overcome mountains" has been provided by Dr D.C. Wadhwa. As far back as January 16, 1984, Dr Wadhwa of the Gokhale Institute in Pune, filed a petition in the Supreme Court to stop the chronic misuse by the Bihar Government of its Ordinance-making power. By using the expedient of prematurely adjourning the Assembly [*sic*]<sup>115</sup>, several ordinances were kept alive over a period of 14 years.

Dr Wadhwa has been rightly congratulated by the Supreme Court which, accepting his petition, stated that "he has made enormous research and brought the reprehensible practice of the Government of Bihar to the notice of the Supreme Court". They also awarded him Rs 10,000 by way of damages which, by international standards, is a pittance. At least from now on, thanks to Dr Wadhwa and his single-minded devotion, the formality of placing ordinances before state assemblies will be performed. ... Meanwhile, three cheers for Dr. Wadhwa!"

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<sup>112</sup> Acts, corrected by the author

<sup>113</sup> *The Statesman* dated January 11, 1987

<sup>114</sup> perseverance, corrected by the author

<sup>115</sup> Legislature, corrected by the author

### **Government of India sends Circular Letter on Judgment to all State Governments**

34. On February 25, 1987, the Government of India, Ministry of Home Affairs, sent a circular letter to the Chief Secretaries of all the State Governments (By name) bringing to their notice the judgment of the Supreme Court of India in my case and requesting them to first examine all proposals for promulgation or re-promulgation of Ordinances in the light of the abovementioned judgment before sending the same for obtaining the instructions of the President. I give below the relevant portions of the circular letter:<sup>116</sup>

“Paragraph 4. The practice of repromulgation of Ordinances was challenged in Writ Petitions No. 412-15 of 1984 – D.C. Wadhwa and others vs. State of Bihar and others and the Supreme Court has since delivered judgment in this case on 20<sup>th</sup> Dec. 1986.

Paragraph 5. Having regard to the facts, the Supreme Court has interpreted Article 213 of the Constitution and laid down the following propositions:

- (a) the power conferred on the Governor to issue Ordinances is in the nature of an emergency power.
- (b) the primary law making authority under the Constitution is the Legislature and not the Executive.
- (c) Only when the Legislature is not in session, certain circumstances may arise which render it necessary to take immediate action and in such a case in order that public interest may not suffer by reasons of the inability of the Legislature to make a law to deal with the emergent situation, the Governor is vested with the power to promulgate Ordinances.
- (d) However, every Ordinance promulgated by the Governor must be placed before the State Legislature. The object of this provision is that since the power conferred on the Governor to issue Ordinances is an emergent power exercisable when the Legislature is not in session, the Ordinance promulgated must necessarily have a limited life. It is, therefore, obvious that the power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary

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<sup>116</sup>Circular letter to the Chief Secretaries of all the State Governments (By name), F. No. 23/23/87-Judl. dated February 25, 1987

situation and it cannot be allowed to be “perverted to serve political ends.”

- (e) If within the time prescribed, the Legislature does not pass an Act to replace the Ordinance, the Ordinance comes to an end. If the Executive were permitted to continue the provisions of an Ordinance in force by the methodology of repromulgation without submitting to the voice of the Legislature, it would amount to usurpation [*sic*]<sup>117</sup> by the Executive of the law-making functions. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme.

Paragraph 6. Having regard to the circumstances of the case, the Court came to the conclusion that the exercise of power in re-promulgation of the Ordinances by the State Government was certainly a colourable exercise of power and such a strategem would be repugnant to the constitutional scheme. Therefore, the court felt that the Governor cannot repromulgate the same Ordinance successively without bringing it before the State Legislature.

Paragraph 7. Article 213 of the Constitution authorises promulgation or repromulgation of the Ordinance. The Court may however, be inclined to strike down the repromulgation of an Ordinance where the exercise of power of the Governor is regarded as a colourable exercise. The question of colourable exercise of power has to be decided on the facts and circumstances of each case. However, where the executive fails to put up the legislative proposals of converting the Ordinance into an Act in the next session of the State Legislature, but successively repromulgates the same Ordinance, then it may be liable to be quashed.

Paragraph 8. You are, therefore, requested to ensure that all proposals of the State Government for promulgation or repromulgation of Ordinances are first examined in the light of the above propositions before referring the same to us for obtaining instructions of the President under the proviso to Article 213 (1) of the Constitution.

This circular letter was signed by the Additional Secretary to the Government of India. The copy of this circular letter was forwarded to the Secretary to the Governor (All States) for information and necessary action.”

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<sup>117</sup> usurpation, corrected by the author

### Re-promulgation of Ordinances Continued

35. In spite of the judgment of the Supreme Court of India declaring the re-promulgation of Ordinances as unconstitutional, the Government of Bihar continued to re-promulgate Ordinances which will be clear from the following reports:

- (a) Shri A.G. Noorani, Senior Advocate, Supreme Court of India, wrote as a tail-piece note to his article entitled "Supreme Court and Ordinances" this report by the Patna correspondent of *The Statesman* a month after the judgment:<sup>118</sup>

"Differences have cropped up between the state government and the speaker of the Bihar assembly, Mr Sheo Chandra Jha, over the duration of the budget session of the House starting from February 12. The issue at stake is "the intention of the government headed by Mr Bindeshwari Dubey to re-promulgate the ordinances which would automatically lapse once they are not made Acts by legislation within 42 days of being tabled on the floor of the House when it meets on February 12."

"In utter contempt of the Supreme Court's judgment delivered last month on re-promulgation of ordinances which was held illegal, the Bihar government appears bent upon perpetuating the "fraud on the Constitution once again." Comment is superfluous."

- (b) *The Times of India* News Services report dated June 27, 1987, stated as under:<sup>119</sup>

"THE month-long monsoon session of the Bihar legislature began on a stormy note today with the opposition demanding the resignation of the chief minister, Mr Bindeshwari Dubey, both in the *Vidhan Sabha* and the *Vidhan Parishad* on the ground that the government was engaged in ushering an "Ordinance Raj" in the state. ... The opposition members were even more defiant in the *Vidhan Parishad*, tearing the agenda paper and copies of ordinances and flinging them in to the well of the House.

The CPI leader, Mr Ramendra Kumar, alleged that out of 15 ordinances that were tabled today, three had been placed in the

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<sup>118</sup> *Economic and Political Weekly* dated February 28, 1987

<sup>119</sup> *The Times of India* dated June 27, 1987

house six times and two for five times. He said that re-promulgation of ordinances without any discussion in the House was a “fraud” on the Constitution. ...

He said the role of legislature was being undermined by the government and the executive was unnecessarily interfering in the business of the legislature. He read out the Supreme Court verdict, delivered on December 20, decrying the practices [*sic*]<sup>120</sup> of issuing ordinances. ...

The leader of the opposition, Mr Karpoori Thakur, expressed similar views and requested the speaker to direct the government to withdraw the ordinances. He also quoted the Supreme Court judgment in support of his contention that re-promulgation of ordinances amounted to contempt of the legislature.

The speaker said he would look in to the matter and give a ruling later after going through the Supreme Court judgment.”

- (c) *The Times of India* in its Current Topics column published on July 3, 1987, the following write up under the heading “A Bihar Malady”:<sup>121</sup>

### A Bihar Malady

“TO Bihar has gone the dubious distinction of demonstrating that there is precious little the Supreme Court can do to enforce compliance with its judgment. It will be recalled that about six months ago, the Supreme Court had severely indicted the Bihar government for its habit of re-promulgating ordinances again and again, without giving the legislature a chance to debate and vote. It was “a fraud on the Constitution”, according to the Court. Of course, Bihar is not the only State guilty of abusing a power that is essentially meant to enable an administration to cope with an emergency situation. Other states like Andhra Pradesh and Kerala also resorted to this underhand method, though only sparingly.

Now it transpires that the Patna establishment simply cannot kick the habit of issuing and re-issuing ordinances. When the Bihar assembly [*sic*]<sup>122</sup> began its monsoon session in the last week of

<sup>120</sup> practice, corrected by the author

<sup>121</sup> *The Times of India* dated July 3, 1987

<sup>122</sup> Legislature, corrected by the author

June, the legislators were confronted with as many as 16 ordinances; of these eleven ordinances are [*sic*]<sup>123</sup> re-promulgated ones. The opposition even charged that in some case [*sic*]<sup>124</sup> the necessary Presidential sanction had not been secured. The only defence the treasury benches could offer was that the opposition regimes, too, had found the re-promulgation of ordinances a convenient technique. To powerful bureaucrats and callous politicians in Patna perhaps the Supreme Court's indictment matters little. Perhaps they know that it would again be years before the Supreme Court can get around to pronouncing on the legality of these re-promulgated ordinances. Only contempt of the judiciary and disregard of the democratic principle that there can be no legislation without representation, can explain this perpetuation of a constitutional fraud."

- (d) Shri A.J. Philip in his article entitled "Dogged research – In Retrospect" published in *The Hindustan Times* wrote as under:<sup>125</sup>

#### **Dogged research – In Retrospect**

"... it may be sad news for Dr Wadhwa that in spite of all the hullabaloo that he raised, the Bihar Government still continues the practice of promulgating and repromulgating ordinances. ... Of course, there has been a let up in the repromulgation of ordinances thanks to the public outcry and for this we should be thankful to Dr Wadhwa.

While the Government is undoubtedly the villain of the piece for the so-called Ordinance Raj, can the legislators of Bihar escape responsibility? "It is amusing that in the house even Congress-I legislators accuse the Government of resorting to ordinances. Had they been more responsive and alert, the phenomenon would not have come about", said the Bihar Assembly Speaker Mr S.C. Jha, in an interview. How are the legislators responsible? "After an ordinance is promulgated, it has to be placed in the legislature when it meets next. Any legislator can stand up and say that he is opposed to it and press for a vote. If the House rejects it, the ordinance automatically lapses. How many legislators cared to do this"? asked

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<sup>123</sup> were, corrected by the author

<sup>124</sup> cases, corrected by the author

<sup>125</sup> *The Hindustan Times* dated July 12, 1987



Mr Jha. To quote John Stuart Mill: "The worth of a State, in the long run, is the worth of the individuals (legislators) composing it."

- (e) An editorial in *The Hindustan Times* entitled "Not by Ordinances" ran as under:<sup>126</sup>

"Dr Shankar Dayal Sharma has begun his career as Chairman of the *Rajya Sabha* with a ruling clearly aimed at strengthening the role of Parliament. He has rightly reminded the Government of the need to resist temptation to issue ordinances at slight provocation. On the objection raised by Mr. L.K. Advani and others against the amendment of the Finance Act through an ordinance, Dr. Sharma has declared that the Government should keep in mind that "recourse to ordinances should be taken only when absolutely necessary". ... Of all the States, Bihar has the most dismal record in this matter. The Governor of Bihar promulgated 256 ordinances between 1967 and 1981 and they were kept alive for periods ranging from one to fourteen years by repromulgation. Of these, 69 were repromulgated several times and kept alive with prior permission of the President. The observations of the Supreme Court on the Bihar Government's repromulgation of ordinances which became the subject of a writ petition filed by an economist, Dr D.C. Wadhwa, about a year ago, are highly relevant. The Court declared the repromulgation of ordinances as an usurpation of the powers of the legislature by the executive and thus clearly unconstitutional. ... The problem is that some States tend to exercise their power to issue ordinances for expediency. The Supreme Court had rightly observed that the power to promulgate ordinances "cannot be allowed to be perverted to serve political ends."

36. So, this is the story, so far, about the re-promulgation of Ordinances. It is widely believed that all Supreme Court judgments are not implemented either by the Government of India or by the state governments. Therefore, it is humbly submitted that the Supreme Court of India should *suo moto* call a report from all the state governments and the Central government regarding the re-promulgation of Ordinances in their states and at the Centre after its judgment on December 20, 1986 and initiate proceedings for the contempt of the court against the defaulters. Will it muster the courage to do so?

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<sup>126</sup> *ibid*, dated November 9, 1987

### **Coming Back to this Book**

37. Coming back to this book, as the subject matter of my writ petition was considered by the Supreme Court to be of great constitutional importance, the Court had directed all the parties (the Government of Bihar, the Union of India and myself) to file our written submissions in support of our respective contentions.

38. All the parties had filed their written submissions. After seeing my written submissions, the Government of Bihar had requested the Court, after the hearing was over, to allow them to file additional written submissions. Though unusual, the Court had allowed them to do so and had asked me also to file additional written submissions, if necessary, which I did.

### **Drafting of Written Submissions**

39. The written submissions of the Union of India were drafted by an Advocate, settled by a Senior Advocate and filed by an Advocate on Record. I presume that the same thing was followed in the case of the State of Bihar, because their Senior Advocate was the same though no name is mentioned about it in the written submissions and the additional written submissions filed by the State of Bihar. In my case, I prepared my written submissions. As my Senior Advocate had not settled my written submissions, I had shown the same to some eminent law teacher friends in the country, whom I knew, and to a friend of mine, a Member of the Law Commission, Government of India, for their comments. All of them were of the opinion that these written submissions should be published because they will serve as a model for all the lawyers in the future and will also be useful to law students in their legal education. In fact, Professor Upendra Baxi, the then Director of the Indian Law Institute, New Delhi, and former Professor of Law and Vice-Chancellor of Delhi University, presently Professor of Law, University of Warwick (U.K.) previewed the same in *Lex et Juris*, a law magazine,<sup>127</sup> before the said submissions were submitted in the Supreme Court.

### **Why this Book?**

40. It is unusual to bring out a book which contains documents submitted in litigation. Generally, such documents do not have any utility beyond the narrow boundaries of the particular litigation. When the litigation ends, the documents on the file also lose their utility and are sent to the record room. However, the documents included in the present book were regarded by many, including the

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<sup>127</sup> *Lex et Juris*, The Law Magazine, dated October 1986

judiciary, as of more than temporary value, and, therefore, accepting their advice, the author persuaded himself to prepare the present book of petitions, affidavits, written submissions and other documents, filed in a case which has now become well known. It also contains the judgment of the Supreme Court on the Writ Petition and an Epilogue written by me.

41. It is one of the ironies of political life that a temporary legislation like Ordinances raises controversies that are not temporary but are of a critical nature. This proposition is borne out by the case law. The litigation that involved the preparation of the present documents served the purpose of throwing light on some dark corners of public life in India and also performed the function of enabling the judiciary to re-affirm certain democratic values enshrined in our Constitution. The judgments are, in themselves, regarded as sources of law. But no judgment can be fully understood without looking at the factual background and the documentary material that formed the basis of the judgment. It is hoped that the present book will be viewed by the readers in that light.

42. The Indian Law Institute, New Delhi, whose ex-officio Chairman is the Chief Justice of the Supreme Court of India, decided to publish all the documents related to this case, including the judgment of the Supreme Court, in the form of a book. In fact, Dr. Upendra Baxi, the then Director of the Indian Law Institute, wrote an introduction to this book. Unfortunately, the book could not be published at that time on account of my some unavoidable reasons. Dr. Upendra Baxi has revised his introduction.

43. As my earlier book entitled *Re-promulgation of Ordinances: A Fraud on the Constitution of India*, which was submitted as an Annexure 'A' to the writ petition in the Supreme Court of India, was published by the Gokhale Institute of Politics and Economics, Pune, the Institute agreed to publish the present book also as a sequel to the earlier book.

### Usefulness of the Written Submissions

44. If the author is not regarded as guilty of some immodesty, he would like to state here that the affidavits, written submissions and other documents forming part of the present book might probably be of some use for others who may be interested in public interest litigation. Incidentally, the author has been given to understand and it is obvious from the counter affidavit and written submissions filed by the State of Bihar that affidavits and written submissions in writ petitions in India are not always prepared satisfactorily, or in such detail as would meet the requirements of the case.

45. There are several sentences and quotations which are incomplete or are unintelligible in the counter affidavit and the written submissions filed by the State of Bihar. For example, the sentence "That the writ petitioners have attempted to show that the State of Bihar has acquired permission" (p. 41) is incomplete and unintelligible. On p. 42, the sentence "I am advised to submit that all emergencies like other events have a time dimension. It exists during the period of carrier" is not clear and is unintelligible. In the same paragraph, the sentence "It is another matter that during a subsequent period either immediately following that or with a gape game, the emergency identical in nature may be in existence" is not clear and is unintelligible. Again, on p. 42, the sentence "In regard to such questions which have not arisen before the Court relevant for the decision of an actual case properly in seisin of the court, Article 143 of the Constitution has made a specific provision" is not clear and is unintelligible. On p. 148, the quotation "A law though temporary in other respects" is incomplete. The sentence on p. 150 that "Clause 26 provided that meetings including annual meetings" is incomplete. Similarly, on p.160, the sentence "Indeed one would have before the Legislature" is incomplete.

46. Besides, there are numerous spelling mistakes, grammatical mistakes and other mistakes. I have pointed out such mistakes in the foot-notes of counter affidavit, written submissions and the additional written submissions of the State of Bihar.

47. It is likely that the written submissions drawn by the author included in this book may give some ideas or provide some assistance to those members of the intelligentsia who might have occasion to pursue litigation in the nature of writs.

#### **Usefulness of the Book**

48. It is not for the author to say anything more but he would like to add that certain controversies have a habit of recurring even though they seem to belong to a category which is least likely to recur. If that happens, the material presented herein will be of additional historical value. There is every possibility that the book gets included in the reading material for students of constitutional law and political science of different levels in different universities. It will, of course, be of great use to the lawyers, judges, policy makers, legislators, politicians, social scientists and the enlightened public. It will also be of great interest to all those who are interested in the rule of law, constitutional morality and parliamentary democracy in the country. Persons interested in public administration will find the book highly useful to them as well.

### Acknowledgements

My obligations are many. When I approached late Shri Nani A. Palkhivala, Senior Advocate, Supreme Court of India and former Indian Ambassador to the U.S.A., with the request to argue my case in the Supreme Court of India, he not only readily agreed to do so but also immediately telephoned Shri Ravinder Narain, a senior partner of the then Dadachanji & Co., Advocates, Supreme Court of India, to accept my case as a public interest litigation and file a writ petition in the Supreme Court without charging any fee. I am obliged to him for that. When I met Shri Ravinder Narain, he entrusted this case to Shri Talat M. Ansari, Advocate, another partner of the Dadachanji & Co. (presently a partner of Kelly Drye Warren Anderson, a law firm in New York, U.S.A.) who helped me in ways more than one till the disposal of this case for which I am grateful to him. Shri Aditya Narain, who started his career as an Advocate in Dadachanji & Co., with my case, did a lot of spade work by going through the book several times and who was very helpful to me at every stage of this case for which I am grateful to him. Shri D.N. Mishra, Advocate, Dadachanji & Co., looked after my case in the Supreme Court and kept me posted of the developments regarding the hearings and orders of the court in my matter, for which I am thankful to him also.

As it was not possible for Shri Palkhivala to come to Delhi at every hearing of the case, he requested Shri Soli J. Sorabjee, Senior Advocate, Supreme Court of India, and former Attorney General, Government of India, to argue my case in the Supreme Court, which he did, without charging any fee. I am grateful to him for this. Dr. Dhananjaya Y. Chandrachud, Advocate, Supreme Court (presently Judge in the Bombay High Court) helped Shri Sorabjee in my case, without charging any fee, for which I am grateful to him.

M/s Dadachanji & Co., not only accepted this case without charging any fee, they even paid the court fee, etc., and provided the services of their staff, particularly of Shri Bala Chandran, Shri Ram Chandran, Shri Mohan Kumar, Shri Meharban Singh and Shri Joginder Singh, all employees of Dadachanji & Co., for typing and cyclostyling work related to the case, which was quite heavy, for which I am thankful to their abovementioned staff also.

Shri Ravinder Narain took keen personal interest in the case, guided me as to how to proceed in the matter and who remained present in the court when the case was admitted.

Shri Soli J. Sorabjee, Dr. Dhananjaya Y. Chandrachud, Shri Dadachanji, Shri Ravinder Narain, Shri Talat M. Ansari and Shri Aditya Narain were present in the court when the judgment was delivered.

Late Shri P.M. Bakshi, former member, Law Commission, Government of India, and Director, Indian Law Institute, New Delhi, went through my written submissions and additional written submissions and gave me some useful suggestions for which I am grateful to him.

My special thanks are due to Dr. Upendra Baxi, Noted Jurist and the tallest law teacher in the country, former Professor of Law, Vice-Chancellor, Delhi University, and Director, Indian Law Institute, New Delhi (presently Professor of Law, University of Warwick, U.K.) for writing an introduction to this book.

I am also thankful to Professor Arup Maharatna, Officiating Director of the Gokhale Institute of Politics and Economics, Pune, for taking a keen interest in this book.

I am thankful to all the Research Assistants in the Gokhale Institute who typed this matter and helped me in comparing it from time to time to see that no mistake is left. In spite of all this if some mistakes are left, I alone am responsible for that.

Last, but not the least, I am extremely thankful to the press, national as well as regional, to support me in this case against the re-promulgation of Ordinances. There were no television channels (except Doordarshan) in those days. But the print media wholeheartedly supported me in my struggle against the re-promulgation of Ordinances for which I am most grateful to it.

Gokhale Institute of Politics and Economics  
(Deemed to be a University),  
Pune 411 004  
October 2, 2008

D.C. Wadhwa

# INTRODUCTION

## Prefatory Observations

It remains an extraordinary honour for me to remain associated with Professor D.C. Wadhwa's excellent treatise concerning the Ordinance Raj in Bihar. Without doubt this learned book exposes the underbelly of Indian constitutionalism and even of activist judicial action. *Endangered Constitutionalism* testifies to a scholar's epic, impassioned, and yet reflexive commitment to expose and combat the subversion of Indian constitutionalism and to place erudite knowledge at the service of restoration of constitutional legality in India in ways which benefit the hapless Indian citizens.

This archival work is also quite exceptional because it narrates the story of the ways in which India's foremost and gifted activist justices frustrate in the end result the integrity of the cause which Professor Wadhwa brought to their notice. The Epilogue subjects the Supreme Court judgment to a searching exegetical and doctrinal analysis. Professor Wadhwa is an eminent agrarian economist but lawyers and judges, I suggest, have much to learn from him in terms of legal analysis and the ways of deciphering the original critical intent of the Indian constitutionalism.

What is new about Wadhwa's one-person struggle is not the restatement of executive lawlessness that subverts the letter and spirit of the Indian Constitution; this unfortunately remains a recurrent story. What is new is the fact that Dr. Wadhwa seizes the moment not to redress *episodic* violations but presents to us an account of how *structural* violations of Indian constitutionalisms may be interlocuted. The difference is indeed important because the day to day deployment of activist judicial power and energy while crucially exposing the growing illegalization of the State leaves severely alone the less visible yet more profound ways of systematic abuse of public power. Put another way, this work furnishes a remarkable archive of the betrayal of public trust in the forms and functioning of representative democracy.

Professor Wadhwa, now in his mid-seventies, launched his solitary struggle about a quarter century earlier. And I find myself singularly fortunate in bearing witness to this struggle. Both of us, in this lapse of a quarter century, now remain guests of a finite lifetime. But Dr. Wadhwa's constitutionally sincere purpose has not waned through this chronology. While activist justices retire and remain engaged in a different and at times more lucrative pursuits, not always fully

conversant with the promise of constitutional justice for the worst-off Indian citizens, solitary activist scholarly engagement may neither know nor enjoy the bliss of superannuation and must continue to pursue struggles against lost causes. This provides, surely, one important reason why even the hyperglobalizing Indian citizens ought to find time to read and study this important work. They may well complain that the data here assembled are not an easy read; who ever said that the archives of state lawlessness must remain a galloping, unputdownable type narrative?

Further, not many justices, law teachers, students, lawyers or media persons fully know, or fully care to appreciate, the traumatic experience undergone by the individual social action petitioners-in-person. If out of Delhi, they have to travel long distances at their own cost and invest in accommodation and local expenditure only to meet with frequent adjournments, rather generously granted to state counsel. Even public spirited senior lawyers and individual petitioners need to remain in attendance. When their expectations of fair hearing stand belied, many undergo howsoever unintended judicially caused trauma. Their entire lifeworlds remain wounded by the experience, a poignant fact altogether often passed by in the narratives of activist adjudication. Of course, all litigants must remain steady enough to withstand the vagaries of judicial process; however, not all public spirited citizens possess the staying power that professional lawyers display so remarkably well. I offer these remarks, also based on my own personal experience, to bring fully to public view the travails of social action petitioners and the wider social implications thus entailed.

### Intersections

It is not often the case that substantial scholarly/scientific work stands fully offered to the gaze of India's apex justices. The intersection between rigorous production of knowledge and judicial process is rare. As India's foremost agrarian economist, Dr. Wadhwa was struck by covert state censorship over knowledge production. He thus painstakingly collected and digested information (in pre- Right to Information Act regime) about agrarian legislation (and subordinate legislation as well) in a multivolume study; he also strove to lead a movement for an India-wide record of rights in land<sup>1</sup>

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<sup>1</sup> See, D.C. Wadhwa's multivolume studies entitled *Agrarian Legislation in India (1793-1966)*; see also his 'Guaranteeing Title to Land-The Only Sensible Solution,' published variously in the *Economic and Political Weekly* and as a monograph by the Planning Commission, Government of India, New Delhi. His commitment remains still undiminished; Professor Wadhwa has by urgent communications recently addressed to Ms. Sonia Gandhi, Prime Minister Manmohan Singh, and the Chief Minister of Maharashtra, stressing urgency of action.



It is in this process of enquiry that he stumbled upon the extraordinary phenomenon manifest in the State conduct of Bihar. Rather than recourse to proper deliberatively informed acts of legislation, the State of Bihar remained entirely ordinance-happy. The Constitution no doubt authorizes promulgation of ordinances when the legislature is not in session; however, the story of Bihar is one continuous narrative of endless re-promulgations of ordinances as a way of governance. Most economists would have rested content with this painful discovery; but this was not the course ethically open for Dr. Wadhwa. Instead, he remained impelled by an urgency for the need to do something more by way of social action.

The Indian Constitution contemplates promulgation of ordinances as exceptional legislation; the *de facto* Bihar 'Constitution' considers ordinance as the routine form of legislation. If the former assigns to ordinances a supplemental role, the latter allows ordinances, virtually, to possess powers to supplant the law-making by the duly elected legislature. The *de facto* Bihar 'Constitution' even amends the Indian Constitution through perpetual promulgation and repromulgation of a large number of ordinances. This presents a maze through which a scholar possessing only a finite life could only barely navigate. It is a tribute to Dr. Wadhwa's rare scientific determination that he not merely pursued information from the feudal nooks and crannies of Bihar state administration archives but decided to expose it in a book-length study<sup>2</sup>. Not content with this, he also decided to file the book as a social action petition before the Supreme Court. With this filing, social action litigation moved from its incipient stage of (what I have called) *epistolary* jurisdiction<sup>3</sup> to the stage of *bibliophile* jurisdiction.

One would have thought that the activist Supreme Court would have gratefully accepted the invitation of Dr. Wadhwa backed up by unimpeachable evidence. Almost quite the contrary happens here. The documentation assembled here fully exposes the progressive enfeeblement of social action litigation jurisdiction, so assiduously developed by India's most gifted Justices. This work demonstrates that while the Court has assumed *powers* by issuing open invitation to citizens to come before it to correct all the excesses of power threatening democratic values and rule of law, it has refused, over the years, to consistently assume a matching *responsibility*. A citizen activating the social action jurisdiction of the Court

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<sup>2</sup> D.C. Wadhwa, *Repromulgation of Ordinances: A Fraud on the Constitution of India* (1983)

<sup>3</sup> U. Baxi, "Taking Suffering Seriously" - Social Action Litigation in the Supreme Court of India" in *Law & Poverty: Critical Essays* 387 (1988); (U. Baxi, Ed.)

soon learns how arduous and hapless the enterprise is or can become. The book in your hands illustrates vividly the perils to which a conscientious citizen may expose herself. Some are routine; others remain extraordinary by any standards.

The routine perils are those which question the justiciability of the issues (despite the fact that standing has otherwise almost become a matter of citizens' fundamental right to constitutional remedies), burden the social action litigation petitioners with prevarication and circumlocution in affidavits filed by the state government and even on behalf of the President of India, and confront activist citizens with the burden of a leisurely courtcraft, almost venerated as an institutional virtue by the Supreme Court. The extraordinary perils, which their Lordships refuse simply to realize, are the demoralizing costs imposed on a vigilant and conscientious citizen. To more fully appreciate the impact of this observation, I would urge you to carefully look at the table on page 64 which documents the bizarre movement of the listing of the case which can only be compared with the game of snakes and ladders!

If a social action petitioner had to attend the court on each of the 37 (actually a lot more) occasions – in this case coming from Pune to New Delhi – you can imagine the sacrifice of talent, time and money expected by the Supreme Court of India of a citizen pursuing the constitutional adventure of restoring elementary norms of civilized legality in India! A similar spectre haunted intrepid journalist and public spirited citizen Ms. Sheela Barse, who championed for years the rights of juveniles illegally confined by the Indian states in jails; she had to abandon the litigation which was reproachfully appropriated by the Supreme Court, with no spectacular change in the position of the suffering juveniles in unauthorized incarceration in custodial institutions<sup>4</sup>. Dr. Wadhwa persevered; the ordering of cost of Rs.10,000 to him remains a cruel constitutional joke! Surely, the Court should have taken judicial notice of costs of travel, residence and related expenses, apart from the mental agony involved in an altruistic constitutional pursuit. While the state attorneys are fully taken care of at the cost of public exchequer in deviously defending manifest illegalities, a social action petitioner is summoned to sacrifice a good deal in the pursuit of an uncertain constitutional result!

*Clearly, the Supreme Court of India has systematically aggravated the asymmetries of power between citizen and the state in the struggle for recovery of constitutionalism by Indians for India. This was not the grana*

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<sup>4</sup> *Sheela Barse v. Union of India*, 1986(3) SCC 596.

*impulse which animated the origins of social action litigation, which was designed to empower citizens against the lawlessness of the Indian state.*

### Adjudicative Meanderings

The Supreme Court has allowed itself, even in the inaugural presence of Justice Bhagwati and his activist Brethren, to emasculate the power and potential of the new found jurisdiction. This has happened in several drastic ways. We have already noted the wayward management of the court schedule. In addition, the Court is rather slow in ensuring that state affidavit responses are filed in time; the state should not have any reason to 'go slow' especially when it assails a social action petitioner by saying she has no case to argue! The Court is also not able to impose the requirement that state affidavits should not be evasive. What is worse, the Court often tolerates sworn truths all too often subsequently exposed as lies on affidavit by the State!<sup>5</sup>

In this very case, a counter-affidavit was filed by a Section Officer of the State of Bihar (page 40)! This is in itself an indication of the deference shown by the State to the highest court in the land! Apart from endeavouring to advise the Supreme Court that the notion of 'repromulgation' rests on a "complete misconception," the learned Section Officer advised that promulgation of Ordinance is based on the need for emergent action. Emergencies, concedes the learned Section Officer, have undoubtedly a "time dimension" but the Supreme Court must surely appreciate that

During a subsequent period either immediately following  
or that with a time gap [in original the words are 'gape gamp'];  
the emergency identical in nature may be in existence (page 42).

This is the only averment the learned Section Officer makes in his counter-affidavit when faced with a precise chart of ordinances repromulgated for life-group of 1-14 years! (pages 8-9). This is all that the State has to say in response to a scrupulously meticulous affidavit by a distinguished social scientist of India. The judgment has nothing to say about the cavalier legal behaviour of the State; nor about the contorted logic, not worthy even of a Section Officer in Law Department of Bihar, justifying 'emergency' massive repromulgation.

The Union of India always remains conveniently more deferential! Opposing the prayer that Union be directed by the Court not to sanction re-promulgation,

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<sup>5</sup> See U. Baxi *supra* note 3 at 403-404, notes 78-79 (1989).

a Deputy Secretary in the Ministry of Home Affairs files a counter affidavit. But the counter-affidavit, too, remains all too casual. It, for example, states that the Union Home Minister wrote to Chief Minister of Bihar in September, 1980 advising that repromulgated ordinances “should be replaced by the Acts of the Legislature at the earliest” (page 56), but it goes on to say that the Court may not issue any direction to the Union restraining it from

granting consent... for repromulgating any ordinance for which consent is required under the Constitution... in as much as the Union of India has no authority under the Constitution to withhold approval of the President to an Ordinance if no provision contained in the Ordinance is unconstitutional and or contrary to law (page 57).

This submission is carefully misleading. The petitioner had not raised any question of any provision of any ordinance being unconstitutional or unlawful. The issue was that the manner of repromulgation was itself unconstitutional. And clearly, even if not in so many words, the Union Government itself said so to the State of Bihar in September, 1980. Further, as any careful reader of Justice Sarkaria Commission’s Report on Union-State relations would know, grossly unjustified withholding of State Ordinances requiring prior approval of the President occurs regularly.<sup>6</sup> To be sure, there is a line of difference between “withholding” and “declining” permission. But “withholding” for a slice of infinity, without any reasons being given, is in reality no different from disapproving! Surely, there was room for a more considered affidavit by the Union of India concerning the actual practices of constitutional power. Surely, the affidavit needed to confront the issue whether frequent re-promulgation of lapsed ordinance was ‘constitutional.’ Evasive gestures on the part of state attorney fully denies to the Court crucial legal services by state counsel otherwise supposed to behave as the officer of the Court. When thus not manifestly contumacious, such persistent conduct does not to say the least advance the ability of the Court to decide difficult constitutional matters.

All this shows that the Supreme Court of India itself remains too lenient concerning the timing of submission of affidavits by state counsel and the standards of argumentation therein offered. This remains deeply unfortunate because the Court has so often reiterated that social action litigation is not adversarial but cooperative. Indeed, its *raison d’etre* is to restore legality and vindicate the

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<sup>6</sup> Government of India, *Report of the Commission on Centre-State Relations*, Part I, 145-157 (1988).

letter and spirit of constitutionalism. In allowing indifferent pleadings by state counsel, often to a point of constitutional insincerity, the Court also endorses in effect the conversion of social action litigation into an adversarial mode. And in fully failing, on everyday basis, to harshly interrogate such forensic practices, the Supreme Court consummates the syndrome of power without responsibility in its very own 'doings' of social action litigation.

### **Symbolic Victories Without any Real Gains**

The decision in this case offers a symbolic victory for the citizen; but the victory remains only and merely such. All that the Court achieves is the invalidation of one Ordinance (page 258). And this occurs in the face of the fact that Their Lordships take note of the fact that as many as 256 ordinances in terms of "life-groups" of one to fourteen years were re-promulgated between 1967 and 1981 (page 244); that the "stratagems of repromulgation" was extensively used (pages 245-250). Additionally, the Court lists (page 251) five ordinances which were 'repromulgated' for as many as 34-39 times for periods ranging between 12-14 years! The Court describes the phenomenon in vivid phrases: the "enormity" of promulgation and repromulgation is "startling" (page 245); the "stratagem of repromulgation" was extensively and frequently resorted to "in a routine manner" (page 254); the Government of Bihar has "made it a settled practice to go on repromulgating Ordinances from time to time ... with a sense of deliberateness" (page 252); the "massive scale" and "routine manner" of this exercise stands aggravated by a circular letter (page 253) expressly declaring that repromulgation of un-amended ordinances does not require the approval of the Council of Ministers!

Having thus narrated the practice, the Court categorically itself recourses to some postures of what must be named as nothing short of constitutional deviance. Repeatedly, it asserts that the practice amounts to virtual "usurpation" by the executive of the power of the legislature (page 256), and it "transgresses" the legislative power in a "convert or indirect manner" and through the "stratagem" of repromulgation. The stratagem is "repugnant to the constitutional scheme" as it "covertly and indirectly" arrogates to the executive the "law-making function of the Legislature," (page 257). The Court further highlights the fact that although the same power is possessed by the President of India

There is not a single instance in which the President has, since 1950 till today, repromulgated any Ordinance after its expiry (page 258).

The Court describes Bihar as perpetuating the “Ordinance Raj” (p. 258) and declares this to be antithetical to the Constitution.

On such settled facts, judicial denunciation remains unfortunately not matched by any corresponding judicial action. Please compare the prayers of the petitioner (pages 21-22) with the ultimate ‘relief’ granted and you will appreciate fully the reality that the Supreme Court has, after all, exercised a hortative or advisory jurisdiction. The Court could have, but did not, call for records and quashed Ordinances which have been repromulgated and may still be in force. The Court could have issued, but did not, a directive explicitly prohibiting the practice of repromulgation of ordinances after the period of six weeks from the reassembly of the legislature mandatory under Article 213(2) (a). The Court did not strike down though it could have, the circular of 29 July 1981 dispensing with the need for Cabinet approval in case of ordinances re-promulgated in their original form. Neither did the court redress the past nor did it address the future. It was content to strike down a solitary ordinance and to take note that the other two impugned ordinances were already replaced by legislation.

The decision also demonstrates the nature of ultimate relief which the Court has allowed to be sculpted in social action litigation: this relief is one that is summed up in the usual “hope and trust” kind of final order. But both ‘hope’ and ‘trust’ are singularly misplaced in a context where a state has usurped unconstitutionally the power of the elected representatives of the people. The Indian jurisprudence is not unfamiliar with cease and desist order exemplified by Mr. Justice Lentin in *Antulay* social action proceedings.<sup>7</sup> And, it proved dramatically effective in arresting arbitrary exercise of state power. Instead here, the Court remains content even in a case of this magnitude to develop a jurisprudence of prayer, somehow against all well-archived facts, it remains content with fervent appeals summoning an errant executive to the path of constitutional rectitude.

In the absence of the entirely constitutionally permissible cease-and-desist orders, it is clear that the Supreme Court here fully chose to exit from its invigilatory constitutional power and function, and worse still a bit too readily! One does not quite know, pending further empirical studies whether Ordinance Raj type practices of governance have abated; inveterate political habits die hard. But one may hope that the rate, frequency and duration of repromulgation may perhaps have been somewhat affected by the Supreme Court ruling.

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<sup>7</sup> See U. Baxi, *Liberty and Corruption: The Antulay Case and Beyond* 43-52 (1990).

The Supreme Court has innovated (as constructively demonstrated by the inaugural Agra Home case proceedings and since then) the instrumentality of continuing jurisdiction, or continuing *mandamus*, to ensure that the rule of law values stand somehow inscribed on the administrative culture.<sup>8</sup> There was every reason for the Court in this case to direct the Bihar Government to lay information before it concerning the promulgation and re-promulgation of Ordinances, and as a part of its continuing jurisdiction, to invalidate *suo motu* re-promulgation of ordinances in ways manifestly violative of the constitutional scheme, enunciated by the Court itself in this very case. It simply did not choose to do so. And the question remains: Why so? The decision in this case constitutes a mystery, worthy of Sherlock Holmes, and not Justice Oliver Wendell Holmes type juridical resolution!

It is abundantly clear that the exceedingly brief judgment in this case altogether surrenders the pedagogic function of social action litigation and jurisprudence. Their Lordships denounce, rightly, a pattern of ordinance-prone behaviour of the State of Bihar. But they make no visible attempt to understand let alone explain its originary epidemiological dimensions. As this monograph shows with overwhelming clarity, the state lawyers were at no stage put to the requirement of showing why repromulgation of as many as 256 ordinances with a “life-group” of 1-14 years was considered necessary or expedient. The Court does not apart from reproducing the petitioner’s chart of re-promulgated Ordinances, itself seek and answer to the following salient question: why did the state of Bihar need to repromulgate for well over eleven years the Panchayati Raj, Religious Trusts, State Aid to Industries, Khadi and Village Industries Ordinances? Similarly, why did it require decade long repromulgation of Ordinances on such matters as soil and water, panchayati raj, municipal laws, housing board, cooperative societies? And why did the state require a “life-group” of 9-6 years for repromulgation of as many as 19 ordinances on matters such as irrigation, Gramdan, levying of cesses and motor vehicles laws? And what was so special about the Bihar Sugarcane Ordinance of 1968 which was repromulgated for as many as thirteen years, eleven months and nineteen days? (pages 91-95)

Even if the Supreme Court wished rightly *not* to adjudicate on the legality of these ordinances, it should have, in order to form any views on their propriety, sought a detailed affidavit response on each one of these ordinances. Instead, it allowed argumentative strategies turning on legal quibbling by state lawyers on the one hand and judicial denunciation on the other. The result is neither the

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<sup>8</sup> See *Dr. Upendra Baxi v. State of Uttar Pradesh* 1981 (3) SCALE, 1136.

Court, nor the petitioner, nor the bureaucracy and political establishment in the state of Bihar, may understand, even in bare outline, the terminal pathology of the practices of power. And, the bureaucracy and political managers of the State may as a result, paradoxically, persevere in their attitude of self-righteousness and even continue to feel that the judicial strictures as presenting an unwarranted incursion on their constitutional estate! In contrast, had they been put to rigorous work of compelling 'justification' for the excessive use of the ordinance-making power, they would possibly have learnt from their own labours the enormity of the abuse of power. And the *exposé* aspect of the social action petition would have been more meaningfully communicated nationwide. By moving on a denunciative rhetorical axis, the Supreme Court has surrendered a precious opportunity to function as a constitutional pedagogue for the nation. All in all, the materials assembled in this monograph ruefully suggest a tendency towards atrophy of judicial will power to combat unconstitutional usurpations by an executive formation which, overall, stridently manifests anti-people, anti-law, and anti-rights tendencies.

### The Endangered Constitutionalism

Professor Wadhwa in the Epilogue suggests various ways in which the Supreme Court of India allowed itself to be misled. In a scintillating critique, the learned author painstakingly shows the egregiousness of the Court's observation that because the legislature may have 'too much business' repromulgation, even in its endless forms may yet be justified. The author argues, rightly in my opinion, that this observation is scarcely grounded in the text, or the context, of the Indian Constitution nor specifically warranted by any pragmatic considerations. As concerns former, he remains entirely right to insist that 'Article 213 of the Constitution does not provide for the re-promulgation of an Ordinance *under any circumstances*' (emphasis added). In fact, it has fixed the maximum life of an Ordinance. As concerns the latter consideration, he again remains right in drawing our attention to the fact that if 'the time at the disposal of the legislature in a particular session is short, the solution does not lie in the re-promulgation of an Ordinance but it lies in extending the duration of the session of the legislature. After all, there is no upper limit fixed in the Constitution for the duration of a session of the legislature.'

Further, any conscientious reader of this work may find herself in agreement that the 'duration of the sessions of state legislatures as well as that of Parliament are continuously being curtailed.' The learned author further substantiates this by



the following disclosure:

For example, after the practice of re-promulgation of Ordinances was started in Bihar, the duration of the sessions of the Bihar Legislative Assembly had gone down from 145 days in 1950 to 55 days in 1981, the last year of the study. Similarly, the duration of the sessions of the Bihar Legislative Council had gone down from 152 days in 1950 to 55 days in 1981. As regards the number of days the Legislative Assembly actually met, the number of days had gone down from 80 in 1950 to 41 in 1981. The corresponding figures for Legislative Council are 60 in 1950 and 37 in 1981. It is not accidental that from that period, no session of the Bihar Legislature lasted for more than six weeks, the idea being to ensure that the Ordinances do not lapse automatically.

Surely, the situation is not confined to Bihar but recurs elsewhere, though perhaps not so dramatically. The overall message of this profound work remains much wider. It is just this: Indian legislatures far too disproportionately dedicate their precious time to purposes other than making laws and public policies, mandated by Indian constitutionalism. It is this unconstitutional, or at least less constitutionally insincere, the misallocation of legislative and political time that carries sinister portents of Indian parliamentary democracy as well as for the future of the rule of law and human rights in India and *for* Indians, ought to form a serious agendum of apex activist judicial role and power.

This then is the profound meaning of 'endangered constitutionalism.' Professor Wadhwa, with many other constitutional compatriots, knows full well that this message *now* remains entirely insensible for the hyperglobalizing Indian state managers and political actors. The enduring message of this important work lies on another register, which fully accentuates the justification of practices of *subaltern Indian constitutionalism*<sup>9</sup>. Through his luminous lifework, Professor Wadhwa continues to remind us of this mission and task. I salute his achievement.

### A Word in Lieu of Conclusion

Because it is extremely improbable that a petitioner of the stature of Dr. D.C. Wadhwa may ever emerge as an actor on the Indian social action theatre

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<sup>9</sup> See, for an elaboration of this notion, Upendra Baxi, 'The Promise and Peril of Transcendental Jurisprudence: Justice Krishna Iyer's Mortal Combat with the Production of Human Rightlessness in India,' in C. Raj Kumar and K. Chockalingam (eds.) *Human Rights, Justice, and Empowerment* 3-25 (2007, Delhi, Oxford University Press).

challenging such Ordinance Raj unconstitutional perfidies, two important messages emerge for further judicial role and action.

First, there is nothing that disables the Court to now act *suo motu* calling for information from the State of Bihar to furnish information about the governance habit of re-promulgation of lapsed ordinances, since the time the judgment was delivered and on that basis to proceed to decide the issues previously unaddressed. Second, and equally if not more important, the Court now ought itself to conduct an institutional audit of its own performance relating to the unconstitutional recalcitrance displayed by state managers, officials and attorneys. Such an audit ought to remain concerned with the issue whether the Court has availed all available means to ensure at least that: [a] state attorneys treat with respect the social action petitioners and as officers of the court instruct their clients that this is not an adversarial jurisdiction and [b] its clear and compelling directions are neither modified nor allowed to lapse because the concerned states decide to pay little or no attention to these.

No doubt, and to reiterate, the Supreme Court has so far rightly insisted that social action litigation is inherently a cooperative rather than an adversarial endeavour. No private interest may legitimately animate a social action petition; nor may the respondent state (outside the bounds of such allegation) seriously defend its 'powers' to act in unconstitutional ways. This is good so far as it goes. However, the question raised by Dr. Wadhwa concerns the quality of that declared public/ constitutional 'good.' *Should adjudicative temerity or collapse also pass muster in the name of cooperative/pedagogic judicial postures?* How far even judicial power conceived righteously as a pedagogic influence directed to the fostering a rule of law culture in the wielding of public power may still continually thus be allowed to fall short of the concrete function to finally decide on the *unconstitutionality of state action?*

I commend, for the reasons thus far stated, a serious reading of this work necessarily going beyond Professor Wadhwa's and my own lifetime. The finite life and times of activist-scholars constitute a reflexive voice hopefully transcending the great Indian political and constitutional bazaar. Such voices may at least aspire to achieve some Archimedean points of discourse. Because of this, yet, they still deserve a dignity of reasoned public discourse. Should you think otherwise, you also bear the burden of questing for a new constitutional faith; and I, for one, wish you eminently well in this charting a new path.

UPENDRA BAXI

August 2, 2008

Professor of Law, University of Warwick (U.K.)

# DOCUMENT 1

## Writ Petition Filed by Dr. D.C. Wadhwa and Three Others

In the Supreme Court of India  
Extraordinary Original Jurisdiction  
Civil Writ Petition No. 412-415 of 1984<sup>1</sup>

*In the Matter of*

### Petitioners

1. Dr. D.C. Wadhwa
2. Kariya Munda
3. Madheshwar Prasad Singh
4. Nityanand Prasad Singh

### Respondents

- v.
1. State of Bihar through the Secretary, Ministry of Law, Patna
  2. Governor of Bihar, Patna
  3. Union of India through the Secretary, Ministry of Home Affairs, New Delhi

### A Petition under Article 32 of the Constitution of India

The Humble petition of the petitioners abovenamed most respectfully sheweth.

1. The Petitioner No. 1 is a member of the research staff of the Gokhale Institute of Politics and Economics, Pune, and has conducted and undertaken research on the practice followed by the State of Bihar in promulgating and re-promulgating Ordinances in purported exercise of powers conferred under Article 213 of the Constitution of India instead of getting such Ordinances enacted into Acts of the State Legislature. The re-promulgation of Ordinances

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<sup>1</sup> As I was not affected by any Bihar Ordinance, I had got associated with me three persons from Bihar, who were directly affected by the Bihar Ordinances, to meet the contention of the respondents that I had no *locus standi* to maintain this Writ Petition. Thus, though there were four petitioners, there was only one Writ Petition in which the Supreme Court delivered its authoritative judgement.

is not a political issue but is a constitutional issue. This practice has been followed by all governments in the State of Bihar since 1967 including the Janata Government and the Congress Government. The Petitioner No. 1 has conducted research on this topic for a period of two years. The Petitioner No. 1 has also published a book entitled *Re-promulgation of Ordinances: A Fraud on the Constitution of India* on the basis of this research. The research conducted and the data collected by the Petitioner No. 1 are published and contained in the said book. For the sake of brevity and in order to avoid repetition, the petitioners are annexing a copy of the said book to this Writ Petition, marked as Annexure 'A'.<sup>2</sup> The petitioners crave leave to refer to and rely upon the statement of facts and data referred to in the said book as though the same is specifically incorporated in this Writ Petition.

2. The Petitioner No. 2 is the owner of certain forest lands and grows forest produce on the said lands. The Petitioner No. 2 is directly affected by the provisions of the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983) which was first promulgated in 1977 and is being re-promulgated again and again since then instead of being converted into an Act of the Legislature and is being enforced against the said Petitioner.

3. The Petitioner No. 3 is a student studying in Intermediate (Science) class in A.N. College, Boring Road, Patna. The said petitioner is challenging the constitutional validity of the Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983) which was promulgated originally in 1979 and has since been successively re-promulgated and continues to be in force. The said petitioner is directly affected by the provisions of the said Ordinance.

4. The Petitioner No. 4 is an owner of kiln and manufactures bricks and is challenging the validity of the Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983). The said Ordinance was originally promulgated in 1982 and has been re-promulgated since then, from time to time, and is still in force. The said petitioner is directly affected by the provisions of the said Ordinance since it provides for the regulation of manufacture of bricks.

5. The petitioners submit that by the present Writ Petition the petitioners are raising a question of utmost public importance and constitutional interpretation which has to be decided in the national interest. This petition,

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<sup>2</sup> Not printed in this volume

*inter alia*, raises the following questions of law:

- (i) Whether the extraordinary legislative power of the Governor of a state under Article 213 of the Constitution of India can be used to usurp the constitutional function of the State Legislature to enact laws and whether the Governor can promulgate and re-promulgate Ordinances instead of getting such Ordinances enacted into Acts of the State Legislature.
- (ii) Whether the period of operation of an Ordinance specified in Article 213 (2) of the Constitution read with the requirement of Article 174 of the Constitution of India restricts the power of the Governor to re-promulgate an Ordinance after the expiry of a period of six weeks from the reassembly of the Legislature.
- (iii) Whether the Ordinance-making power of the Governor can be used to promulgate successively the same Ordinances without fulfillment of conditions precedent of Article 213 (2) of the Constitution instead of bringing Bills on the lines of the Ordinances and getting such Bills enacted by the Legislature.

6. The power to promulgate an Ordinance is conferred on the Governor under Article 213 of the Constitution. For the sake of convenience and ready reference Article 213 is set out hereinbelow:

213. (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

Provided that the Governor shall not, without instructions from the President, promulgate any such Ordinance if —

(a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or

(b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or

(c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been

reserved for the consideration of the President, it had received the assent of the President.

(2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance —

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

*Explanation* — Where the Houses of the Legislature of a State having Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

(3) If and so far as an Ordinance under this Article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this Article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

7. The petitioners submit that Article 213 of the Constitution gives emergent legislative powers to the Governors of the states to be exercised by them on fulfillment of certain conditions and in order to meet extraordinary and urgent situations which cannot brook delay. The following conditions have to be cumulatively satisfied before the power conferred under Article 213 can be exercised by a Governor:

(a) The Legislature must not be in session.

(b) Certain urgent and emergent circumstances must exist.

- (c) Such circumstances must require immediate action.
- (d) The Governor must be satisfied that such circumstances require immediate action.

8. Thus, until and unless all the four conditions are cumulatively fulfilled, an Ordinance cannot be promulgated under Article 213 of the Constitution. The further restriction in respect of an Ordinance contained in Article 213 pertains to the requirement of placing the Ordinance on the Table of the Legislature immediately on its reassembly and the expiry of the Ordinance after a period of six weeks from the date of reassembly of the Legislature if during that period the Ordinance is neither replaced by an Act of the Legislature nor rejected by a resolution passed by the Legislature. It is submitted that the exercise of power to promulgate an Ordinance is, therefore, strictly conditioned by the existence of circumstances as well as the necessity to take immediate action on account of those circumstances. In the absence of fulfillment of these conditions, no Ordinance can be promulgated and any Ordinance promulgated without the fulfillment of these conditions would be *ultra vires* Article 213 of the Constitution and unconstitutional.

9. It is submitted that the power to promulgate Ordinances has been incorporated in the Constitution in order to give an emergent power to the Governor of a state to be exercised by him when the Legislature is not in session and where an emergent situation requiring immediate enactment of law is in existence and the enactment of law cannot be delayed till the Legislature reassembles. This power, however, has been granted only in order to meet urgent situation which cannot brook delay and to prevent grave public inconvenience that may be caused if immediate action is not taken. The power to legislate by promulgation of an Ordinance cannot be used recklessly or by imagining a state of affairs to exist when, in fact, it does not exist nor indeed can the power be used *mala fide* in order to prevent the people's elected representatives from passing or rejecting a Bill after a free and open discussion, which is of the essence of the democratic process. The power which is to be used to meet extraordinary situation cannot be purported to serve political ends.

10. It is submitted that Article 213 inherently contains a restriction on the power for re-promulgation of Ordinances. This inherent restriction on the power is contained in sub-Article (2) of Article 213 read with sub-Article (1) of the said Article. Under sub-Article (1) of the said Article 213, the said power can be exercised only to take immediate action necessary to meet

circumstances which exist for taking such action. Sub-Article (2) specifically provides that an Ordinance so promulgated, in order to meet an extraordinary situation, must be placed on the Table of the Legislature when it reassembles after the promulgation of the Ordinance. The Ordinance so placed on the Table of the Legislature will cease to be operative if the Legislature itself passes a resolution to that effect. Alternatively, an Ordinance ceases to be operative after a period of six weeks from the reassembly of the Legislature if the Legislature does not convert that Ordinance into an Act. The period of six weeks has been granted in the Constitution in order to give time to the Government to introduce a Bill in lieu of the Ordinance and have the Ordinance enacted into an Act of the Legislature.

11. This implied restriction contained in sub-Article (2) of Article 213 also brings out the inherent limitation if read with the provisions of Article 174 of the Constitution of India which requires that the recess of the Legislature shall not exceed six months. Thus, the power to promulgate an Ordinance in the scheme of the Constitution has been granted only to meet contingencies which may arise during the period of recess of the Legislature with sufficient time given to the Government to get the Ordinance converted into an Act of the Legislature on the reassembly of the Legislature as a whole or the Legislative Assembly (where there is no Legislative Council), as the case may be. However, the power to promulgate an Ordinance cannot be used to continuously re-promulgate the same Ordinance instead of introducing a Bill in the Legislature and getting the said Ordinance enacted into an Act of the Legislature.

12. The petitioners submit that the State of Bihar has been, in gross violation of the provisions of the Constitution and in order to perpetuate a fraud on the constitutional provisions, promulgating and re-promulgating Ordinances, from time to time, instead of introducing Bills in respect of such Ordinances in the Legislative Assembly or the Legislative Council and getting such Ordinances enacted into Acts of the Legislature. This grossly illegal and unconstitutional practice followed by the State of Bihar has led to absolute violation of democratic principles as a result of which no debate or discussion is held on provisions of law and such provisions are perpetuated on the pure whim of the Executive without any contribution by the real law-making authority under the Constitution, namely, the Legislative Assembly and the Legislative Council. It is submitted, as would be clear from the facts set out hereinafter and from the facts set out in Annexure 'A'<sup>3</sup> to this Writ Petition,

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<sup>3</sup> The book, not printed in this volume



that the re-promulgation of Ordinances has been done in the State of Bihar as a matter of routine and the practice clearly establishes that there has been no satisfaction either of the Governor himself or of the Council of Ministers regarding the existence of conditions precedent under Article 213 of the Constitution, which are necessary for the purposes of exercising the power conferred under the said Article. In fact, the power has been grossly misused and abused in the said State and by all the Governments in the said State since 1967 in order to perpetuate Executive fiat in the form of law.

13. It is submitted that an Ordinance, which has the force of a law, is a purely temporary measure with a statutorily short life of six weeks from the reassembly of the Legislature. It is submitted that neither the Legislature nor the Governor can extend the life of an expiring Ordinance. It is submitted that the Governor of Bihar has been extending the lives of Ordinances by a contrivance, known as re-promulgation, to evade the limitation as to the duration of those Ordinances imposed by the Constitution. Even the President of India has been giving his consent for re-promulgation of the Ordinances in cases where his prior approval is necessary for such re-promulgation. Some Ordinances have, thus, been kept in force for as long as fourteen years. Up to 1966, no Ordinance was re-promulgated. All the Ordinances promulgated till then were either replaced by the Acts of the State Legislature before their expiry dates or were allowed to expire on their expiry dates. However, since 1967 there has arisen a practice, in this State, of successively repeating the terms of an Ordinance when its normal term under the provisions of Article 213 of the Constitution is about to end.

14. The Governor of Bihar does not extend the life of an earlier Ordinance directly which would at once reveal his intention of contravening the Constitution and thus render the Ordinance void. Yet he does precisely this, only in an indirect manner. He promulgates an Ordinance, say 'A', on a certain date. When that Ordinance approaches its expiry date, he promulgates another Ordinance, say 'B', on the same subject and with exactly the same contents, by which he also repeals Ordinance 'A'. When Ordinance 'B' approaches its expiry date, he promulgates another exactly identical Ordinance, say 'C', by which he also repeals Ordinance 'B'. In this manner, he goes on replacing one Ordinance by an exactly identical other Ordinance year after year for years together till the last Ordinance promulgated by him on the subject is replaced by an Act of the State Legislature or is allowed to expire. The re-promulgation of the Ordinances in this manner has been resorted to, as a matter of routine, to such an extent and on such a vast scale

and covering such a variety of subjects in this State that it has become an inveterate habit, thereby resulting in the supplanting of the ordinary legislative process as laid down in the Constitution.

15. The petitioners state that by adopting the method set out hereinabove, the State of Bihar has, through the Governor of Bihar, re-promulgated 256 Ordinances from 1967 till the end of 1981. Table 8 in Annexure 'A'<sup>4</sup> gives the lives of the Ordinances so re-promulgated by the State of Bihar.

16. The following Table gives the distribution of those 256 re-promulgated Ordinances by their life-groups.

Life-groups (Years)	Number of Ordinances
00-01	59
01-02	51
02-03	45
03-04	21
04-05	21
05-06	21
06-07	11
07-08	08
08-09	04
09-10	04
10-11	06
11-12	04
12-13	00
13-14	01
<b>Total</b>	<b>256</b>

17. Out of 256 Ordinances so re-promulgated by the Governor of Bihar between 1967 and 1981, 69 Ordinances were re-promulgated by him with

<sup>4</sup> The book, not printed in this volume

the prior permission of the President of India. The distribution of those 69 Ordinances according to their life-groups is given in the Table annexed hereto as Annexure 'B'. Even while granting such permission there is no application of mind on behalf of the President of India with regard to the existence of conditions precedent for the promulgation of such Ordinances.

18. The data contained in Annexure 'A' have been updated. According to the updated data, the Governor of Bihar has re-promulgated from 1967 to December 31, 1983, 265 Ordinances, at different times, for different number of times and for varying periods. The following Table gives the distribution of these 265 Ordinances by their life-groups.

Life-groups (Years)	Number of Ordinances
00-01	60
01-02	59
02-03	36
03-04	26
04-05	21
05-06	21
06-07	14
07-08	09
08-09	02
09-10	04
10-11	07
11-12	04
12-13	01
13-14	00
14-15	01
<b>Total</b>	<b>265</b>

19. Out of these 265 Ordinances, re-promulgated by the Governor of Bihar between 1967 and December 31, 1983, 71 Ordinances were

re-promulgated by him with the prior permission of the President of India who did not apply his mind. The Table showing the distribution of those 71 Ordinances according to their life-groups is annexed hereto in Annexure 'C'.

20. The following eight Ordinances, promulgated by the Governor of Bihar during the recess of the State Legislature from August 1, 1983, to December 7, 1983, were placed on the Table of the Bihar Legislative Assembly on December 8, 1983 and on the Table of the Bihar Legislative Council on December 12, 1983, when these Houses reassembled after their prorogation *sine die* on July 29, 1983, and August 1, 1983, respectively:

- (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983) promulgated on August 8, 1983
- (ii) The Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983) promulgated on August 8, 1983
- (iii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983) promulgated on August 18, 1983
- (iv) The Srimati Radhika Sinha Institute and Sachhidananda Sinha Library (Acquisition and Management) Second Ordinance, 1983 (Bihar Ordinance No. 18 of 1983) promulgated on August 13, 1983
- (v) The Bihar Contingency Fund (Second Amendment) Ordinance, 1983 (Bihar Ordinance No. 16 of 1983) promulgated on August 12, 1983
- (vi) The Bihar State Engineering and Pharmacy Education Institutions (Control and Take Over) (Amendment) Ordinance, 1983 (Bihar Ordinance No. 22 of 1983) promulgated on October 11, 1983
- (vii) The Indira Gandhi Institute of Medical Sciences Ordinance, 1983 (Bihar Ordinance No. 23 of 1983) promulgated on November 18, 1983
- (viii) The Kumardhubi Engineering Works Ltd. (Control and Take Over of Management) (Amendment) Ordinance, 1983 (Bihar Ordinance No. 24 of 1983) promulgated on December 2, 1983

21. The Ordinances at Serial Nos. (i) to (v) were re-promulgation of the old Ordinances while the remaining three were new Ordinances. Secondly, the Ordinances mentioned at Serial Nos. (i) and (iii) were promulgated and re-promulgated after obtaining the instructions of the President of India under proviso to clause (1) of Article 213 of the Constitution of India. The petitioners submit that by this Writ Petition, the petitioners are challenging the first three Ordinances set out hereinabove which have been unconstitutionally re-promulgated. As would be clear from the facts set out hereinafter, the State Government had sufficient time and ample opportunity to get these Ordinances converted into Acts of the Legislature. However, in spite of this, these Ordinances were not got enacted into Acts of the Legislature but unconstitutionally re-promulgated.

22. A statement showing the lives of the abovementioned five re-promulgated Ordinances upto 31-12-1983 is annexed hereto and marked Annexure 'D'.

23. The Legislative Assembly of Bihar met from July 9 to August 24, 1973, and the Legislative Council from July 16 to August 25, 1973. As all the Ordinances that were in force, after that session of the Legislature, could continue in operation, according to the provisions of the Constitution, only up to August 26, 1973, 55 Ordinances were promulgated on that date itself, that is, August 26, 1973, to replace the expiring Ordinances. One new Ordinance also was promulgated on that date. After that both the Houses of the Legislature met on December 7, 1973. The session of the Legislative Assembly continued up to December 21, 1973, and that of the Legislative Council up to December 22, 1973. As all the then existing Ordinances could remain in force only up to January 17, 1974, 49 Ordinances were promulgated on that date, that is, January 17, 1974, to take the place of the old Ordinances. After that both the Houses met from March 18 to April 8, 1974, with the result that all the then existing Ordinances became liable to expire on April 29, 1974. But before their expiry, 50 Ordinances were promulgated — seven on April 27, 34 on April 28 and nine on April 29, 1974 — to take the place of those expiring Ordinances. Four new Ordinances also were promulgated on those dates — two on April 27, one on April 28, and one on April 29, 1974. After that the Legislative Assembly met from June 5 to July 12, 1974, and the Legislative Council from June 12 to July 13, 1974, as a result of which all the then existing Ordinances could remain in force only up to July 23, 1974. Therefore, 51 Ordinances were promulgated on July 23, 1974, itself to replace them. This practice went on and on.

24. In 1979, for example, both the Houses reassembled on March 19. The session of the Legislative Assembly lasted up to March 31, 1979, while that of the Legislative Council up to April 8, 1979. After that session of the Legislature, all the then existing Ordinances became due to expire on April 30, 1979. But on April 28, 1979, 49 Ordinances were promulgated to take the place of the expiring Ordinances. After that the Legislative Assembly met from June 26 to July 30, 1979, and the Legislative Council from July 9 to August 1, 1979. As all the then existing Ordinances became liable to expire on August 20, 1979, 51 Ordinances were promulgated on August 18, 1979, to replace those Ordinances. After that both the Houses met from January 24 to February 13, 1980. As all the then existing Ordinances could continue to be in force up to March 5, 1980, only, 52 Ordinances were promulgated on that date, that is, March 5, 1980, to replace the old Ordinances. After that the Legislative Assembly met from June 23 to July 25, 1980, and the Legislative Council from June 30 to July 25, 1980, which made all the then existing Ordinances due for expiry on August 11, 1980. Therefore, 49 Ordinances were promulgated on August 11, 1980, itself to replace those Ordinances. One new Ordinance also was promulgated on that date. After that both the Houses met from December 9 to December 22, 1980, and, therefore, all the then existing Ordinances were rendered liable to expire on January 20, 1981. On January 19, 1981, however, 53 Ordinances were promulgated to replace the expiring Ordinances. After that both the Houses met from March 12 to March 30, 1981, which made all the then existing Ordinances due for expiry on April 23, 1981. But 59 Ordinances were promulgated — 30 on April 22 and 29 on April 23, 1981 — to replace those dying Ordinances. After that the Legislative Assembly met on June 29 and the Legislative Council on July 1, 1981. The sessions of both the Houses lasted up to July 28, 1981. That rendered all the then existing Ordinances liable to expire on August 12, 1981. But 60 Ordinances were promulgated — 35 on August 11 and 25 on August 12, 1981 — to replace the expiring Ordinances. Two new Ordinances also were promulgated on those dates — one on August 11 and one on August 12, 1981. (The dates of the different sessions of the Bihar Legislature, the total number of Ordinances promulgated by the Governor of Bihar on different dates and the number of the new Ordinances promulgated by him on different dates can be seen from Tables 6, 3 and 8 respectively contained in the Annexure 'A'<sup>5</sup> annexed hereto). This practice continues till date.

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<sup>5</sup> The book, not printed in this volume

25. The *modus operandi* for re-promulgation of Ordinances is as follows:

- (a) Immediately at the conclusion of each session of the State Legislature, a circular letter is sent by the Parliamentary Affairs Department of the State Government to all the Commissioners and Secretaries, Special Secretaries, Additional Secretaries and Heads of Departments of the State regarding the re-promulgation of Ordinances. In that circular letter all the abovementioned officers are first informed about the date on which the State Legislature has been “got prorogued”. It then points out that under the provisions of Article 213 (2) (a) of the Constitution all the Ordinances cease to be in force after six weeks of the reassembly of the Legislature of the State. It next mentions the dates of reassembly of both the Houses of the State Legislature for that particular session and the date from which all the Ordinances shall cease to operate if not re-promulgated before that date. After conveying all this information to them, the circular letter asks them to get in touch with the Law Department of the State and take immediate action for getting all the concerned Ordinances re-promulgated, so that all those Ordinances are definitely re-promulgated before the dates of their expiry. Finally, the same circular letter tells them that the approval of the Council of Ministers is not necessary for re-promulgation of the Ordinances in such cases where no amendment is proposed to be made in the previous Ordinances. A copy of that circular letter is sent to the Secretary, Law Department, and the Deputy Secretary, Law (Legislative) Department, for information and necessary action. It may be pointed out here that though the word ‘re-promulgation’ does not appear in the re-promulgated Ordinances, the use of that word five times in the circular letter is certainly not a slip of the pen. Not only is the word ‘re-promulgation’ used five times, even the subject matter itself of the circular letter is also mentioned in it as “Re-promulgation of Ordinances.”
- (b) Immediately on the receipt of that circular letter, all the Departments submit their files of the Ordinances to be re-promulgated to the Law Department. The Law Department then prepares two lists of the Ordinances to be re-promulgated. The first list contains the names of the Ordinances which are to be

re-promulgated with the approval of the Governor only. The second list contains the names of the Ordinances to be re-promulgated after receiving the permission of the President of India. Both these lists, together with the relevant files, with an endorsement that the provisions of these Ordinances are proper in the eyes of law, are sent by the Law Department to the Governor's Secretariat.

- (c) The copies of the Ordinances to be re-promulgated with the approval of the Governor, as shown in the first list, are submitted to the Governor for his approval and signature. The Governor approves and signs them soon after they are submitted to him. The Ordinances duly signed by him are then sent back to the Law Department for re-promulgation by getting them published in the State Gazette.
- (d) As regards the re-promulgation of the Ordinances listed in the second list, where the prior approval of the President of India for their re-promulgation is necessary, a separate letter for each of those Ordinances is sent by the Governor's Secretariat to the Ministry of Home Affairs, Government of India, for seeking the approval of the President of India, for re-promulgating that Ordinance, under the provisions of the proviso to clause (1) of Article 213 of the Constitution of India.
- (e) Every such letter informs the Ministry of Home Affairs about the date on which that Ordinance was last promulgated, then about the dates on which the last session of the State Legislature was held after the last promulgation of the Ordinance and says that the Ordinance could not be converted into an Act by the State Legislature during that session. The reason for not enacting the Ordinance into an Act, given in each letter, is almost the same, namely, that the State Legislature was busy with the discussion of the Governor's Address, Budget and passing the Appropriation Bill or that the State Legislature was preoccupied with passing the Supplementary Budget, though sometimes the only reason given is want of time. Next, after mentioning the date on which that Ordinance shall cease to operate, the letter informs the Ministry of Home Affairs the State Government's decision to promulgate another Ordinance on the subject containing exactly the same provisions as in the existing



Ordinance before the date of its expiry. Some letters say that the contents of the proposed Ordinance are exactly the same as those of the existing one. Lastly, the letter requests the Ministry of Home Affairs to obtain the approval of the President for the promulgation of that Ordinance and communicate the same to the Government at an early date and in any case not later than the date of expiry of that Ordinance.

- (f) Though most of such letters, sent by the Governor's secretariat to the Ministry of Home Affairs, attempt, by not using the word "re-promulgation", to keep their own counsel, yet some of them let the cat out of the bag when they say that that Ordinance was re-promulgated from time to time to save the life of the said Ordinance or that the life of the Ordinance had been extended, from time to time, or that the State Government had, therefore, decided to re-promulgate the Ordinance or the Ordinance which was due to expire on a particular date was re-promulgated on such and such date and that it was necessary that the Ordinance should be promulgated again before its date of expiry in order to keep the administrative machinery working.
- (g) The sanction of the President of India to the re-promulgation of those Ordinances is conveyed
- (i) either through the Resident Commissioner, Government of Bihar, New Delhi, who, through a teleprinter message, informs the Governor's secretariat, with a copy of that message to the Chief Secretary and the Law Secretary, Government of Bihar, of the approval of the President to the promulgation of the Ordinances, or
- (ii) directly by the Home Ministry to the Governor's Secretariat either by a teleprinter message or by a police wireless message saying that the President approves the promulgation of the particular Ordinances. A formal letter of approval follows.
- (iii) The formal letter, marked as "most immediate" and sent, by registered post, separately for each of the Ordinances to be re-promulgated, conveys the approval of the President as contained in the enclosed Order which says that in pursuance of proviso to clause (1) of Article 213 of the Constitution,

the President approves the promulgation by the Governor of Bihar of that particular Ordinance. That Order is issued by Order and in the name of the President and is signed by the Deputy Secretary/Director of the Ministry of Home Affairs, Government of India.

- (h) Immediately on the receipt of the teleprinter message or the police wireless message, as the case may be, the Governor signs all those Ordinances mentioned in those messages and sends them to the Law Department for re-promulgating them.
- (i) Particular care is taken, at the time of re-promulgating an Ordinance, to provide for the repeal of the existing Ordinance. In this way though earlier Ordinances are repealed, their provisions, even without being shifted about, reappear in the new Ordinances which, therefore, are nothing but mere reproduction of the old Ordinances.

26. It is submitted that it would be clear from the aforesaid facts that the manner in which the Ordinances are promulgated and re-promulgated by the State of Bihar with the connivance of Ministry of Home Affairs of the Union of India, whenever necessary, shows that the State of Bihar has been grossly violating the provisions of the Constitution and has adopted a novel method to usurp the legislative powers of the duly constituted body consisting of the representatives of the people elected by an election process on the basis of an accepted constitutional franchise. The petitioners submit that the practice of re-promulgating Ordinances and the three Ordinances referred to above are illegal, unconstitutional, in violation of the scheme of the constitutional provisions and also in violation of the provisions of Articles 14 and 19 of the Constitution of India on the following amongst other grounds which are without prejudice to one another:

- (a) The petitioners submit that Article 213 of the Constitution of India grants power to the Governor to promulgate Ordinances. The normal power of legislation is granted under the scheme of the Constitution to Legislature which is duly elected by the people in exercise of adult franchise. However, in order to meet an emergent or extraordinary situation which may necessitate immediate action during the period when the Legislature is not in session, a power has been granted to the Governor to promulgate Ordinances. This power can be exercised only if an

emergent situation exists and subject to the fulfillment of the conditions set out in Article 213.

- (b) It is submitted that the power under Article 213 can be exercised only if the following conditions are cumulatively fulfilled:
- (i) The Legislature is not in session.
  - (ii) Certain urgent and emergent circumstances exist.
  - (iii) Such circumstances require immediate action.
  - (iv) The Governor is satisfied that such circumstances exist and require such immediate action.
- (c) It is only if all these conditions are fulfilled that the Governor can exercise power under Article 213 of the Constitution and promulgate Ordinances. It is submitted that even if a single condition is not fulfilled, the Ordinance promulgated would be *ultra vires* the provisions of Article 213. It is submitted that the re-promulgation of the Ordinances is unconstitutional because by its very nature it cannot and does not satisfy the preconditions of urgency, emergency and the need for immediate action.
- (d) It is clear from the scheme of Article 213 that a power is given to the Governor to promulgate an Ordinance in order to take "immediate action" when the Legislature is not in session. Article 213 further requires that the Ordinance shall be placed before the Legislature and shall, unless otherwise disapproved by a resolution of the Legislature, cease to have effect on the expiry of six weeks from the reassembly of the Legislative Assembly or where the Legislature has two Houses, on the expiry of six weeks from the reassembly of the second House, whichever is later, unless converted into an Act by the Legislature. This clearly shows that the power granted under Article 213 is a power to take a temporary measure in order to meet an emergent situation requiring immediate action. It is submitted that the power to take a temporary measure cannot be used to make permanent or semi-permanent laws.
- (e) The petitioners submit that the power granted under Article 213 cannot be exercised to re-promulgate Ordinances which have been placed before the Houses of the Legislature and in respect of which the period of six weeks required under sub-Article (2)

of Article 213 has expired. The period of six weeks specified under Article 213 has been granted in order to enable the Government to introduce a Bill in the Legislature and complete the procedure of converting the Ordinance into an enactment of the Legislature.

- (f) It is further submitted that in no event can an Ordinance have a life of more than 7½ months. Under Article 174, the Government has to summon the Legislature in such a manner that six months do not intervene between the last sitting of one session and the first sitting of the next session. Even if six months are allowed to intervene, then under the scheme of the Constitution, the life of an Ordinance cannot exceed a period of 7½ months. It is submitted that the re-promulgation of an Ordinance is illegal because it extends the life of that Ordinance. It is further submitted that as the Legislature of a state cannot extend the life of an Ordinance, so the Governor has no power to do so.
- (g) It is submitted that re-promulgation of an Ordinance is *ultra vires* the provisions of Article 213 of the Constitution. Under the constitutional scheme, no Ordinance can be re-promulgated. Any such re-promulgation would amount to a fraud on the Constitution. Once the emergent circumstances have been utilized for promulgating an Ordinance and there has been a session of the State Legislature, the power to deal with the situation by an Ordinance has exhausted itself. This power cannot be again exercised because the emergent circumstances cannot continue indefinitely. It is further submitted that re-promulgation is *ultra vires* the basic scheme and structure of the Constitution of India.
- (h) The petitioners state and submit that under the scheme of the Constitution of India, the power to legislate has been given to the Legislature. Exceptions are carved out in certain emergent situations only. If exceptions are made into regular practice, then the exceptions become the rule of the day and the power of the legitimately elected representatives of the people is usurped by an extra-constitutional authority by an extra-constitutional method. Such usurpation would be *ultra vires* the Constitution.
- (i) The petitioners submit that the power of the Executive to legislate cannot be exercised recklessly or by imagining a state of affairs

which does not exist. The Executive's power to legislate cannot be exercised *mala fide* in order to prevent the people's elected representatives from passing or rejecting a Bill after free and open discussion which is the essence of democratic process. The Executive's power to legislate cannot be exercised to serve political ends. It is submitted that any such exercise would be *ultra vires* and unconstitutional.

- (j) It is submitted that the manner in which the State of Bihar has been re-promulgating Ordinances, as would be clear from the facts set out hereinabove and in Annexure 'A'<sup>6</sup> to this petition, clearly shows that the re-promulgation has been done without any satisfaction and by complete non-application of mind. It is further submitted that the re-promulgation of Ordinances is only to by-pass the Legislature.
- (k) The petitioners submit that it would be clear from the scheme of the Constitution that the Executive has no power to re-promulgate Ordinances. However, the State of Bihar has in the guise of promulgating Ordinances, re-promulgated the Ordinances referred to hereinabove in gross violation of the provisions of the Constitution. The re-promulgation of Ordinances is clearly illegal and amounts to a fraud on the Constitution since nothing can be done indirectly which cannot be done directly.
- (l) It is submitted that the Governor has, in re-promulgating the Ordinances, been acting in violation of the provisions of the Constitution and thereby violating the oath taken by him under Article 159 of the Constitution to preserve the Constitution. The impugned action of re-promulgation is in gross violation of the Constitutional oath of the Governor.
- (m) The petitioners state and submit that the automatic re-promulgation of Ordinances has been done without application of mind and without the advice of the Council of Ministers. As set out hereinabove, the practice is continued to re-promulgate Ordinances, which do not require any amendment, without even placing the Ordinances before the Cabinet. Thus, the re-promulgation of the Ordinances is in violation of Article 163 of the Constitution of India.

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<sup>6</sup> The book, not printed in this volume

- (n) The petitioners submit that re-promulgation of Ordinances by the Governor in the State of Bihar amounts to usurpation of the power of the Legislature given to it under Article 245 of the Constitution of India. The respondents are, by an indirect method, legislating in situations where the Legislature alone has power to legislate and thereby discharging the function of the Legislature without following the process required for such function under the law and without any discussion or debate on such law. Such usurpation is clearly illegal and unconstitutional and liable to be set aside on this ground alone.
- (o) The petitioners submit that they have set out sufficient material on record to discharge the burden necessary for showing that the exercise of power under Article 213 is *ultra vires* and unconstitutional. The discharge of this burden clearly establishes the case of the petitioners and is unimpeachable and cannot be denied by the respondents.
- (p) It is submitted that the practice of re-promulgating Ordinances and the provisions of
- (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983);
  - (ii) The Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983); and
  - (iii) The Bihar Bricks Supplies (Control) Third Ordinance; 1983 (Bihar Ordinance No. 21 of 1983)

are illegal since they have no authority of law. The said practice and the said Ordinances are arbitrary having no authority of law and are, therefore, in violation of the petitioners' fundamental rights guaranteed under Article 14 of the Constitution of India.

- (q) The Ordinances which have been re-promulgated without the authority of law encroach upon the right of the petitioners to carry on their business and impose restrictions which cannot be imposed by re-promulgation of an Ordinance. By purporting to legislate in the form of Ordinances in a situation where the Constitution demands Acts of the Legislature, the State has acted unreasonably thereby violating Article 19 (1) (g) of the Constitution of India. Further, since Ordinances themselves are

without constitutional authority, the restrictions imposed thereby fall outside the protection of Article 19 (6) and, therefore, are hit by Article 19 (1) (g).

27. The petitioners submit that they have not filed any other similar Writ Petition before this Hon'ble Court or before any other High Court of India. The petitioners submit that the issues raised in the present petition are of utmost public importance and have to be decided by this Hon'ble Court. The petitioners further state and submit that the practice adopted by the State of Bihar is in violation of the petitioners' fundamental rights guaranteed under Articles 14 and 19 of the Constitution of India. The practice followed by the State of Bihar is also in violation of Article 213 and other provisions of the Constitution. In view thereof, the petitioners are entitled to approach this Hon'ble Court by way of a Writ Petition under Article 32 of the Constitution of India. The petitioners have paid the appropriate court fees.

### PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to

- (a) issue an appropriate writ, order or direction or declaration declaring the practice followed by the State of Bihar and the Governor of Bihar for re-promulgating Ordinances to be *ultra vires* the Constitution;
- (b) issue an appropriate writ, order or direction or declaration declaring
  - (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983),
  - (ii) The Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983), and
  - (iii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983)to be *ultra vires* the Constitution;
- (c) issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction restraining the respondents either directly or through their servants, agents or otherwise, from re-promulgating or attempting to re-promulgate

any Ordinance after the period of six weeks from the reassembly of the Legislature set out in Article 213 of the Constitution has expired;

- (d) issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction prohibiting the Respondent No. 3 either directly or through its servants, agents or otherwise from granting consent to Respondents No. 1 and 2 for re-promulgating any Ordinance for which such consent is required under the Constitution;
- (e) issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction calling for the records and quashing the Ordinances which have been re-promulgated and are still in force;
- (f) issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction commanding the respondents not to re-promulgate
  - (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983),
  - (ii) The Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983), and
  - (iii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983)

or any other Ordinance that may be promulgated in future, after the expiry of the period of six weeks from the reassembly of the Legislature set out in Article 213 of the Constitution of India;

- (g) award the cost of the Writ Petition; and
- (h) pass such other and further orders as this Hon'ble Court may deem just and proper in the facts and circumstances of the case.

And the petitioners shall, as in duty bound, ever pray.

*Filed on*

16th January, 1984

*Filed by*

J.B. Dadachanji & Co.,  
Advocates, Supreme Court,  
New Delhi



**AFFIDAVIT**

I, Diwan Chand Wadhwa, son of Shri Beli Ram Wadhwa, aged about 51 years, resident of 832/B-B1 Shivaji Nagar, Pune-411004, at present temporarily residing in New Delhi, do hereby solemnly affirm and state as under:

1. That I am the Petitioner No. 1 in the accompanying Writ Petition and am fully familiar with the facts and proceedings of the case. I am competent to affirm to the facts stated in the Writ Petition.

2. That I have read and understood the accompanying Writ Petition and I state that the facts contained in paragraphs 1 to 27 of the Writ Petition are true to my personal knowledge and also to my knowledge derived from the research conducted by me and from the records of Respondent No. 1; the submissions made therein are on legal advice which I believe to be true.

3. That the Annexure 'A' to the Writ Petition is the original of the book *Re-promulgation of Ordinances: A Fraud on the Constitution of India*; Annexures 'B' to 'D' are true statements of facts.

4. I state that the petitioners have not filed any other similar Writ Petition before this Hon'ble Court or before any other High Court of India.

*Deponent*

(Diwan Chand Wadhwa)

***Verification***

I, Diwan Chand Wadhwa, the deponent abovenamed, do hereby verify that the facts stated in paragraphs 1 to 4 of the Affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this the 16th day of January, 1984

*Deponent*

(Diwan Chand Wadhwa)

**Annexure 'A'**<sup>7</sup>

It was a copy of the book by:

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

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<sup>7</sup> Not printed in this volume

## Annexure 'B'

Distribution of 69 Ordinances (according to their life-groups) promulgated by the Governor of Bihar from 1967 to 1981 with the prior permission of the President of India

Life-groups (Years)	Number of Ordinances
00-01	21
01-02	13
02-03	15
03-04	06
04-05	04
05-06	02
06-07	02
07-08	02
08-09	00
09-10	01
10-11	02
11-12	00
12-13	00
13-14	01
Total	69

**Annexure 'C'**

Distribution of 71 Ordinances (according to their life-groups) promulgated by the Governor of Bihar from 1967 to December 31, 1983, with the prior permission of the President of India

Life-groups (Years)	Number of Ordinances
00-01	20
01-02	16
02-03	11
03-04	09
04-05	05
05-06	01
06-07	03
07-08	02
08-09	00
09-10	00
10-11	03
11-12	00
12-13	00
13-14	00
14-15	01
<b>Total</b>	<b>71</b>

## Annexure 'D'

### Lives of the Re-promulgated Ordinances (in force at present) up to December 31, 1983

S.No.	Title of the Ordinance	Date on which the Ordinance was first promulgated with the number of the Ordinance in brackets	Date(s) on which the Ordinance was re-promulgated with the number(s) of the Ordinance(s) by which the Ordinance was re-promulgated in brackets	Life of the Ordinance upto 31-12-1983		
				Years	Months	Days
(1)	(2)	(3)	(4)	(5)		
1.	The Bihar Forest Produce (Regulation of Trade) Ordinance, 1977	01.06.1977 (115)	21.07.1977 (158) 01.09.1977 (210) 26.12.1977 (264) 24.04.1978 (044) 24.08.1978 (106) 05.02.1979 (032) 28.04.1979 (074) 18.08.1979 (125) 05.03.1980 (044) 21.04.1980 (077)	6	7	—

(1)	(2)	(3)	(4)	(5)
			11.08.1980 (129)	
			19.01.1981 (032)	
			23.04.1981 (123)	
			12.08.1981 (186)	
			25.01.1982 (030)	
			30.04.1982 (052)	
			14.08.1982 (059)	
			29.01.1983 (005)	
			20.04.1983 (012)	
			18.08.1983 (020)	
2.	The Bihar Intermediate Education Council Ordinance, 1979	31.12.1979 (167)	05.03.1980 (041) 21.04.1980 (086) 11.08.1980 (149) 19.01.1981 (034) 24.04.1981 (075) 12.08.1981 (171) 24.01.1982 (021) 29.04.1982 (038)	4 0 1

(1)	(2)	(3)	(4)	(5)		
			14.08.1982 (54)			
			27.01.1983 (01)			
			13.04.1983 (11)			
			17.08.1983 (19)			
3.	The Bihar Bricks Supplies (Control) Ordinance, 1982	03.12.1982 (65)	29.01.1983 (04) 20.04.1983 (13) 18.08.1983 (21)	1	0	29
4.	The Srimati Radhika Sinha Institute and Sachhidananda Sinha Library (Acquisition and Management) Ordinance, 1983	21.05.1983 (14)	13.08.1983 (18)	0	7	11
5.	The Bihar Contingency Fund (Amendment) Ordinance, 1983	14.06.1983 (16)	12.08.1983 (17)	0	6	17

## DOCUMENT 2

### **Application by Dr. D.C. Wadhwa and Others, the Petitioners, for *Ex-parte Ad Interim* Stay against Re-promulgation of Certain Ordinances**

In the Supreme Court of India  
Extraordinary Original Jurisdiction  
Civil Miscellaneous Petition

in

Civil Writ Petition No. 412-415 of 1984

*In the Matter of*

**Petitioners**

**Respondents**

Dr. D.C. Wadhwa and others

v.

State of Bihar and others

**An Application for *Ex-parte Ad Interim* Stay and Stay by Notice of Motion as per the Orders and Rules of this Hon'ble Court**

The Humble petition of the petitioners abovenamed most respectfully sheweth.

1. The petitioners have filed the accompanying Writ Petition, *inter alia*, challenging the three Ordinances referred to therein and the practice adopted by the State of Bihar of re-promulgating Ordinances, instead of getting such Ordinances converted into Acts of the Legislature after expiry of the period specified in Article 213 of the Constitution. For the sake of brevity and in order to avoid repetition, the petitioners crave leave to refer to and rely upon the facts and submissions made in the Writ Petition as though the same are specifically incorporated herein.

2. The petitioners state that the following three Ordinances, namely,

- (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983), re-promulgated on 18-8-1983;



- (ii) The Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983), re-promulgated on 17-8-1983; and
- (iii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983), re-promulgated on 18-8-1983;

were the re-promulgation of the old Ordinances. After the re-promulgation of these Ordinances on the dates mentioned above, the Bihar Legislature met in the month of December, 1983. The Legislative Assembly met from December 8, 1983, to December 14, 1983 (actual number of sittings four) and the Legislative Council met on December 13 and 14, 1983 (actual number of sittings two). As none of the abovementioned three Ordinances was replaced by an Act of the Legislature, all these three Ordinances became liable to expire on January 23, 1984, in accordance with the provisions of Article 213 of the Constitution. But the petitioners understand that these Ordinances were not allowed to expire and have been re-promulgated again before their expiry dates.

3. These re-promulgated Ordinances are in force at present and shall remain in force till the expiry of a period of six weeks from the first day of the next session of the Legislature. In addition thereto, five other Ordinances, as set out in the Writ Petition, are in force at present. These Ordinances were also liable to expire on January 23, 1984. But the petitioners understand that these Ordinances also were not allowed to expire and have been re-promulgated again.

4. The petitioners submit that the session of the Bihar Legislature is likely to be called in the month of February, 1984, or soon thereafter. Since the session of the Bihar Legislature is likely to commence, constitutional obligation requires that the Ordinances which have been re-promulgated and which are in force at present should be placed before the Legislature and got enacted, if so considered by the Legislature. No prejudice would be caused to the respondents if they are directed by this Hon'ble Court to get these Ordinances converted into Acts of the Legislature if the Legislature so enacts. It is submitted that the legality under the Constitution and constitutional propriety require that Bills on the basis of these Ordinances be introduced before the Legislature and appropriately got enacted by the Legislature. In view thereof, it is submitted that it is a fit case for issuing directions to the State of Bihar and to the Governor of Bihar not to re-promulgate the eight Ordinances referred to in the Writ Petition or any other Ordinances promulgated in future and to have such Ordinances introduced as Bills in

the Legislature and appropriately enacted if they are desired to be continued. No prejudice would be caused to the respondents if such an order is passed. It is further submitted that it is a fit case for issuing direction to the Union of India not to give its approval for the re-promulgation of the Ordinances mentioned at Serial Nos. (i) to (iii) of paragraph 2 of this Application or any other Ordinances promulgated in future for which such approval is required under the Constitution.

5. It is submitted that the impugned action of the respondents is clearly unconstitutional for the grounds set out in the Writ Petition.

### PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to

- (a) direct the Respondents No. 1 and 2 not to re-promulgate the eight Ordinances referred to in paragraph 20 of the Writ Petition or the Ordinances promulgated to replace these Ordinances;
- (b) restrain the Respondents No. 1 and 2 from re-promulgating any Ordinance that may be promulgated during the pendency of this Writ Petition;
- (c) prohibit the Respondent No. 3 from granting its consent to Respondents No. 1 and 2 for re-promulgating
  - (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983), and
  - (ii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983)
 as in force at present, for which such consent is required under the Constitution;
- (d) direct the Respondent No. 3 not to give its consent to Respondents No. 1 and 2 for re-promulgating any Ordinance that may be promulgated with its approval during the pendency of this Writ Petition;
- (e) pass *ex-parte ad interim* stay in terms of prayers (a) to (d) hereinabove; and
- (f) pass such other and further orders as this Hon'ble Court may deem just and proper in the facts and circumstances of the case.

And the petitioners shall, as in duty bound, ever pray.

*Drawn By*  
Advocate, Supreme Court

*Filed By*  
J.B. Dadachanji & Co.,  
Advocates, Supreme Court,  
New Delhi

*Filed on*  
January 28, 1984

### AFFIDAVIT

I, Diwan Chand Wadhwa, son of Shri Beli Ram Wadhwa, aged about 51 years, resident of 832/B-B1 Shivaji Nagar, Pune-411004, at present temporarily residing in New Delhi, do hereby solemnly affirm and state as under:

1. That I am the Petitioner No. 1 in the accompanying Writ Petition and am fully familiar with the facts and proceedings of the case. I am competent to affirm to the facts stated in the Writ Petition.

2. That I have read and understood the accompanying Stay Petition and I state that the facts contained in paragraphs 1 to 5 are true to my personal knowledge and also to my knowledge derived from the research conducted by me and from the records of Respondent No. 1 and the submissions made therein are on legal advice which I believe to be true.

*Deponent*  
(Diwan Chand Wadhwa)

### *Verification*

I, Diwan Chand Wadhwa, the deponent abovenamed, do hereby verify that the facts stated in the foregoing affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this 28th day of January, 1984

*Deponent*  
(Diwan Chand Wadhwa)

# DOCUMENT 3

## **Application by Dr. D.C. Wadhwa and Others, the Petitioners, for the Amendment of the Writ Petition**

Extraordinary Original Jurisdiction  
Civil Miscellaneous Petition No. — of 1984

in

Civil Writ Petition No. 412-415 of 1984

*In the Matter of*

**Petitioners**

**Respondents**

Dr. D.C. Wadhwa and others

v.

State of Bihar and others

**An Application of the Petitioners for the Amendment of the Writ  
Petition under Order 6, Rule 17 Read with Section 151 of the Code  
of Civil Procedure, Read with the Orders and Rules of this Hon'ble  
Court**

The Humble petition of the petitioners abovenamed most respectfully  
sheweth.

1. The petitioners have filed the accompanying Writ Petition, *inter alia*,  
challenging the three Ordinances referred to therein and the practice adopted  
by the State of Bihar of re-promulgating Ordinances, instead of getting such  
Ordinances converted into Acts of the Legislature after expiry of the period  
specified in Article 213 of the Constitution. For the sake of brevity and in  
order to avoid repetition, the petitioners crave leave to refer to and rely upon  
the facts and submissions made in the Writ Petition as though the same are  
specifically incorporated herein.

2. The petitioners state that the following three Ordinances, namely,

- (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance,  
1983 (Bihar Ordinance No. 20 of 1983), re-promulgated on  
18-8-1983;

- (ii) The Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983), re-promulgated on 17-8-1983; and
- (iii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983), re-promulgated on 18-8-1983;

mentioned in the Writ Petition referred to above were re-promulgation of the old Ordinances. After the re-promulgation of these Ordinances on the dates mentioned above, the Bihar Legislature met in the month of December, 1983. The Legislative Assembly met from December 8, 1983, to December 14, 1983 (actual number of sittings four) and the Legislative Council met on December 13 and 14, 1983 (actual number of sittings two). As none of the abovementioned three Ordinances was replaced by an Act of the Legislature, all these three Ordinances became liable to expire on January 23, 1984, in accordance with the provisions of Article 213 of the Constitution. But the petitioners understand that these Ordinances were not allowed to expire and have been re-promulgated again before their expiry dates. The re-promulgated Ordinances are in force at present and shall remain in force till the expiry of a period of six weeks from the first day of the next session of the Legislature. In addition thereto, five other Ordinances, as set out in the Writ Petition, are in force at present. These Ordinances were also liable to expire on January 23, 1984. But the petitioners understand that these Ordinances also were not allowed to expire but were re-promulgated again.

3. It is submitted that the petitioners may be allowed to amend the Writ Petition as under to challenge the constitutionality of the re-promulgation of the latest re-promulgated Ordinances. The grounds set out in the abovementioned Writ Petition would apply *mutatis mutandis* to these re-promulgated Ordinances also:

A. The petitioners may be allowed to add the following paragraph 20-A after paragraph 20 of the Writ Petition:

20-A. The petitioners understand that the aforesaid eight Ordinances have been re-promulgated by the Governor of Bihar before their expiry dates on 23-1-1984. The petitioners state that the re-promulgation is illegal and contrary to law for the reasons more specifically set out hereinabove.

B. The petitioners may be permitted to add the following ground (r) after ground (q) in paragraph 26 of the Writ Petition:

(r) The petitioners submit that re-promulgation of the Ordinances, referred to in paragraph 20 of the Writ Petition, by the State of Bihar and the re-promulgation of

- (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Bihar Ordinance No. 20 of 1983);
- (ii) The Bihar Intermediate Education Council Third Ordinance, 1983 (Bihar Ordinance No. 19 of 1983); and
- (iii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Bihar Ordinance No. 21 of 1983), to replace the Bihar Ordinances No. 20 of 1983, 19 of 1983, and 21 of 1983

is illegal and unconstitutional and contrary to law on the grounds set out hereinabove which would apply *mutatis mutandis* to these re-promulgated Ordinances.

C. The petitioners may be permitted to add the following phrase at the end of Prayer (b) of the Writ Petition: and also declaring the Ordinances re-promulgating the aforesaid three Ordinances to be *ultra vires* the Constitution;

### PRAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to allow the petitioners to amend the Writ Petition in the manner set out in paragraph 3 hereinabove and to pass such other and further orders as may be deemed just and necessary in the facts and circumstances of the case.

And the petitioners shall, as in duty bound, ever pray.

*Drawn By*

Advocate, Supreme Court

*Filed By*

J.B. Dadachanji & Co.,  
Advocates, Supreme Court,  
New Delhi

*Filed on*

January 28, 1984

APPLICATION FOR AMENDMENT OF THE WRIT PETITION 37

**AFFIDAVIT**

I, Diwan Chand Wadhwa, son of Shri Beli Ram Wadhwa, aged about 51 years, resident of 832/B-B1 Shivaji Nagar, Pune-411004, at present temporarily residing in New Delhi, do hereby solemnly affirm and state as under:

1. That I am the Petitioner No. 1 in the accompanying Writ Petition and am fully familiar with the facts and proceedings of the case. I am competent to affirm to the facts stated in the Writ Petition.

2. That I have read and understood the accompanying Application for amending the Writ Petition and I state that the facts contained in paragraphs 1 to 3 are true to my personal knowledge and also to my knowledge derived from the research conducted by me and from the records of Respondent No. 1 and the submissions made therein are on legal advice which I believe to be true.

*Deponent*

(Diwan Chand Wadhwa)

***Verification***

I, Diwan Chand Wadhwa, the deponent abovenamed, do hereby verify that the facts stated in the foregoing Affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this 28th day of January, 1984

*Deponent*

(Diwan Chand Wadhwa)

# DOCUMENT 4

## Supreme Court Order for Rule *Nisi*

Supreme Court of India  
Record of Proceedings  
Writ Petition No. 412-415/1984  
(For preliminary hearing)

*In the Matter of*

### Petitioners

Dr. D.C. Wadhwa and others

v.

### Respondents

State of Bihar and others

(With applications for *ex-parte* stay CMP Nos. 3380-83/1984)

Coram:

Hon'ble Mr. Justice D.A. Desai  
Hon'ble Mr. Justice A.P. Sen  
Hon'ble Mr. Justice V. Balakrishna Eradi

For the Petitioners:

Mr. Soli J. Sorabjee, Sr. Advocate  
M/s. D. N. Mishra, Ravinder Narain, A. Sagar and  
Ms. Rainuwalia, Advocates

For the Respondents<sup>1</sup>

UPON hearing Counsel the Court made the following

### ORDER<sup>2</sup>

Issue Rule *Nisi*. Issue notice on the stay application returnable in three weeks. CMPs are allowed.

(A.M. Srivastava)  
Court Master

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<sup>1</sup> Not mentioned

<sup>2</sup> This Order was passed on 9-2-1984



# DOCUMENT 5

## Supreme Court Order on Application for Stay

Supreme Court of India  
Record of Proceedings  
CMP Nos. 3376-79/1984 (in W.P. No. 412-415/1984)

*In the Matter of*

**Petitioner(s)/Appellant(s)**

**Respondent(s)**

Dr. D.C. Wadhwa and others

v.

State of Bihar and others

**(For Stay)**

Date: 6-4-1984. This matter was called on for hearing today.

Coram:

Hon'ble Mr. Justice D.A. Desai

Hon'ble Mr. Justice Amarendra Nath Sen

For the Petitioners:

Mr. Soli J. Sorabjee, Sr. Advocate

M/s. D. N. Misra, T.M. Ansari and Aditya Narain, Advocates

For the Respondents:

M/s. D. Goburdhan and R.N. Poddar, Advocates

UPON hearing Counsel the Court made the following

### ORDER

Stay application is not pressed at present. This is predicated on the condition that the State of Bihar shall file full comprehensive counter affidavit to the main petition by May 30, 1984. Any rejoinder will be filed within two weeks thereafter. The WPs will be listed on 2nd Tuesday in August 1984 for final hearing subject to overnight part-heard.

(A.M. Srivastava)  
Court Master

# DOCUMENT 6

## Counter Affidavit of the State of Bihar

In the Supreme Court of India  
(Civil Original Jurisdiction)  
W.P. No. 412-415 of 1984

*In the Matter of*

**Petitioners**

**Respondents**

Dr. D.C. Wadhwa and others

v.

State of Bihar and others

### Counter Affidavit of the State of Bihar

I, Janak Kishore Yadav s/o Shri H. L. Yadav resident of Dhakanpura, Patna at present in New Delhi do solemnly affirm and say as follows:

1. That I am the Section Officer in the Office of Law Department, Govt. of Bihar and am conversant with the facts of the case.

2. That I have read the aforesaid writ petitions and am conversant with the facts of the case.

3. That I am advised to raise the following preliminary objections:

- (i) The writ application does not disclose any violation or any immediate apprehension of violation of any fundamental right;
- (ii) The writ petitioners by the petition they have filed have only invited the Supreme Court to play the role of a supervisor of the legislative performance of the State of Bihar. I am advised to submit that the writ petitioners are invoking a purported jurisdiction which is not vested in the Supreme Court.
- (iii) The Supreme Court is vested with judicial power. The content of judicial power is to determine cases where an actual or apprehended injury is caused to some right vested either in the petitioner or persons whom the petitioner is qualified to represent and to grant reliefs not in the shape of damages but in the nature

of specific enforcement of a right violated and, in particular, in regard to the application under Article 32 of the Constitution such right must be a fundamental right as set out in Part III of the Constitution. Beyond this, the application under Article 32 is incompetent.

4. That writ petitioners have attempted to show that the State of Bihar has acquired permission [*sic*]<sup>1</sup>. Apart from the question, such allegation is wholly impermissible to any Court and involves a general supervisory role over the legislative performance including the legislative performance of the legislature. Manifestly, it is a misconceived attempt of the writ petitioners.

5. The only ordinance which is in force is Bihar Intermediate Education Council Ordinance, 1984. It is, therefore, manifest that a general review of the validity of the Ordinances for exercise of power in reference to such Ordinances is wholly outside the scope of the judicial power vested in Courts including the Supreme Court.

6. With reference to the Ordinance still in operation, it is sufficient to mention that the writ petitioners beyond making a general allegation of a right, without colour or detail, have not defined either the nature of the right or the nature of the violation already committed or apprehended. Moreover, as a matter of law, for the reasons hereinafter stated, it will clearly appear that the writ petitioners claiming a title to forest lands have really no title of any kind.

7. Under the provisions of sections 3, 3A and 3B read with section 4 of the Bihar Land Reforms Act, 1950, all forests have vested in the State of Bihar under the relevant notifications which cover the whole of the State of Bihar and in respect of such forests, the petitioners if ever they had any ownership of any forest land which is not admitted as lost, the same and such land has long ago vested in the State of Bihar free from encumbrances. It is, therefore, clear that the petitioners have no *locus standi* to revoke the jurisdiction of this Court under Article 32 independently of the other objections set out above.

#### *Merits of the Writ Application*

8. At the very outset, before referring to the various paragraphs of the writ application seriatim, I am advised to refer to the various questions formulated in paragraph 5(a), (b) and (c)[*sic*]<sup>2</sup> of the writ application. I am advised to submit that the use of the words 're-promulgate' and

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<sup>1</sup> Sentence not clear

<sup>2</sup> Reference is wrong, in the Writ Petition, they are 5 (i), (ii) and (iii)

're-promulgation' is a complete misconception. It may be an expression which might in a popular sense convey some meaning, but in the Constitutional sense, these expressions are purely misconception.

9. I am advised to submit that all emergencies like other events have a time dimension. It exists during a period of carrier [*sic*]<sup>3</sup>. It is another matter that during a subsequent period either immediately following that or with a gape gamp [*sic*]<sup>4</sup>, the emergency identical in nature may be in existence. For the purpose of Article 213, the Governor is required with reference to the date when he proposes to make an Ordinance to satisfy himself that emergency is in existence and the existence of such emergency is not destroyed by the fact that the identical emergency was in existence earlier. It is with reference to the point of time that application of mind of the Governor is called for and if he is satisfied that at that point of time, emergency is in existence, the fact that earlier similar powers have been exercised does not constitute a bar. It will be surprising that if all the circumstances which are mentioned in Article 213 exist and making of the Ordinance is urgently required, that power may evaporate and be not available to the Governor merely because similar situation had existed previously also and he had exercised the power under Article 213. If at all, the only relevance of the previous situation and exercise of the power is that the Governor is from before familiar with problem which is faced and which caused for exercise of his power.

10. The contents of judicial power vested in Court has [*sic*]<sup>5</sup> been the subject matter of examination in a large number of cases of the Australian Court as also in the United States. It has been pointed out that the jurisdiction of the Courts in exercise of judicial power exclusively vested in them is attracted only when a question is relevant for the decision of the present rights and obligations of any person in the concrete and not in respect of abstract questions however important they may be, but abstract in relation to the case in respect of the actual rights or obligations of the parties *inter se* before the Courts are themselves represented by such party.

11. This aspect of the matter gets particularly emphasized so far as the Indian Constitution is concerned. In regard to such questions which have not arisen before the Court relevant for the decision of an actual case properly in seisin [*sic*]<sup>6</sup> of the Court, Article 143 of the Constitution has made a specific provision. It is the power of the President to consult the Supreme Court in

<sup>3</sup> Sentence not clear

<sup>4</sup> Unintelligible

<sup>5</sup> have been, corrected by the author

<sup>6</sup> Not clear

regard to a question which has arisen or [*sic*]<sup>7</sup> likely to arise not before the Court itself but outside the Court. The necessary corollary is that but for the specific provision in Article 143 it would not have been even open to the President to ask the Court to determine an abstract question not affecting such rights or obligations of the parties before the Court. Even in respect of Article 143, this Court has expressed its opinion that it is merely an advice or expression of an opinion and not being a decision, does not possess that binding character which the decision of the Supreme Court possesses. It follows, therefore, that all the questions that are sought to be raised in both the Courts are outside the scope of judicial power and the writ application is not maintainable.

12. Subject to the objections mentioned above, I submit that the circumstances in which the legislature did not find it possible to find time for the enactment in terms of the Ordinance is a matter of internal proceedings and priority before the legislature. The legislative wing of the State is unable in view of its powers and privileges to submit [*sic*]<sup>8</sup> judicial scrutiny of how and what circumstances time after time, certain legislation for enactment in terms of the Ordinances could not be taken. It may be mentioned that the writ application nowhere alleges that in point of fact either that Ordinance was made when the legislature was in session or that the same was not laid before the legislature or was any resolution passed disapproving any of the Ordinances. Of the only two contentions that there was no power to pass an Ordinance in terms similar to another Ordinance and that the Governor had not applied his mind, the first contention has already been dealt with in this counter affidavit. In regard to the second contention that the Governor did not apply his mind, it is manifest that the affidavit in support of the writ application is valueless. The deponent of the affidavit supporting the writ application claims to have further knowledge as also knowledge based upon the records, but in the nature of things the deponent could not have any personal knowledge of the matter and the deponent has not pointed out to any particular record from which he came to know that the Governor had not applied his mind. I submit that these allegations only betray the ignorance of the constitutional provisions relating to the satisfaction of the Governor which comprised matters of a nature not only beyond the reach of the deponent but which is a matter in regard to which inquiry by Courts is also expressly forbidden by the very terms of the Constitution.

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<sup>7</sup> is, added by the author

<sup>8</sup> to, added by the author

13. Furthermore, I further submit that the satisfaction of the Governor about the existence of the circumstances on which the Governor forms his opinion about the necessity of taking immediate action is not justiceable [*sic*]<sup>9</sup>. In identical terms under Article 213 were the provisions of the earlier Government of India Acts, the language of those provisions was judicially interpreted by the then highest courts. The Constituent Assembly being aware of the interpretation raised upon such language, after full deliberation decided, in view of the special circumstances of this country in respect of serious objections from various quarters, to enact the Constitution incorporating the very language interpreted earlier in Articles 123 and 213 of the Constitution and it has been rightly decided by this Court earlier that the satisfaction of the Governor is not justiceable [*sic*]<sup>10</sup>.

14 (a). That the Petitioner No. 1 claims to be a member of the Research Staff of an Institute. It is difficult to conceive as to what fundamental right of his is involved and violated or imminently threatened so as to entitle him to present an application under Article 32 of the Constitution.

14 (b). As already stated earlier, the claim of Petitioner No. 2 to the ownership of certain forest land is misconceived and erroneous. Beyond the bare assertion that he is directly affected by the provisions of the Forest Produce Regulation of Trade Ordinance, 1983, he has said nothing further either to define his interest in what manner and to what extent he was affected by the Ordinance challenged by him. The Petitioner No. 3 who has stated that he is a student in Intermediate Science class has not defined his fundamental right nor as to how he was affected by the Ordinance challenged by him. Likewise, Petitioner No. 4, the alleged owner of the kiln and manufacturer of bricks, is vague in regard to his rights and violation thereof.

With further reference to paragraphs 2, 3 & 4 of the Writ Petition I state that the Bihar Forest Produce Regulation of Trade Ordinance 1983 is no longer in force and the old matter is governed by the Act to the same effect, namely, Bihar Act 12 of 1984. Bihar Intermediate Council Ordinance in the shape of Bill is pending before a Select Committee. The Bihar Bricks Supply Control Ordinance has been replaced by Act 13 of 1984. It is unnecessary to deal with other Ordinances referred to in the Writ Petition except to say that they are no longer in operation.

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<sup>9</sup> justiciable, spelling incorrect

<sup>10</sup> justiciable, spelling incorrect

COUNTER AFFIDAVIT OF THE STATE OF BIHAR 45

Beyond what has been already stated earlier, it is unnecessary to deal with in detail with the allegations repeatedly stated in the other paragraphs. The allegations and insinuations contained in the rest of the other paragraphs are both misconceived and are matters which either do not arise at all for consideration or are beyond the judicial scrutiny. I do not admit the accuracy even on the factual statements contained in those other paragraphs. In view of the submissions and statements made in the foregoing paragraphs, it is not necessary to answer to the averments made in the petition parawise.

That I have read the contents of the counter affidavit and say that all the facts stated therein are true from information derived from the files of the case and which I believe to be true.

New Delhi  
Dated: 30.5.1984

*Deponent*

# DOCUMENT 7

## **Rejoinder Affidavit of the Petitioners, Dr. D. C. Wadhwa and Others, in Reply to the Counter Affidavit of the State of Bihar**

In the Supreme Court of India  
Civil Original Jurisdiction  
Writ Petition No. 412-415 of 1984

*In the Matter of*

**Petitioners**

**Respondents**

Dr. D.C. Wadhwa and others

v.

State of Bihar and others

### **Rejoinder Affidavit of the Petitioners, Dr D. C.Wadhwa and Others, in Reply to the Counter Affidavit of the State of Bihar**

I, Diwan Chand Wadhwa, son of Shri Beli Ram Wadhwa, aged about 51½ years, resident of 832/B-BI Shivaji Nagar, Pune-411004, at present temporarily residing at New Delhi, do hereby solemnly affirm and state as under:

I. I am the Petitioner No. 1 in the Writ Petition filed before this Hon'ble Court and am fully familiar with the facts of the case. I am competent to depose the present rejoinder affidavit.

II. I have gone through the affidavit filed on behalf of the State of Bihar by Shri Janak Kishore Yadav, and my reply to the same is as under:

III. At the outset, I state and submit that the deponent of the affidavit is merely a Section Officer in the Office of the Law Department in the Government of Bihar and is not competent to affirm or deny the counter affidavit. He has neither the understanding of issues raised nor the knowledge to affirm or deny the facts alleged in the Writ Petition.

IV. Without prejudice to the foregoing submission, my paragraphwise reply to the counter affidavit is as follows:



1 & 2. In reply to paragraphs 1 and 2 of the counter affidavit, I state and submit that the deponent of the affidavit is not competent to affirm or deny the counter affidavit.

3. The contents of paragraph 3 of the counter affidavit raise preliminary objections which are dealt with herein below:

(i) In reply to sub-paragraph (i) of paragraph 3 of the counter affidavit, I state and submit that the re-promulgation of Ordinances by the State of Bihar has been done in gross violation of the provisions of Article 213 of the Constitution of India. These Ordinances are, therefore, without the authority of law and arbitrary and in violation of Articles 14 and 19 of the Constitution of India. I further state that the Ordinances specifically violate the fundamental rights not only of the Petitioner No. 1 but also of the other petitioners. I crave leave to make good this submission at the time of hearing of the Petition. I, however, state that so far as the Bihar Intermediate Education Council Ordinance is concerned, by the said Ordinance a Council is purported to be established in the State of Bihar for the purpose of regulating Intermediate Education in the State of Bihar. The said Council has powers to prescribe syllabi, prepare text-books and conduct examinations, prescribe regulations for fulfillment by students appearing in examinations, etc., as well as to deal with matters connected with Intermediate Education. The Petitioner No. 3 is a student and the examinations which he is required to sit for, as well as the courses which have been prescribed, and the criteria laid down for his admission and education are governed by the said Council which has no authority whatsoever in law. The said Council has been formed under the said Ordinance which itself is without the authority of law. The actions of the said Council are, therefore, arbitrary, without the authority of law and in violation of the petitioner's fundamental rights under Articles 14 and 19 of the Constitution of India. It is, therefore, submitted that the Writ Petition is maintainable and the averments made in sub-paragraph (i) of paragraph 3 of the counter affidavit are denied.

(ii) The contents of sub-paragraph (ii) of paragraph 3 of the counter affidavit are denied. It is submitted that the petitioners have not invited the Hon'ble Supreme Court to play the role of a supervisor of the performance of the Legislature of the State of Bihar. I state

and submit that it is settled law that this Hon'ble Court is the guardian of the Constitution and is entitled in law to enforce compliance with constitutional provisions. It is not open to a state to flagrantly violate the provisions of the Constitution and then claim the defence that this Hon'ble Court cannot enforce such provision and direct the state to comply with specific Articles of the Constitution. In the system of limited government with checks and balances, it is the duty of the judiciary to ensure that the different organs of the state do not overstep their constitutional limits. It is, therefore, denied that the petitioners are invoking a jurisdiction which is not vested in this Hon'ble Court. It is submitted that the petitioners are invoking a constitutional jurisdiction of this Hon'ble Court, which in the form of Article 32 is a fundamental right of the petitioners, and this Hon'ble Court has jurisdiction to direct the State of Bihar or any other state in India not to re-promulgate Ordinances. The contents of sub-paragraph (ii) of paragraph 3 of the counter affidavit are, therefore, incorrect and are denied.

- (iii) The contents of sub-paragraph (iii) of paragraph 3 of the counter affidavit are incorrect and are denied. It is submitted that it is settled law that whenever there is a public wrong by an act of commission or omission of the state, which is contrary to the provisions of the Constitution, any member of the public, acting *bona fide* and having sufficient interest, can maintain action for redressal of such public wrong or public injury. The petitioner states that it is now settled by a majority judgment of a seven-Judge Bench of this Hon'ble Court that in the absence of a machinery to effectively represent the public interest generally in court, redressal for violation of the Constitution can be had by moving this Hon'ble Court even though a specific individual moving this Hon'ble Court may not be directly injured in his own right. It is in the light of this settled position in law that the Petitioner No. 1 has moved this Hon'ble Court with a request to issue an appropriate writ, order or direction declaring that the practice followed by the State of Bihar and the Governor of Bihar for re-promulgating Ordinances is *ultra vires* the Constitution. In any event and without prejudice to the foregoing submissions, it is submitted that Petitioners No. 2 to 4 are directly affected by

the impugned three Ordinances which are without the authority of law and are, therefore, arbitrary and in violation of Articles 14 and 19 of the Constitution of India.

4. The contents of paragraph 4 of the counter affidavit are unintelligible. It is denied that the Writ Petition is misconceived or that this Hon'ble Court has no power to grant reliefs prayed for by the petitioners.

5. The contents of paragraph 5 of the counter affidavit are denied. It is submitted that it is open to this Hon'ble Court to examine whether all the conditions precedent for the exercise of power under Article 213 have been fulfilled. The petitioners are not seeking a general review of the Ordinances, as alleged or otherwise, but are merely challenging the practice followed by the State of Bihar to continuously re-promulgate ordinances instead of getting them replaced by the Acts of the State Legislature which is the only true and proper authority under the Constitution to enact laws except in exceptional and emergent situations. It is further submitted that the Bihar Intermediate Education Council Ordinance also is *ultra vires* the Constitution.

6. In reply to paragraph 6 of the counter affidavit, I state that the petitioners have specifically averred in the Writ Petition that the three impugned Ordinances affect the right of Petitioners No. 2, 3 and 4 to do business and the right to education without the authority of law and are, therefore, clearly arbitrary. In other words, the right to do business and the right to education is sought to be regulated, controlled and restricted by the provisions which have no authority of law and are *ultra vires* the Constitution and are, therefore, necessarily arbitrary and in violation of Articles 14 and 19 of the Constitution of India. It is submitted that the nature of rights, namely, the right to do business and the right to education, has been specifically spelt out in the Writ Petition and the nature of violation has also been spelt out in the Writ Petition. It is, however, submitted that this is in the alternative and without prejudice to the contentions of the petitioners that the constitutional violation of such nature can be challenged by any person acting *bona fide* without violation of a particular fundamental right of such a person. Legislation in violation of constitutional limitations stands in danger of overthrowing not only one right but all rights including the fundamental rights.

7. In reply to paragraph 7 of the counter affidavit, I state and submit that the forest produce grown on the land of the Petitioner No. 2 is clearly owned by him. Any law which regulates the disposal of forest produce which is the business of Petitioner No. 2 is clearly in violation of Article 19 and, therefore,

the Petitioner No. 2 has *locus standi* to invoke the jurisdiction of this Hon'ble Court independently under Article 32 of the Constitution of India.

8. In reply to paragraph 8 of the counter affidavit, I deny that the term 're-promulgation' of an Ordinance is a complete misconception. It is submitted that the manner in which the Respondent State has been successively re-promulgating Ordinances, year after year, gives the term constitutional significance by connoting, and emphasises the method by which the Ordinance-making power of the State is abused. It is, therefore, denied that the term is a complete misconception, as alleged or otherwise. In fact, the term 're-promulgation' has been used in official documents. It is clear that the object of the Governor in repealing an expiring Ordinance and promulgating the same Ordinance again, with exactly the same contents, is to disguise his collateral unlawful object of indirectly extending the life of the expiring Ordinance. The Governor while pretending to comply with the constitutional provisions when he repeals the dying Ordinance, in effect, ensures the continuation of that Ordinance by shift or contrivance. To call it promulgation is completely wrong; indeed it is an abuse of the term.

9. The contents of paragraph 9 are incorrect and are denied. Article 213 of the Constitution defines emergency as circumstances requiring immediate action. Even assuming without conceding that circumstances may continue "once in a blue moon", the emergency cannot exist for 14 years. It is submitted that no emergency can last beyond seven-and-a-half months and the Executive has either to get the Ordinance replaced by an Act of the Legislature during this period or give it a decent burial. The consistent practice of re-promulgating Ordinances, time and again, as a matter of routine, clearly shows the non-application of mind regarding the existence of emergent situation calling for the exercise of emergent powers granted under Article 213 of the Constitution. It is submitted that the circumstances necessary for the exercise of a power under Article 213 must arise independently. The Government itself cannot create the circumstances artificially and take advantage of them. The petitioners seek leave to develop all these arguments in greater detail at the time of hearing of the Writ Petition as it would not be appropriate to argue it out in a rejoinder affidavit.

10. The contents of paragraph 10 of the counter affidavit are denied. Reliance on Australian and the U.S. case law is irrelevant as the law is sufficiently developed by this Hon'ble Court and has now been settled. It is submitted that this Hon'ble Court has jurisdiction to decide the issues raised in the present petition. It is denied that the issues raised are abstract, as alleged

or otherwise.

11. The contents of paragraph 11 of the counter affidavit are denied and are incorrect. It is submitted that irrespective of the powers conferred by Article 143 of the Constitution, this Hon'ble Court has jurisdiction to deal with the present Writ Petition. It is submitted that it is settled law that this Hon'ble Court can remedy any violation of the constitutional provisions by any state or Public Authority.

12. The contents of paragraph 12 of the counter affidavit are completely misconceived. It is submitted that the Petitioner No.1 is not challenging the power of the legislature to pass the Ordinance in the form of an Act or to let it lapse. It is submitted that the petition of the Petitioner No. 1 is restricted to the Executive practice of re-promulgating Ordinances, time and again, instead of having them converted into Acts of the Legislature. So far as the allegation regarding the application of mind by the Governor is concerned, it is denied that the affidavit of the petitioner is valueless. None of the facts stated or averred in the Writ Petition or in its annexures have been denied by the respondents or are capable of being denied by the respondents. The facts stated in the Writ Petition as well as in the annexures to the Writ Petition clearly bring out that the Ordinances have been re-promulgated as a matter of routine and without application of mind. Although an averment is made in the paragraph under reply that the deponent had no personal knowledge of the matter and the deponent has not pointed out any particular record from which he came to know that the Governor had not applied his mind, none of the averments in the annexures to the petition are denied. These averments which now constitute admitted facts make it clear to any reasonable person that the re-promulgation of Ordinances was done without application of mind to the meaning and implications of Article 213 and in contravention of the provisions of the Constitution. The rest of the paragraph under reply is denied as being incorrect. It is denied that any inquiry by the courts in this regard is forbidden, as alleged or otherwise.

13. The contents of paragraph 13 are denied. It is submitted that the contents of paragraph 13 clearly bring out the ignorance of the deponent regarding the law laid down by this Hon'ble Court. It is submitted that it is now settled law as laid down by the Constitution Bench of this Hon'ble Court that the opinion of the President or the Governor in respect of promulgation of an Ordinance is justiciable. It is submitted that the 44th Constitutional Amendment, when read in the context of the 38th Constitutional Amendment which has been supplanted and overridden

by specific textual declaration by the 44th Amendment, leaves no doubt that judicial review is not excluded with regard to the question relating to the President's or Governor's satisfaction while promulgating an Ordinance. The paragraph under reply does not have any regard to the settled law that the satisfaction of both the President and the Governor is justiciable.

14 (a). The contents of paragraph 14 (a) are denied. I am a Professor at the Gokhale Institute of Politics and Economics, Pune, a research institute of international repute. The President of the Servants of India Society (established by Gopal Krishna Gokhale) is the Chairman of the Board of Management of this institute. Pandit Hriday Nath Kunzru, a member of the Constituent Assembly and a noted constitutionalist, was the Chairman of the Board of Management of this institute till his death. As a member of the research staff of such an institute and as a conscientious and responsible citizen of India, I believe that it is my duty (a duty imposed by the Constitution also) to strive for the preservation and promotion of constitutionalism in the country. By spending a number of years of my life and a lot of money (a lot for a man of my means) in collecting and marshalling the best possible evidence (evidence that would have rarely been presented before the Supreme Court in its experience), I have proved that I am deeply interested in the constitutional functioning of our polity and that my interest is not merely casual or fleeting. I have brought to light, through my study, a practice, that is, re-promulgation of Ordinances in Bihar, which goes much beyond the common violation of legal norms by the Executive. The violation is not accidental, it is deliberate. The re-promulgation of Ordinances violates a basic feature of the Constitution itself, namely, that the power of the legislation has to be exercised by the legislature except in constitutionally stated circumstances and that the said power cannot be usurped by any other organ or functionary of the state, overtly or covertly. This violation of the basic feature of the Constitution stands on a higher footing than the violation of fundamental rights. In the recent history of publication, no book has received so wide a notice as the one by me on this subject has received. Besides, I have been doing research for the last twenty years on a multi-volume project on Agrarian Legislation in India since 1793. In 1969, I undertook a study on the working of *zamindaris* in Bihar. In 1978, I wrote a paper, commissioned by the Government of India, on the status of tenants in Bihar (1793-1978). In 1979, I started working on a book on the agrarian structure in Bihar since 1793 to date. These studies involved looking into the laws on the subject, the actual practice followed in this regard and the factors responsible for non-implementation of the legal provisions, including the lacunae built into

the laws. It was during these investigations that I made the discovery about the existence of illegal and evil practice of re-promulgation of Ordinances in Bihar. I have found that my above-mentioned research works have been seriously hampered by the situation that came to prevail regarding the re-promulgation of Ordinances in the State of Bihar. It is, therefore, in a triple capacity that I have a genuine interest in filing this Writ Petition, namely,

- (i) as a citizen entitled to demand compliance with the constitutional provisions,
- (ii) as a student of agrarian legislation in India, and
- (iii) as a person intimately connected academically with the State of Bihar.

The petitioner craves leave to also refer to the reply to paragraph 3 (iii) hereinabove. It is submitted that in view thereof the Petitioner No. 1 is entitled to invoke the jurisdiction of this Hon'ble Court under Article 32 of the Constitution of India.

14 (b). In reply to paragraph 14 (b) of the counter affidavit, I state and submit that Petitioner No. 2 is owner of the forest produce grown on his land, which is sought to be regulated by the impugned Ordinance. The impugned Ordinance places restrictions on the petitioner's right to do business in forest produce and is, therefore, in violation of the said petitioner's right guaranteed under Articles 14 and 19 of the Constitution of India. As regards the violation of rights of the Petitioners No. 3 and 4, they have been specifically spelt out in the Writ petition.

The second sub-paragraph of paragraph 14 (b) is not denied.

The contents of sub-paragraph three of paragraph 14 (b) are denied and are incorrect. It is denied that the Writ Petition is misconceived or not maintainable, as alleged or otherwise. It is significant that the respondents have not even sought to deny or answer the averments made in the Writ Petition paragraph-wise. These averments are, therefore, to be taken as admitted by the respondents. It is, therefore, submitted that this Hon'ble Court should make the Rule absolute and grant reliefs to the petitioners as prayed for by the petitioners in the Writ Petition.

*Deponent*

(Diwan Chand Wadhwa)

*Verification*

I, Diwan Chand Wadhwa, the deponent abovenamed, do hereby verify that the contents of the foregoing Affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this 24th day of July, 1984

*Deponent*

(Diwan Chand Wadhwa)



# DOCUMENT 8

## Counter Affidavit of the Union of India

In the Supreme Court of India  
Civil Original Jurisdiction

Writ Petition No. 412-415 of 1984

*In the Matter of*

**Petitioners**

**Respondents**

Dr. D. C. Wadhwa and others

v.

State of Bihar and others

## Counter Affidavit of the Union of India

I, K.L. ARORA, Deputy Secretary, Ministry of Home Affairs, New Delhi, do hereby solemnly affirm and state as follows:

1. That I am the concerned Deputy Secretary in the Ministry of Home Affairs and am acquainted with the facts and circumstances of the case from the official record.

2. That I have gone through a copy of the Writ Petition mentioned above and have understood the contents thereof.

3. That I do not admit the correctness of any statement and/or allegation made in the aforesaid Writ Petition which has not been admitted by me in this affidavit and the petitioners should be put to strict proof thereof.

4. That the deponent has been advised to give reply to those statements in the Writ Petition with respect to which the Respondent No. 3, the Union of India, is concerned.

5. That with reference to the statements made in para 13 of the Writ Petition that the President of India has been giving his consent for repromulgation of the Ordinance in cases where his prior approval is necessary for such re-promulgation, the deponent respectfully submits that the President cannot refuse to give his approval to an Ordinance if he is satisfied that the Governor has got the full authority under the Constitution on the subject

matter with respect to which the Governor proposes to promulgate the said Ordinance and that the President being satisfied as stated above conveyed his instructions approving Ordinances.

6. That with reference to the allegations made in para 17 of the Writ Petition that while granting permission to the Ordinances there is no application of mind on behalf of the President of India with regard to the existence of conditions precedent for the promulgation of such Ordinances the deponent respectfully submits that the President of India while issuing instructions as required under the proviso to Article 213 (1) of the Constitution shall not have to be satisfied as to whether the conditions precedent for promulgation of the proposed Ordinance as provided in Article 213 of the Constitution of India do exist or not. It is for the Governor to satisfy himself on the above point. The President of India if satisfied that any provision contained in the proposed Ordinance sent to him for approval is not unconstitutional or contrary to law, conveys his approval to the proposed Ordinance.

7. That with reference to paras 19 and 21 of the Writ Petition, the deponent submits respectfully that the President of India being satisfied that the proposed Ordinances sent to him for approval do not contain any provision which is unconstitutional and/or contrary to law, conveyed his instructions approving the Ordinances.

8. That the statements made in sub-paras (d), (e), (f), (g) and (h) of para 25 of the Writ Petition are matters of record.

9. That the deponent states that the allegations made in para 26 of the Writ Petition that the Ordinances are promulgated and re-promulgated by the State of Bihar in connivance with the Ministry of Home Affairs of the Union of India is wholly unfounded and baseless.

10. That the deponent reiterates that the President of India after being satisfied that there is no legal or constitutional bar for the promulgation of a proposed Ordinance issues instructions as required under Article 213 (a) of the Constitution approving the proposed Ordinance.

11. That the deponent states that it having been found that certain Ordinances which were sent to the President of India for conveying his instructions thereon, had been promulgated several times, the Home Minister, Government of India, wrote to the Chief Minister of Bihar in September, 1980, requesting him that those Ordinances should be replaced by the Acts of the Legislature at the earliest.

12. That the deponent states further that because of the repeated reminders to the Chief Minister of Bihar a special session of the State Legislature was held and out of 15 Ordinances 13 Ordinances were converted into Acts between August, 1981 and January, 1982.

13. That the Bihar Forest Produce (Regulation of Trade) Fourth Ordinance, 1983 and the Bihar Bricks Supplies (Control) Fourth Ordinance, 1983 have since been replaced by Acts of State Legislature after the President accorded his assent to the Bills on April 28, 1984.

14. That the prayer (d) of the Writ Petition for issuance of Writ of Prohibition or any such appropriate Writ prohibiting the Respondent No. 3, the Union of India, from granting consent to the Respondents No. 1 and 2 for re-promulgating any Ordinance for which consent is required under the Constitution, is not tenable inasmuch as the Union of India has no authority under the Constitution to withhold approval of the President to an Ordinance if no provision contained in the Ordinance is unconstitutional and or contrary to law.

*Deponent*

(K.L. Arora)

***Verification***

I, the abovenamed deponent, do hereby solemnly verify that the contents of the counter affidavit are true to my knowledge and nothing is concealed and nothing is false.

*Deponent*

(K.L. Arora)

Dated, July 25, 1984

## DOCUMENT 9

### **Order of the Supreme Court on the Application of the State of Uttar Pradesh for Stay of the Judgment of the Lucknow Bench of the Allahabad High Court, in *Uttar Pradesh Hindi Sahitya Sammelan, Lucknow, and Others v. Government of Uttar Pradesh, Declaring the Re-promulgation of Ordinances as Unconstitutional***

Supreme Court of India

Record of Proceedings

Civil Miscellaneous Petition No. 22203/84

(In CA No. 2447 of 1984)

*In the Matter of*

**Petitioners/Appellants**

State of U.P.

v.

**Respondents**

U.P. Hindi Sahitya Sammelan and others

**(Application for stay)**

Date: 20.9.84: This matter was called on for hearing today.

Coram:

Hon'ble Mr. Justice O. Chinnappa Reddy

Hon'ble Mr. Justice A.P. Sen

Hon'ble Mr. Justice E.S. Venkataramiah

For the Petitioners/Appellants:

Mr. K. Parasaran, Attorney General and

Mrs. Shobha Dikshit, Advocate

**WRIT PETITION REFERRED TO CONSTITUTION BENCH 59**

**For the Respondents:**

**Dr. L.M. Singhvi, Sr. Advocate with  
M/s L.K. Pandey and K.B. Jindal, Advocates**

**UPON hearing Counsel the Court made the following**

**ORDER**

**Stay application dismissed. Tag this matter with Writ Petition No. 412-415 of 1984. These matters raise important constitutional issues which we consider are sufficient to be placed before a Constitution Bench. We therefore direct that these matters be listed before a Constitution Bench at a very early date.**

**(Krishan Lal)**

**Court Master**

# DOCUMENT 10

## **Rejoinder Affidavit of the Petitioners, Dr. D. C. Wadhwa and Others, in Reply to the Counter Affidavit of the Union of India**

In the Supreme Court of India  
Civil Original Jurisdiction  
Writ Petition No. 412-415 of 1984

*In the Matter of*

**Petitioners**

**Respondents**

Dr. D.C. Wadhwa and others

v.

State of Bihar and others

### **Rejoinder Affidavit of the Petitioners, Dr D.C. Wadhwa and Others, in Reply to the Counter Affidavit of the Union of India**

I, Diwan Chand Wadhwa, son of Shri Beli Ram Wadhwa, aged about 52 years, resident of 832/B-B1 Shivaji Nagar, Pune 411004, at present temporarily residing at New Delhi, do hereby solemnly affirm and state as under:

I. That I am the Petitioner No. 1 in the abovementioned Writ Petition filed before this Hon'ble Court and I am fully conversant with the facts of the case. I am competent to depose the present rejoinder affidavit.

II. I have gone through the counter affidavit filed by Shri K.L. Arora, Deputy Secretary, Ministry of Home Affairs, Government of India, on behalf of the Union of India and my reply to the same is as follows:

1 and 2. Paragraphs 1 and 2 of the counter affidavit need no reply.

3. The contents of paragraph 3 of the counter affidavit are denied and the submissions and facts stated in the Writ Petition are reiterated. It is stated that I have carried out extensive research in respect of facts, averred in the Writ Petition, which have been incorporated in the book written by me and annexed to the Writ Petition. This book has been written after extensive

research and the sources and the details of the data given in the book in respect thereof are available. I crave leave to refer to and rely upon the said sources and details, if necessary. The averments in the counter affidavit are denied in so far as the same are inconsistent with the Writ Petition except to the extent specifically admitted hereinafter.

4. Paragraph 4 of the counter affidavit needs no reply.

5 and 6. The contents of paragraphs 5 and 6 of the counter affidavit are denied to the extent that the President cannot refuse to give his assent to the re-promulgation of an Ordinance. It is submitted that the President of India is vested with the constitutional authority to see and supervise that the provisions of the Constitution of India are duly implemented in all aspects. It is the constitutional duty of the President of India to see that the provisions of the Constitution of India are not abused. This is further strengthened by the provisions of Article 60 of the Constitution of India which provides for the oath of the President to protect and defend the Constitution and the law. Thus, it is the constitutional duty of the President to apply his mind and to see and ensure that the provisions of the Constitution are not abused and legislatures are not given a go-by by nearly perpetual re-promulgation of Ordinances. It is denied that the Governor has got full authority under the Constitution to perpetually re-promulgate Ordinances without ensuring that the same are placed before the Legislature for enactment. The contents of paragraphs 13 and 17 of the Writ Petition are reiterated.

7. The contents of paragraph 7 of the counter affidavit are denied and the contents of paragraphs 17 and 19 of the Writ Petition are reiterated. It is submitted that the satisfaction of the President was not proper and the President ought to have applied his mind regarding the existence of the pre-requisite conditions for the promulgation of an Ordinance. Since this satisfaction has not been objectively fulfilled by the President, the Ordinances in question are illegal and unconstitutional and the practice of re-promulgation of Ordinances is also illegal and unconstitutional.

8. Paragraph 8 of the counter affidavit needs no reply.

9. The contents of paragraph 9 of the counter affidavit are denied and the contents of paragraph 26 of the Writ Petition are reiterated. It is submitted that the very fact of approval of re-promulgation of Ordinances by the Ministry of Home Affairs shows that this is being done with absolute non-application of mind and in connivance of the Ministry of Home Affairs in violation of the provisions of the Constitution.

10. The contents of paragraph 10 of the counter affidavit are denied. It is submitted that as stated hereinabove, the President has a constitutional duty to ensure that the provisions relating to the promulgation of Ordinances are not abused and that the pre-requisite conditions for the promulgation of Ordinances under Article 213 of the Constitution are fulfilled.

11. In reply to paragraph 11 of the counter affidavit, I state and submit that it is significant to note that the Respondent No. 3 has admitted the writing of a letter in September, 1980, to the Chief Minister of Bihar asking him to have the re-promulgated Ordinances replaced by the Acts of the Legislature.

12 and 13. The contents of paragraphs 12 and 13 of the counter affidavit need no reply.

14. In reply to paragraph 14 of the counter affidavit, I state and submit that a writ of prohibition should be issued to the Union of India restraining it from granting consent to the Respondent Nos. 1 and 2 from re-promulgating Ordinances as prayed for in the Writ Petition.

*Deponent*

(Diwan Chand Wadhwa)

***Verification***

I, Diwan Chand Wadhwa, the deponent abovenamed, do hereby verify that the contents of the foregoing Affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this 21st day of December, 1984

*Deponent*

(Diwan Chand Wadhwa)



# DOCUMENT 11

## Application of the Petitioners, Dr. D.C. Wadhwa and Others, for Grant of Stay Restraining the State of Bihar from Re-promulgating Ordinances

In the Supreme Court of India  
Extraordinary Original Jurisdiction  
Civil Misc. Petition No. — of 1985

in

Civil Writ Petition No. 412-415 of 1984

*In the Matter of*

**Petitioners**

**Respondents**

Dr. D.C. Wadhwa and others

v.

State of Bihar and others

### **An Application for Stay**

The Humble petition of the petitioners abovenamed most respectfully sheweth.

1. The petitioners have filed the above Writ Petition challenging the practice followed in the State of Bihar of re-promulgating Ordinances instead of getting them converted into Acts passed by the State Legislature. For the sake of brevity and in order to avoid repetition, the petitioners crave leave to refer to and rely upon the facts and submissions made in the Writ Petition as though the same are specifically incorporated herein.

2. The Writ Petition was listed for hearing before this Hon'ble Court on 9-2-1984. Along with the Writ Petition, the petitioners had also filed an Application for Stay which was also listed before this Hon'ble Court on the said date. This Hon'ble Court was pleased to issue Rule *Nisi*. This Hon'ble Court further issued Notice returnable in three weeks on the Application for Stay filed by the petitioners being Civil Miscellaneous Petition No. 3380-83 of 1984.

3. The matter came up for hearing before this Hon'ble Court on 6-4-1984. On the said date, this Hon'ble Court was pleased to pass the following Order:

“Stay Application is not pressed at present. This is predicated on the condition that the State of Bihar shall file full comprehensive counter affidavit to the main petition by May 30, 1984. Any rejoinder will be filed within two weeks thereafter. The WPs will be listed on 2nd Tuesday in August, 1984 for final hearing subject to overnight part-heard.”

4. Pursuant to the abovementioned Order dated 6-4-1984 of this Hon'ble Court, the matter was listed as Item No. 8 in the Weekly Board of this Hon'ble Court on August 14, 1984. The matter, however, could not be taken up for hearing and went lower down in the list instead of coming up for final disposal. The position of the matter in various Weekly Lists is set out hereinbelow.

Weekly List Number (1)	Period of the Weekly List (2)	Serial No. of Petitioners' Case in the Weekly List (3)
21	14-08 to 16-08-1984	08
22	22-08 to 23-08-1984	11
23	28-08 to 30-08-1984	15
24	04-09 to 05-09-1984	21
25	11-09 to 13-09-1984	23
26	18-09 to 20-09-1984	25
27	25-09 to 27-09-1984	28
28	10-10 to 11-10-1984	29
29	16-10 to 18-10-1984	31
30	30-10 to 01-11-1984	31
31	06-11 to 07-11-1984	32
32	13-11 to 15-11-1984	37
33	20-11 to 22-11-1984	39
34	27-11 to 29-11-1984	41
35	04-12 to 06-12-1984	35
36	11-12 to 13-12-1984	31
37	18-12 to 20-12-1984	28

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5. It may be stated that in the meanwhile the High Court of Allahabad (Lucknow Bench) by its Judgment and Order dated 6-4-1984 in the case of *Uttar Pradesh Hindi Sahitya Sammelan and others v. Government of Uttar Pradesh* held that the practice of re-promulgating Ordinances was unconstitutional. The State of Uttar Pradesh filed a Special Leave Petition before this Hon'ble Court and also filed an Application for Stay of operation of the aforesaid Judgment of the Allahabad High Court. This Hon'ble Court by its Order dated 20-9-1984 in the Civil Miscellaneous Petition No. 22203/84 (in C.A. No. 2447 of 1984) dismissed the Stay Application of the Government of Uttar Pradesh and directed the Appeal to be heard along with the petitioners' matter. This Hon'ble Court also referred the matter to Constitutional Bench for hearing at a very early date. The Order dated 20-9-1984 passed by this Hon'ble Court is set out below:

“Stay Application dismissed. Tag this matter with Writ Petition No. 412-415 of 1984. These matters raise important constitutional issues which we consider are sufficient to be placed before a Constitution Bench. We therefore direct that these matters be listed before a Constitution Bench at a very early date.”

6. The petitioners were not aware of the abovementioned Order of this Hon'ble Court and came to know of the same only through the Advocates of the respondents in the aforesaid case. On coming to know of the said Order, the petitioners, through their Advocate, mentioned the matter before the Constitution Bench of this Hon'ble Court. As a result of the mentioning, the matter was listed as Item No. 12 in Weekly List No. 2 of 1985 (for the period from 15.1 to 18.1.1985) before the Constitution Bench. But the matter could not be taken up for hearing by the Constitution Bench till the commencement of the summer vacation of this Hon'ble Court on May 13, 1985. The matter is still pending disposal before this Hon'ble Court.

7. It is stated that the delay in taking up the matter for hearing is leading to different practices being followed in different states of the country. As a result of the decision of the Allahabad High Court (Lucknow Bench) and as a result of the dismissal by this Hon'ble Court of the Stay Application filed before it by the State of Uttar Pradesh, the aforesaid decision of the Allahabad High Court (Lucknow Bench) prevails and is operative in the State of Uttar Pradesh. Thus, in the State of Uttar Pradesh, the Ordinances cannot be re-promulgated. However, in view of the fact that no stay was granted in the case of the petitioners, the State of Bihar is continuing to re-promulgate Ordinances.

8. On June 27, 1985, the Monsoon Session of the Bihar Legislature commenced. On that date itself, that is, on June 27, 1985, the Chief Minister of Bihar placed on the Table of the Bihar *Vidhan Sabha* copies of the thirteen (13) Ordinances promulgated by the Governor of Bihar between the conclusion of the last session and the commencement of this session of the Bihar Legislature. The following is the list of those 13 Ordinances:

- (i) The Bihar Provident Fund (Amendment) Second Ordinance, 1985
- (ii) The Bihar State University (Amendment) Second Ordinance, 1985
- (iii) The Patna University (Amendment) Second Ordinance, 1985
- (iv) The Bihar State University (Constituent Colleges) Service Commission Second Ordinance, 1985
- (v) The Bihar Non-Government Secondary Schools (Management and Control Amendment) Second Ordinance, 1985
- (vi) The Bihar Entertainment Tax (Amendment) Second Ordinance, 1985
- (vii) The Bihar Niji Chikitsa (Bhartiya Chikitsa Paddhati) College (Control) Third Ordinance, 1985
- (viii) The Bihar and Orissa Excise (Amendment) Second Ordinance, 1985
- (ix) The Bihar Coal Mines Area Development Authority Second Ordinance, 1985
- (x) The Bihar Molasses Control (Amendment) Second Ordinance, 1985
- (xi) The Bihar Intermediate Education Ordinance, 1985
- (xii) The Bihar Cess (Amendment) Ordinance, 1985
- (xiii) The Patna Municipal Corporation (Amendment) Ordinance, 1985

Out of these thirteen Ordinances, the first ten were re-promulgation of the old Ordinances. This shows that re-promulgation of Ordinances is still going on in the State of Bihar.

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9. By refusing to grant Stay Application of the Government of Uttar Pradesh against the Allahabad High Court (Lucknow Bench) Judgment, this Hon'ble Court has in effect prohibited the Government of Uttar Pradesh from re-promulgating Ordinances till the disposal of the present case. On the other hand, as stated hereinabove, the State of Bihar continues to re-promulgate Ordinances (even after the admission of the petitioners' Writ Petition by this Hon'ble Court against this practice) instead of getting them converted into Acts of the Legislature. The petitioners submit that this practice is illegal and unconstitutional for the grounds stated in the Writ Petition.

10. It is, therefore, submitted that it would be in the interest of justice if this Hon'ble Court removes the anomaly (created as a result of divergent practices being followed in two different states in India) by restraining the State of Bihar from following the illegal and unconstitutional practice of re-promulgating Ordinances instead of getting them enacted into Acts of the Legislature.

### PRAAYER

It is, therefore, most respectfully prayed that this Hon'ble Court may be pleased to

- (a) restrain the State of Bihar from carrying on the practice of re-promulgating Ordinances instead of getting them converted into Acts of the Legislature; and
- (b) pass such other and further orders as may be deemed just and necessary in the facts and circumstances of the case.

And the petitioners shall, as in duty bound, ever pray.

*Filed on*  
12th July, 1985

*Drawn and Filed by*  
J.B. Dadachanji & Co.,  
Advocates, Supreme Court,  
New Delhi

**AFFIDAVIT**

I, Diwan Chand Wadhwa, son of Shri Beli Ram Wadhwa, aged about 52½ years, resident of 832/B-B1 Shivaji Nagar, Pune-411004, at present temporarily residing at New Delhi, do hereby solemnly affirm and state as under:

1. That I am the Petitioner No. 1 in the Writ Petition and am fully familiar with the facts and proceedings of the case. I am competent to affirm this affidavit.

2. That I have read and understood the contents of the Stay Application and I say that the facts stated in paragraphs 1 to 10 are true to my knowledge derived from the records of the case and the submissions made therein are on legal advice which I believe to be correct.

*Deponent*

(Diwan Chand Wadhwa)

***Verification***

I, Diwan Chand Wadhwa, the deponent abovenamed, do hereby verify that the contents of the foregoing Affidavit are true to my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this 12th day of July, 1985

*Deponent*

(Diwan Chand Wadhwa)

# DOCUMENT 12

## Written Submissions of the Union of India

In the Supreme Court of India  
Civil Appellate Jurisdiction  
Writ Petition No. 412-415 of 1984

*In the Matter of*

Petitioners		Respondents
Dr. D.C. Wadhwa and others	v.	State of Bihar and others

### Written Submissions of the Union of India

1. The provisions of Article 213 (1) of the Constitution provide that at any time, except when the Legislative Assembly of the State is in session or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require. It has also been provided in this Article that the Governor shall not without instructions from the President, promulgate any such Ordinance if —

- (a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or
- (b) he would have deemed it necessary to reserve the Bill containing the same provisions for consideration of the President; or
- (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for consideration of the President it had received the assent of the President.

Clause (2) of Article 213 provides that an Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor but any such Ordinance —

- (a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the legislature, or if before the expiration of that period, a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and
- (b) may be withdrawn at any time by the Governor.

2. It is respectfully submitted that an Ordinance promulgated by the Governor of the State under the provisions of Article 213 of the Constitution of India will remain in force as long as the Legislature of the State does not meet. Even if the Legislature meets, the Ordinance does not expire immediately but will remain in force for six weeks from the date of reassembly of the State Legislature unless before the expiration of that period, a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council as the case may be. Thus, Article 213 provides with respect to the legislative power of the Governor under certain circumstances with the matter also requiring the attention of the Assembly.

3. Article 174 (1) of the Constitution deals with the sessions of the State Legislature and provides that the Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit and six months shall not intervene between the last sitting in one session and the date appointed for the first sitting in the next session. Thus, the ordinary life of an ordinance promulgated by the Governor of a state in certain circumstances can be seven and a half months or so unless it is replaced by an Act or disapproved by a resolution of the Legislature before that period.

4. It is submitted that Governors of states can promulgate ordinances without seeking prior approval of the President in respect of all the subjects included in List II (State List) of the VII Schedule of the Constitution. The answering Respondent, Union of India is in the above matter only concerned with those Ordinances sent by the Governor [*sic*]<sup>1</sup> of States for instructions of the President in terms of Article 213(1)(a) and (b) of the Constitution, that is, the Ordinances related to subjects included in List III (Concurrent List) of Schedule VII of the Constitution. During the last four years there were fifteen

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<sup>1</sup> Governors, plural, corrected by the author



Ordinances that were promulgated by the Governor of Bihar after obtaining the approval of the President. In all these cases the reasons for not converting the Ordinances into Acts had been given. Those reasons in general were:

- (a) Duration of the time taken by the State Legislature in discussions on the Governor's address;
- (b) Passing of the State Budget and the Appropriation Bill;
- (c) The pre-occupation of the State Legislature with passing the Supplementary Budget of the State and consideration of other important and pressing matters.

In such cases, the Ordinances were examined on merits and while conveying the instructions of the President therein, the Government was advised to convert these Ordinances into Acts at the earliest. The details of the 150 [*sic*]<sup>2</sup> Ordinances promulgated by the Governor of Bihar repeatedly with the year of first promulgation, the number of times it was promulgated and the date on which it was converted into an Act are annexed hereto and marked as Annexure-A[*sic*]<sup>3</sup>.

5. It is submitted that since Ordinances had been promulgated several times, the Home Minister wrote to the Chief Minister of Bihar in September, 1980 requesting him that these Ordinances should be replaced by Acts of the Legislature at the earliest. Pursuant to repeated reminders to the Chief Minister of Bihar, a special session of the State Legislature was held and out of the fifteen Ordinances, thirteen Ordinances were converted into Acts on the dates mentioned in the Annexure appended hereinabove. Even with respect to the Ordinances not yet converted into Acts, the previous instructions of the President have been communicated.

6. It is submitted that the Constitution does not lay down any time limit on the number of times an Ordinance can be promulgated by the Governor under Article 213 (1) of the Constitution. The criterion laid down is that the Governor should be satisfied about the circumstances existing which make it necessary for him to take immediate action to promulgate an Ordinance. The question as to whether such circumstances prevailed as to make it necessary to take immediate action and promulgate an Ordinance even repeatedly is a matter for the Governor to decide. Article 213 (2) (a) also provides that, every such Ordinance shall be laid before the Legislative

<sup>2</sup> Please see paragraph 5 where it is mentioned fifteen Ordinances and not 150, corrected by the author

<sup>3</sup> Not received by the petitioners

Assembly of the State, or where there is a Legislative Council in the State before both the Houses and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature. This would mean that the Legislature could replace the Ordinance with an Act and if it disapproves of the Ordinance can even pass a resolution to that effect prior to the expiry of the period of six weeks rendering the Ordinance inoperative. There is no provision in the Constitution compelling the Assembly to replace the Ordinance by an Act since the Ordinance itself would lapse with the efflux of time.

## *II. The Factual Aspect*

Dr. D. C. Wadhwa who is one of the petitioners in the Writ Petition is the author of the book titled *Re-promulgation of Ordinances and Fraud on the Constitution of India* [sic]<sup>4</sup>. This book deals with the study of the Ordinances promulgated in the State of Bihar. The gist of the book is that an Ordinance which has the force of law, is a purely temporary measure with a statutory short span of life of six weeks from the commencement of the session of the State Legislature after its promulgation. Within this time the Legislature must necessarily pass an Act to replace the Ordinance, if the continuance of the substance is deemed desirable, and neither the Governor nor the Legislature can extend the life of an Ordinance and that the Governor of Bihar has resorted to re-promulgation to evade the limitation as to the duration of these Ordinances. The book charges the Legislative Assembly [sic]<sup>5</sup> of Bihar with abdicating its law-making power in favour of the Executive. It is also stated in the book that a writ petition in the Patna High Court challenged the vires of such Ordinances and it was contended that re-promulgation of the Ordinances was a fraud on the constitutional power of the Governor. The Patna High Court, however, rejected that contention and [sic]<sup>6</sup> merely because the two houses of the Bihar Legislature sat for sometime between the promulgation of Ordinance 107 of 1971 (The Bihar Sales Tax 4th Amendment Ordinance) and the promulgation of Ordinance 28 of 1972 (The Bihar Sales Tax Amendment Ordinance 1972) no inference of fraudulent exercise of power by the Governor can be made.

2. The averments of the petitioners in the Writ Petition before this Hon'ble

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<sup>4</sup> The exact title of the book is: *Re-promulgation of Ordinances: A Fraud on the Constitution of India*, corrected by the author

<sup>5</sup> Legislature and not only Legislative Assembly, corrected by the author

<sup>6</sup> held that, added by the author

Court that there is no application of mind on behalf of the President while giving sanction or consideration with respect to the promulgation of Ordinance in the State of Bihar is incorrect. Every Ordinance that is submitted to the President by the Governor of a State including those under the provisions of Article 213 (1) of the Constitution of India is examined by the Union Government on merits and if there is no legal, constitutional or other objection to the promulgation of such an Ordinance the instructions of the President are accordingly conveyed to the Governor.

3. Paragraphs 25 (d), (e), (f), (g) and (h) of the Writ Petition, indicate the procedure adopted by the Government of Bihar while forwarding Ordinances for the necessary instructions of the President under proviso to clause (1) of Article 213 of the Constitution and the manner in which previous instructions of the President were communicated to the Governor of Bihar. In this connection it is respectfully submitted that Ordinance sent by the Governor of Bihar for the previous instructions by the President indicate the reasons that necessitated their promulgation. In cases where considered necessary it was also mentioned that the instructions of the President may be communicated by a specific date. It is reiterated that all such Ordinances were examined on merits and where the Union Government was satisfied that there was no legal or constitutional [sic]<sup>7</sup> infirmity to the promulgation of such an Ordinance the previous instructions of the President were communicated to the Government of Bihar through a Police Wireless message, a copy of which was forwarded by post for confirmation. Such orders are issued in the name of the President and normally signed by the Deputy Secretary/Director who deals with the subject in the Ministry of Home Affairs, Government of India.

4. It is averred in the Writ Petition in para 26 that the Ordinances are promulgated by the State of Bihar in connivance with the Ministry of Home Affairs. This is mischievous and erroneous. Each Ordinance as stated earlier is examined on merits and if there is any [sic]<sup>8</sup> legal or constitutional infirmity the previous instructions of the President are conveyed.

### *III. The Legal Aspect*

The petitioners have preferred the Writ Petition under Article 32 of the Constitution of India. It is respectfully submitted that Article 32 of the Constitution of India provides for the right to move the Supreme Court for

<sup>7</sup> constitutional, corrected by the author

<sup>8</sup> no and not any, corrected by the author

enforcement of Fundamental Rights guaranteed under Part III [sic]<sup>9</sup>. The petitioners have not made out a case of infringement of Fundamental Rights. They only say that they are effected [sic]<sup>10</sup> by the existence of these Ordinances in the State of Bihar. The petitioners have only pleaded that the Ordinances are violative of their rights under Articles 14 and 19 (1) (g) [sic]<sup>11</sup>. No particulars whatsoever are pleaded in the petition to establish the nature of the violation of the Fundamental Rights and in such a context this Hon'ble Court ought to refuse to entertain the Writ Petition preferred under Article 32 of the Constitution of India.

2. Article 213 of the Constitution of India deals with the Legislative power of the Governor. It specifies the conditions for exercise of the power. The duration of the Ordinance has also been provided for. Article 213 also provides for other safeguards whereby the Ordinance is placed before the Assembly which is aware of its existence and content. In such circumstances, the Ordinance lapses after a period of six weeks unless a resolution disapproving it has been passed prior thereto. It is, therefore, submitted that the facts that a Bill incorporating the provisions of the Ordinance has not been introduced in the Assembly or a resolution disapproving the Ordinances has not been [sic]<sup>12</sup> would not amount to abdicating the Legislature's power in favour of the Executive.

3. The relief sought for by the petitioners in Prayer (d) of the Writ Petition against this respondent for issuance of a writ of prohibition or any such appropriate writ prohibiting the Respondent No. 3, i.e, Union of India from granting consent to the Respondent Nos. 1 and 2 for re-promulgating any Ordinance for which consent is required under the Constitution, is not tenable in as much as the Union of India has no authority under the Constitution to withhold the approval of the President to an Ordinance, particularly if provisions contained in the Ordinance are not unconstitutional or contrary to law.

It is thus submitted that in such circumstances no relief can be granted to the petitioners in so far as the answering respondent is concerned.

*Drawn by*

K. Swamy

*Settled by*

V.P. Sarthi, Advocate

*Filed by*

C.V. Subba Rao, Advocate

on 25.2.1986

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<sup>9</sup> of the Constitution of India, added by the author

<sup>10</sup> affected, spelling incorrect, corrected by the author

<sup>11</sup> of the Constitution of India, added by the author

<sup>12</sup> passed, added by the author

# DOCUMENT 13

## Written Submissions of the Petitioners, Dr. D.C. Wadhwa and Others

In the Supreme Court of India  
Extraordinary Original Jurisdiction  
Civil Writ Petition No. 412-415 of 1984

*In the Matter of*

<b>Petitioners</b>		<b>Respondents</b>
Dr. D.C. Wadhwa and others	v.	State of Bihar and others

### Written Submissions of the Petitioners

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(ii) The Indian Councils Act, 1861 (24 and 25 Vict., c. 67), section 23	15
(iii) The Government of India Act (5 and 6 Geo. 5, c. 61 as amended by 6 and 7 Geo. 5, c. 37 and 9 and 10 Geo. 5, c. 101), section 72	16, 18, 22
(iv) The Government of India Act, 1935 (26 Geo. 5, c. 2), sections 42-43, 88	17-19, 96 (xiii)
(v) The India and Burma (Emergency Provisions) Act, 1940 (3 and 4 Geo. 6, c. 33), section 3	22
<b>2. Passed by the Governor-General of India in Council</b>	
(i) The Emergency Legislation Continuance Act, 1915 (Central Act 1 of 1915), section 2	21

**3. Passed by the Parliament of India**

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|------|--|-------|
| (i)  | The Constitution (38th Amendment)<br>Act, 1975, section 3  | 66-67 |
| (ii) | The Constitution (44th Amendment)<br>Act, 1978, section 27 | 66-67 |

**III. Books**

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|-------|---|-------|
| (i)   | <i>Indian Constitutional Documents (1600-1918)</i><br>by Panchanandas Mukherji, Calcutta, 1918,<br>Vol. 1, pp. 103-122                      | 35-37 |
| (ii)  | <i>The Constitutional History of England</i> by<br>William Stubbs, Oxford, 1883, 3rd Edition,<br>Vol. 2, p. 612                             | 33    |
| (iii) | <i>View of the State of Europe During the Middle<br/>Ages</i> by Henry Hallam, London, 1856,<br>11th Edition, Vol. 3, pp. 49 and 51         | 33    |
| (iv)  | <i>Select Titles from the Digest of Justinian</i><br>edited by Thomas Erskine Holland and Charles<br>Lancelot Shadwell, Oxford, 1874, p. 15 | 101   |
| (v)   | <i>The Digest of Justinian</i> translated by Charles<br>Henry Monro, Cambridge, 1904, Vol. 1, p. 21   | 101   |

**IV. Dictionary**

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|--|---|----|
|  | <i>A New English Dictionary on Historical<br/>Principles</i> edited by James A.H. Murray,<br>Oxford, 1905, Vol. 7, Part 1, p. 186, column 2 | 61 |
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**PART ONE : THE ISSUE*****I. The Issue***

1. This Writ Petition challenges the validity of the practice of re-promulgation of Ordinances being followed in the State of Bihar. According to this practice an Ordinance promulgated by its Governor is repeated again and again by promulgating another Ordinance having exactly the same substance as the earlier one on or before the date of expiry of the earlier Ordinance. This is done to prolong the life of the expiring Ordinance when it is about to come to an end. As an illustration, the Governor of this State promulgates an Ordinance, say 'A', on a certain date. When that Ordinance approaches its expiry date, in accordance with the provisions of Article 213 of the Constitution, he promulgates another Ordinance, say 'B', on the same subject and with exactly the same contents, by which he also repeals Ordinance 'A'. When Ordinance 'B' approaches its expiry date, he promulgates another exactly identical Ordinance, say 'C', by which he also repeals Ordinance 'B'. In this manner he goes on replacing one Ordinance by an exactly identical other Ordinance year after year for years together till the last Ordinance promulgated by him on the subject is replaced by an Act of the State Legislature or is allowed to expire. The fundamental issue which this Writ Petition raises is whether this practice is *ultra vires* the constitutional provisions embodied in Article 213 of the Constitution of India.

2. The petitioners submit that by the present Writ Petition they are raising a question of utmost public importance and constitutional interpretation which has to be decided in the national interest. Otherwise, what Bihar is today, India will be tomorrow.

**PART TWO : THE BACKGROUND MATERIAL*****II. Constitutional Provisions Regarding the Ordinance-making Power of the Governor of a State and the Sessions of the State Legislatures*****A. ORDINANCE-MAKING POWER OF THE GOVERNOR****Article 213 of the Constitution of India**

3. 213. Power of Governor to promulgate Ordinances during recess of Legislature —

- (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:  
Provided that the Governor shall not, without instructions from the President promulgate any such ordinance if —
  - (a) a Bill containing the same provisions would under this Constitution have required the previous sanction of the President for the introduction thereof into the Legislature; or
  - (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President; or
  - (c) an Act of the Legislature of the State containing the same provisions would under this Constitution have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President.
- (2) An Ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance —
  - (a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and
  - (b) may be withdrawn at any time by the Governor.

*Explanation* — Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

- (3) If and so far as an Ordinance under this Article makes any provision which would not be valid if enacted in an Act of the Legislature of the State assented to by the Governor, it shall be void:

Provided that, for the purposes of the provisions of this Constitution relating to the effect of an Act of the Legislature of a State which is repugnant to an Act of Parliament or an existing law with respect to a matter enumerated in the Concurrent List, an Ordinance promulgated under this Article in pursuance of instructions from the President shall be deemed to be an Act of the Legislature of the State which has been reserved for the consideration of the President and assented to by him.

## B. SESSIONS OF THE STATE LEGISLATURES

### Article 174 of the Constitution of India

#### 4. 174. Sessions of the State Legislature, prorogation and dissolution —

- (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.
- (2) The Governor may from time to time —
- (a) prorogue the House or either House;
  - (b) dissolve the Legislative Assembly.

### *III. Life of Ordinances in the State of Bihar*

5. The practice of prolonging the lives of Ordinances by successively repeating the terms of an Ordinance when its normal term under the provisions of Article 213 of the Constitution of India is about to end is being followed in this State since 1967. The successive Governors of the State have been extending the lives of hundreds of Ordinances, since then, by a contrivance, known as re-promulgation of Ordinances, to evade the limitation as to the duration of those Ordinances imposed by the Constitution.

6. The *modus operandi* for re-promulgation of Ordinances is as follows:

- (a) Immediately at the conclusion of each session of the State Legislature, a circular letter is sent by the Parliamentary Affairs Department of the State Government to all the Commissioners and Secretaries, Special Secretaries, Additional Secretaries and Heads of Departments of the State regarding the re-promulgation of Ordinances. In that circular letter, all the abovementioned officers are first informed about the date on which the State Legislature has been "got prorogued". It then points out that under the provisions of Article 213 (2) (a) of the Constitution all the Ordinances cease to be in force after six weeks of the reassembly of the Legislature of the State. It next mentions the dates of reassembly of both the Houses of the State Legislature for that particular session and the date from which all the Ordinances shall cease to operate if not re-promulgated before that date. After conveying all this information to them, the circular letter asks them to get in touch with the Law Department of the State and take immediate action for getting all the concerned Ordinances re-promulgated, so that all those Ordinances are definitely re-promulgated before the dates of their expiry. Finally, the same circular letter tells them that the approval of the Council of Ministers is not necessary for re-promulgation of the Ordinances in such cases where no amendment is proposed to be made in the previous Ordinances. A copy of that circular letter is sent to the Secretary, Law Department and the Deputy Secretary, Law (Legislative) Department, for information and necessary action. It may be pointed out here that though the word 're-promulgation' does not appear in the re-promulgated Ordinances, the use of that word five times in the circular letter is certainly not a slip of the pen. Not only is the word 're-promulgation' used five times, even the subject matter itself of the circular letter is also mentioned in it as "Re-promulgation of Ordinances".
- (b) Immediately on the receipt of that circular letter, all the Departments submit their files of the Ordinances to be re-promulgated to the Law Department. The Law Department then prepares two lists of the Ordinances to be re-promulgated. The first list contains the names of the Ordinances which are to be



re-promulgated with the approval of the Governor only. The second list contains the names of the Ordinances to be re-promulgated after receiving the permission of the President of India. Both these lists, together with the relevant files with an endorsement that the provisions of these Ordinances are proper in the eyes of law, are sent by the Law Department to the Governor's Secretariat.

- (c) The copies of the Ordinances to be re-promulgated with the approval of the Governor, as shown in the first list, are submitted to the Governor for his approval and signature. The Governor approves and signs them soon after they are submitted to him. The Ordinances duly signed by him are then sent back to the Law Department for re-promulgation by getting them published in the State Gazette.
- (d) As regards the re-promulgation of Ordinances listed in the second list, where the prior approval of the President for their re-promulgation is necessary, a separate letter for each of those Ordinances is sent by the Governor's Secretariat to the Ministry of Home Affairs, Government of India, for seeking the approval of the President, for re-promulgating that Ordinance, under the provisions of the proviso to clause (1) of Article 213 of the Constitution of India.
- (e) Every such letter informs the Ministry of Home Affairs about the date on which that Ordinance was last promulgated, then about the dates on which the last session of the State Legislature was held after the last promulgation of the Ordinance and says that the Ordinance could not be converted into an Act of the State Legislature during that session. The reason for not enacting the Ordinance into an Act, given in each letter, is almost the same, namely, that the State Legislature was busy with the discussion of the Governor's Address, Budget and passing the Appropriation Bill or that the State Legislature was pre-occupied with passing the Supplementary Budget, though sometimes the only reason given is want of time. Next, after mentioning the date on which that Ordinance shall cease to operate, the letter informs the Ministry of Home Affairs the State Government's decision to promulgate another Ordinance on the subject containing exactly the same provisions as in the existing Ordinance before the date

of its expiry. Some letters say that the contents of the proposed Ordinance are exactly the same as those of the existing one. Lastly, the letter requests the Ministry of Home Affairs to obtain the instructions of the President for the promulgation of that Ordinance and communicate the same to the Government at an early date and in any case not later than the date of expiry of that Ordinance.

- (f) Though most of such letters sent by the Governor's Secretariat to the Ministry of Home Affairs attempt, by not using the word "re-promulgation", to keep their own counsel, yet some of them let the cat out of the bag when they say that the Ordinance was re-promulgated from time to time to save its life or that the life of the Ordinance had been extended from time to time or that the State Government had, therefore, decided to re-promulgate the Ordinance or the Ordinance which was due to expire on a particular date was re-promulgated on such and such a date and that it was necessary that the Ordinance should be promulgated again before its date of expiry in order to keep the administrative machinery working.
- (g) The sanction of the President to the re-promulgation of those Ordinances is conveyed either (i) through the Resident Commissioner, Government of Bihar, New Delhi, who, through a teleprinter message, informs the Governor's Secretariat, with a copy of that message to the Chief Secretary and the Law Secretary, Government of Bihar, of the approval of the President to the promulgation of the Ordinance or (ii) directly by the Home Ministry to the Governor's Secretariat either by a teleprinter message or by a Police Wireless message saying that the President approves the promulgation of the particular Ordinance. A formal letter of approval follows.
- (h) Immediately on the receipt of the teleprinter message or the Police Wireless message, as the case may be, the Governor signs all those Ordinances mentioned in that message and sends them to the Law Department for promulgating them.
- (i) The formal letter, marked as 'most immediate' and sent, by registered post, separately for each of the Ordinances to be re-promulgated, conveys the instructions of the President as contained in the enclosed Order which says that in pursuance of proviso to clause (1) of Article 213 of the Constitution, the

President approves the promulgation by the Governor of Bihar of the particular Ordinance. That Order is issued by Order and in the name of the President and is signed by the Deputy Secretary/ Director of the Ministry of Home Affairs, Government of India.

- (j) Particular care is taken, at the time of re-promulgating an Ordinance, to provide for the repeal of the existing Ordinance. In this way, though earlier Ordinances are repealed, their provisions, even without being shifted about, reappear in the new Ordinances which, therefore, are nothing but mere reproduction of the old Ordinances.

7. In this way, the Government of Bihar, through its Governor, kept alive 256 Ordinances for periods ranging from one to 14 years from 1967 till the end of 1981.

8. The following Table gives the distribution of those 256 Ordinances by their life-groups.

Life-groups (Years)	Number of Ordinances
00-01	59
01-02	51
02-03	45
03-04	21
04-05	21
05-06	21
06-07	11
07-08	08
08-09	04
09-10	04
10-11	06
11-12	04
12-13	00
13-14	01
<b>Total</b>	<b>256</b>

Source : Annexure 'A' to the Writ Petition, the Book, p.13

9. Out of these 256 Ordinances, 69 Ordinances were kept alive for the above periods with the prior permission of the President of India. The following Table shows the distribution of those 69 Ordinances according to their life-groups.

Life-groups (Years)	Number of Ordinances
00-01	21
01-02	13
02-03	15
03-04	06
04-05	04
05-06	02
06-07	02
07-08	02
08-09	00
09-10	01
10-11	02
11-12	00
12-13	00
13-14	01
<b>Total</b>	<b>69</b>

Source: Annexure 'A' to the Writ Petition, the Book, p. 14

10. A few instances of those Ordinances are given below:

(The data given below are from Table 8 of the Annexure 'A' to the Writ Petition, the Book, pp. 114, 116, 117, 118, 120, 123, 124, 126, 127, 129, 131, 132, 133, 135, 136, 137, 140, 141, 143, 144, 150, 151, 152 and 153).

S.No. (1)	Name of the Ordinance (2)	Date on Which First Promulgated (3)	Life of the Ordinance (4)		
			Years	Months	Days
(i)	The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1968 (Ordinance No. 3 of 1968)	13.01.1968	13	11	19
(ii)	The Bihar Panchayati Raj (Amending and Validating) Ordinance, 1970 (Ordinance No. 3 of 1970)	14.08.1970	11	4	18
(iii)	The Bihar Hindu Religious Trusts (Amendment) Ordinance, 1970 (Ordinance No. 5 of 1970)	05.09.1970	11	3	26
(iv)	The State Aid to Industries (Amendment) Ordinance, 1970 (Ordinance No. 8 of 1970)	10.09.1970	11	3	21
(v)	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1970 (Ordinance No. 9 of 1970)	17.09.1970	11	3	14
(vi)	The Bihar Soil and Water Conservation and Land Development Ordinance, 1971 (Ordinance No. 16 of 1971)	10.02.1971	10	10	19
(vii)	The Bihar Panchayati Raj (Amendment) Ordinance, 1971 (Ordinance No. 54 of 1971)	15.05.1971	10	7	17

S.No. (1)	Name of the Ordinance (2)	Date on Which First Promulgated (3)	Life of the Ordinance (4)		
			Years	Months	Days
(viii)	The Bihar Municipal (Third Amendment) Ordinance, 1971 (Ordinance No. 57 of 1971)	20.05.1971	10	7	12
(ix)	The Patna Municipal Corporation (Amendment) Ordinance, 1971 (Ordinance No. 58 of 1971)	22.05.1971	10	7	10
(x)	The Bihar State Housing Board Ordinance, 1971 (Ordinance No. 101 of 1971)	14.09.1971	10	3	17
(xi)	The Bihar Co-operative Societies (Second Amendment) Ordinance, 1971 (Ordinance No. 103 of 1971)	07.10.1971	10	2	25
(xii)	The Bihar Agricultural Produce Markets (Amendment) Ordinance, 1972 (Ordinance No. 6 of 1972)	14.02.1972	9	10	16
(xiii)	The Bihar Medical Educational Institutions (Regulation and Control) Ordinance, 1972 (Ordinance No. 69 of 1972)	14.05.1972	9	7	18
(xiv)	The Rajendra Agricultural University (Amendment) Ordinance, 1973 (Ordinance No. 2 of 1973)	15.01.1973	8	11	17

(1)	(2)	Date on Which First Promulgated (3)	Life of the Ordinance (4)		
			Years	Months	Days
(xv)	The Bihar Panchayati Raj (Validating) Ordinance, 1973 (Ordinance No. 5 of 1973)	22.02.1973	8	10	7
(xvi)	The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Ordinance, 1973 (Ordinance No. 6 of 1973)	22.02.1973	8	10	7
(xvii)	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1973 (Ordinance No. 122 of 1973)	01.10.1973	8	3	0
(xviii)	The Motor Vehicles Bihar (Amendment) Ordinance, 1971 (Ordinance No. 56 of 1971)	20.05.1971	7	8	17
(xix)	The Bihar State Aid to Industries (Second Amendment) Ordinance, 1974 (Ordinance No. 56 of 1974)	27.04.1974	7	8	4
(xx)	The Bihar Irrigation Laws (Amendment) Ordinance, 1974 (Ordinance No. 169 of 1974)	27.08.1974	7	4	5
(xxi)	The Bihar Irrigation Field Channel (Amendment) Ordinance, 1974 (Ordinance No. 170 of 1974)	29.08.1974	7	4	3

(1)	(2)	Date on Which First Promulgated (3)	Life of the Ordinance (4)		
			Years	Months	Days
(xxii)	The Bihar Soil and Water Conservation and Land Development (Amendment) Ordinance, 1974 (Ordinance No. 174 of 1974)	16.09.1974	7	3	15
(xxiii)	The Bihar Gramdan (Amendment) Ordinance, 1972 (Ordinance No. 12 of 1972)	26.02.1972	6	5	27
(xxiv)	The Bihar Primary Education (Amendment) Ordinance, 1970 (Ordinance No. 6 of 1970)	05.09.1970	6	3	26
(xxv)	The Bihar Regional Development Authority Ordinance, 1974 (Ordinance No. 175 of 1974)	19.09.1974	6	3	12
(xxvi)	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Fifth Amendment) Ordinance, 1975 (Ordinance No. 197 of 1975)	29.10.1975	6	2	3
(xxvii)	The Bihar Motor Vehicles Taxation (Fifth Amendment) Ordinance, 1975 (Ordinance No. 207 of 1975)	29.11.1975	6	1	2



(1)	(2)	(3)	(4)		
			Years	Months	Days
(xxviii)	The Bihar Cess (Amendment) Ordinance, 1975 (Ordinance No. 209 of 1975)	02.12.1975	6	1	0
(xxix)	The Bihar Public Land Encroachment (Amendment) Ordinance, 1975 (Ordinance No. 210 of 1975)	05.12.1975	6	0	27
(xxx)	The Bihar Motor Vehicles Taxation (Sixth Amendment) Ordinance, 1975 (Ordinance No. 212 of 1975)	05.12.1975	6	0	27
(xxxi)	The Bihar Motor Vehicles Taxation (Seventh Amendment) Ordinance, 1975 (Ordinance No. 214 of 1975)	05.12.1975	6	0	27

11. Between 1971 and 1981, while the Legislature enacted 163 Acts, the Governor of the State promulgated 1959 Ordinances (Annexure 'A' to the Writ Petition, the Book, Table 1, p. 84). It has not been uncommon for the Governor of this State to promulgate as many as 50 Ordinances a day (Annexure 'A' to the Writ Petition, the Book, Table 3, pp. 88-90).

12. The re-promulgation of Ordinances has been resorted to, as a matter of routine, to such an extent and on such a vast scale covering all subjects in this State that it has become inveterate habit there. Even this Hon'ble Court was prompted to observe in *A.K. Roy v. Union of India* (1982) 2 S.C.R. 272 at 285 as under:

“One of the larger States in India has manifested its addiction to that power by making an overgenerous use of it — so generous indeed, that Ordinances which lapsed by efflux of time were renewed successively by a chain of kindred creatures, one after another. And,

the Ordinances embrace everything under the sun, from prince to pauper and crimes to contracts.”

13. The petitioners have in particular challenged the constitutionality of the following three Ordinances:

- (i) The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 (Ordinance No. 20 of 1983) which was first promulgated on 1-6-1977.
- (ii) The Bihar Intermediate Education Council (Third) Ordinance, 1983 (Ordinance No. 19 of 1983) first promulgated on 31-12-1979.
- (iii) The Bihar Bricks Supplies (Control) Third Ordinance, 1983 (Ordinance No. 21 of 1983) first promulgated on 3-12-1982.

14. These Ordinances are, however, only symptomatic of the practice of re-promulgating Ordinances which is prevalent in the State of Bihar. The petitioners basically question the validity of this practice as being violative of Article 213 of the Constitution.

#### *IV. Genesis of the Ordinance-making Power in India*

15. The power to promulgate Ordinances was conferred on the Governor-General of India for the first time by section 23 of the Indian Councils Act, 1861 (24 and 25 Vict., c. 67). That section provided that in cases of emergency, the Governor-General could make and promulgate Ordinances for the peace and good government of British India. Every such Ordinance was to have the like force of law as a law or a Regulation made by the Governor-General-in-Council. The duration of those Ordinances was limited to a period of not more than six months from their promulgation.

16. The abovementioned power of the Governor-General to promulgate Ordinances was continued by section 72 of the Government of India Act (5 and 6 Geo. 5, c. 61 as amended by 6 and 7 Geo. 5, c. 37 and 9 and 10 Geo. 5, c. 101).

17. Under the Government of India Act, 1935 (26 Geo. 5, c. 2), section 42 of that Act conferred power on the Governor-General to promulgate Ordinances only when the Legislature was not in session, while section 43 of that Act empowered him to promulgate Ordinances with respect to certain subjects at any time, even when the Legislature was in session, where the

Governor-General was required to exercise his own discretion. As regards the lives of Ordinances promulgated under the provisions of sections 42 and 43, the Ordinances promulgated under section 42 were to cease to operate at the expiration of six weeks from the reassembly of the legislature, while Ordinances promulgated under section 43 were to continue in operation for such period not exceeding six months as was specified therein but could by a subsequent Ordinance be extended for a further period not exceeding six months.

18. Part II (sections 5 to 45) of the Government of India Act, 1935, had envisaged the establishment of the Federation of India. As the federal structure did not come into being, sections 42 and 43 of the Government of India Act, 1935, were never brought into force. The power of the Governor-General to promulgate Ordinances, thus, was not governed by sections 42 and 43 of the Government of India Act, 1935, but continued to be governed by section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935.

19. The Governors of the Provinces were given power to promulgate Ordinances for the first time by section 88 of the Government of India Act, 1935. The provisions of section 88 of the Government of India Act, 1935, were exactly identical to the provisions contained in Article 213 of the Constitution of India. Thus, under the Government of India Act, 1935, also the Ordinances promulgated by the Governors ceased to have effect after six weeks from the reassembly of the legislatures unless disapproved earlier by their resolutions.

20. Thus, right from the inception of this power of promulgating Ordinances in 1861 till the coming into force of the Constitution of India in 1950 there was no provision in any of the Constitutional Acts empowering the Governor-General or the Governor to extend the life of one Ordinance by a subsequent Ordinance; on the other hand, there was an express provision in all those Constitutional Acts that an Ordinance shall not remain in force for more than six months. As a matter of fact, no Ordinance has been re-promulgated by the Central Government from 1861 till today.

#### *V. Life of the Ordinances Promulgated During the World Wars*

21. During the First World War, the Emergency Legislation Continuance Act, 1915 (Central Act 1 of 1915) was passed by the Governor-General-in-Council which enacted that the provisions of nine Ordinances promulgated

earlier to meet the emergency created by the War shall continue to be in force during the continuance of the War and for a period of six months thereafter.

22. As regards the life of Ordinances promulgated during the Second World War, the words "for the space of not more than six months from its promulgation" in section 72 of the Government of India Act as set out in the Ninth Schedule to the Government of India Act, 1935, were deleted by section 3 of the India and Burma (Emergency Provisions) Act, 1940 (3 and 4 Geo. 6, c. 33) for the period of emergency created by the War which lasted up to March 31, 1946. From April 1, 1946, however, section 72 continued to operate in its original form, that is to say, the power of the Governor-General to promulgate Ordinances was subject to the Ordinances remaining in force for not more than six months from their promulgation.

### *VI. Constituent Assembly's Understanding about the Life of an Ordinance*

#### A. PRESIDENTIAL ORDINANCES (CONSTITUENT ASSEMBLY DEBATES, VOL. 8, 1949, 16-5-1949 to 16-6-1949, pp. 202-215)

23. The Constituent Assembly devoted careful attention to the Ordinance-making power of the President provided in Article 102 of the Draft Constitution. As the common understanding of the Assembly, of the constitutional provisions contained in that Article, was that the maximum duration of an Ordinance could be 7½ months, many members expressed the opinion that the said period was much too long and moved amendments to curtail it.

24. Among those amendments was that of Mr. H.V. Kamath providing that an Ordinance should be laid before both the Houses of Parliament within four weeks of its promulgation. As Article 102 provided that an Ordinance shall cease to operate within six weeks after the reassembly of the Parliament, his amendment, if accepted, would have given an Ordinance a life of ten weeks at the most. He vehemently opposed an Ordinance remaining in force for 7½ months on the ground that even during the British rule an Ordinance promulgated by the Governor-General could not remain in force for more than six months.

25. Pandit H.N. Kunzru also objected to an Ordinance remaining in force

for 7½ months. He moved an amendment that every Ordinance shall cease to operate at the expiration of 30 days from its promulgation. Thus, he wanted the maximum life of an Ordinance promulgated by the President fixed at 30 days.

26. Professor K.T. Shah's amendment provided that every Ordinance shall be laid before both the Houses of Parliament immediately after each House reassembled and unless approved by either House of Parliament by specific resolution, should cease to operate forthwith. He was of the opinion that unless Parliament approved and thereby made an Ordinance, so to say, its own Act, legislation made by the Executive should not be allowed to remain in force for more than six weeks at the most.

27. Mr. Mahboob Ali Baig described an Ordinance remaining in force for 7½ months as Executive oppression.

28. Dr. B.R. Ambedkar described the fears, expressed by the members, that the Executive might delay the summoning of Parliament to prolong the life of an Ordinance as unfounded. He expressed his belief that owing to the exigencies of parliamentary business, Parliament would reassemble more frequently and that the necessity of the Government to maintain the confidence of Parliament would ensure that no dilatory process was adopted by the Government to permit an Ordinance to remain in force for unduly long.

**B. GOVERNORS' ORDINANCES**  
(CONSTITUENT ASSEMBLY DEBATES, VOL. 8, 1949,  
16-5-1949 to 16-6-1949, pp. 869-872)

29. Subsequently, the Constituent Assembly considered the power of the Governors to promulgate Ordinances. The proceedings of the debate in the Constituent Assembly once again show that the members understood the draft provisions to mean that Ordinances would remain in force for not more than 7½ months. A law made by the Executive remaining in force for this period was wholly unacceptable to them. Here again, an attempt was made to get that period curtailed.

30. Pandit H.N. Kunzru wanted that an Ordinance promulgated by the Governor of a State should not remain in force for more than fourteen days.

31. Professor Shibban Lal Saxena was of the view that the Governor of a State should not be vested with Ordinance-making power at all.

32. As similar amendments had been negatived when the President's power to promulgate Ordinances was debated, the Constituent Assembly ultimately negatived these amendments as well.

### ***VII. Life of Ordinances During the Middle Ages in the United Kingdom***

33. Though the Executive in the United Kingdom does not enjoy any power of legislation by means of Ordinances these days, the Kings in England used to promulgate Ordinances in the Middle Ages. Even in those days Ordinances had "temporary operation" and were "tentative" measures. Only those Ordinances which had received the *positive assent of both the Houses of Parliament* (emphasis added), that is, only those Ordinances which were converted into Acts by the Parliament in its next session after their promulgation were entered upon the statute-book (*vide View of the State of Europe During the Middle Ages* by Henry Hallam, London, 1856, 11th Edition, Vol. 3, pp. 49 and 51 and *The Constitutional History of England* by William Stubbs, Oxford, 1883, 3rd Edition, Vol. 2, p. 612).

### ***VIII. Directions of the Court of Directors of the East India Company Regarding Law-making in India***

34. In the beginning of the British rule, the territories of India were divided into the Presidencies of Bengal, Bombay and Madras for administrative purposes. As regards the sources of legislation, from 1793 to 1833, the Governors-in-Councils of those Presidencies made laws, known as Regulations, for the administration of territories in their respective jurisdictions. In 1833, the Charter Act of 1833 (3 and 4 William 4, c. 85) was passed, which raised the Governor-General of Bengal to the position of the Governor-General of India (section 39), withdrew the legislative powers of the Bombay and Madras Governments (section 59) and vested the whole legislative authority, for all the British territories in India, in the Governor-General of India in Council (section 43). There was, thus, established one central legislative authority in place of three councils which had existed earlier. To the body of the Governor-General's Council was added, for the first time, a fourth ordinary member for legislative purposes (section 40).

35. In their Despatch No. 44, dated December 10, 1834 (*Indian Constitutional Documents* (1600-1918) by Panchanandas Mukherji, Calcutta,

1918, Vol. 1, pp. 103-122), accompanying the abovementioned Charter Act of 1833, the Court of Directors of the East India Company, London, wrote to the Governor-General of India that making of law “may take place in many ways and the means of effecting it are easy of contrivance” but the process by which the law is to be made “is matter of nicety and to be settled with much thought and care.”

36. While enumerating the principles, to be kept in mind by the Governor-General of India, with regard to the use of the legislative powers conferred upon him, the Court of Directors wrote to him: “The first principle is that no law, except one of an occasional kind, or arising out of some pressing emergency, should be passed without having been submitted to mature deliberation and discussion” (*ibid.*, paragraph 15, p. 107).

37. After pointing out that in their country “the length and publicity of the process by which a law passes from the shape of a project into that of a complete enactment, and the conflict of opinions through which the transit must be made, constitute a security against rash or thoughtless legislation”, they directed the Governor-General to provide by positive rules

“that every project or proposal of a law shall travel through a defined succession of stages in Council before it is finally adopted; that at each stage it shall be amply discussed; and that the intervals of discussion shall be such as to allow to each member of Council adequate opportunity of reflection and enquiry” (*ibid.*, paragraph 16, p. 107).

### PART THREE : PROPOSITIONS IN BRIEF

#### *IX. Main Propositions*

38. The main propositions of the petitioners are stated below for convenience:

- (i) **Textually**, Article 213 can be resorted to only if circumstances have arisen at the time of promulgating an Ordinance requiring immediate legislation. This ingredient is missing in the present case.
- (ii) **Functionally**, the Governor is not the law-maker for the State and the slightest transgression by him of the confining bounds

of the very limited extraordinary legislative power given to him must render his action void.

- (iii) *Historically*, the debates in the Constituent Assembly show the very limited duration envisaged for the Ordinances.
- (iv) *Factually*, in this case the constitutional requirement of Cabinet advice as a condition precedent to the exercise of the Governor's power has not been fulfilled, which renders his action void.
- (v) *Constitutionally*, the Union and the State Governments must function in a democratic manner and any action conflicting with the established norms of democracy must be
  - (a) regarded as illegal, and
  - (b) viewed with suspicion where *bona fide* is challenged.
- (vi) As a matter of *interpretation*, an extraordinary limited power must be interpreted narrowly if there is a doubt.

#### PART FOUR : PROPOSITIONS IN DETAIL

##### *X. Separation of Powers*

39. The Constitution of India allots the legislative powers and the executive powers to two different constitutional organs. It is true that the classical theory of separation of powers has not been articulated in the Constitution of India in so many words and may not apply in all its fullness to India. At the same time, it cannot be overlooked that implicit in the constitutional scheme is the principle that the organ to which a particular power is allotted should exercise that power and the power should not be exercised by any other organ.

40. It is clear from the *Kesavananda Bharati's* case (1973, Supp. S.C.R. 1) that the separation of powers among the legislature, executive and judiciary forms the basic structure of the Constitution which cannot, according to the majority decision in that case, be changed even by resorting to Article 368 of the Constitution of India. The re-promulgation of Ordinances 'tears away the heart' of the separation of powers.

41. In *Rai Sahib Ram Jawaya Kapur v. The State of Punjab* (1955, 2 S.C.R. 225 at 235-236), this Hon'ble Court has held that

"our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another."



42. Democracy cannot survive unless three organs of the state, namely, the legislature, the executive and the judiciary confine their functions to their respective fields. Any upsetting of the balance of power among these three organs will destroy the basis of democratic functioning.

43. In *Indira Nehru Gandhi v. Raj Narain* (1976, 2 S.C.R. 347 at 668), Chandrachud, J. (as the learned Chief Justice then was) has rightly observed that

“the concentration of powers in any one organ may, by upsetting that fine balance between the three organs, destroy the fundamental premises of a democratic government to which we are pledged.”

44. The above observation was approvingly quoted by Bhagwati, J. (as the learned Chief Justice then was) in the *Minerva Mills Ltd. and others v. Union of India and others* (1981, 1 S.C.R. 206 at 286).

45. The preamble to the Constitution proclaims India to be a democratic republic. In *Kesavananda Bharati's case (supra)* all the seven judges who constituted the majority were of the opinion that the democratic polity was a part of the basic structure of the Constitution. Thus, each and every provision of the Constitution ought to be implemented in the light of this governing philosophy. Free and open discussion of a legislative measure by the people's elected representatives is a basic tenet of a parliamentary democracy and essence of democratic process. The re-promulgation of Ordinances by its very nature does not and cannot satisfy the above-mentioned basic requirements of law-making in a democratic set-up like ours.

### ***XI. Ordinance-making Power is an Extraordinary, Temporary and Limited Legislative Power***

46. Though under the scheme of the Constitution of India the power to legislate has been given to the legislature, exceptions have been made in the Constitution itself to meet the emergent situations. The power to promulgate Ordinances having the force of law is of a temporary nature and is given to the Head of the Executive, both at the Union level and in the states. Since this power is an exception to the implicit scheme of separation of powers in the Constitution, it is qualified by a stringent condition precedent, namely, the existence of an emergent situation. Until and unless this essential and constitutional condition precedent to the exercise of this power is satisfied, no Ordinance can be promulgated.

47. In *R. C. Cooper v. Union of India* (1970, 2 S.C.R. 530 at 559), this Hon'ble Court has held as under:

“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.”

48. In *R. K. Garg v. Union of India* (1982, 1 S.C.R. 947 at 965), this Hon'ble Court has held that

“the President is invested with this legislative power only in order to enable the Executive to tide over an emergent situation which may arise whilst the Houses of Parliament are not in session.”

49. In *A. K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 290), this Hon'ble Court has held:

“The mechanics of the President's legislative power was devised evidently in order to take care of urgent situations which cannot brook delay.”

50. As Article 213 of the Constitution contains the same provisions, as provided in Article 123, *mutatis mutandis*, for the Governors of the states, it is obvious that like the President, the Governor of a state also is basically an Executive Head. It was never the intention of the framers of the Constitution that he should go on functioning as the parallel legislature of the state. In any determination of the question this consideration seems to be of paramount importance.

51. It is obvious from the provisions of Article 245 of the Constitution that its framers intended the law-making functions of the states to be discharged by the state legislatures only. It was only to deal with the emergent situations when the state legislature was not in session and it was essential to make an enactment to meet that situation that a limited Ordinance-making power was conferred on the Executive. The Governor of a state can promulgate an Ordinance only when

- (a) the state legislature is not in session;
- (b) an emergent situation has arisen which cannot be dealt with under the existing law;
- (c) the circumstances are such as require immediate enactment of a new law;

- (d) the enactment of a new law cannot be delayed till the legislature reassembles; and
- (e) he is satisfied about the existence of those circumstances and the necessity of taking immediate action in the form of promulgation of an Ordinance.

52. All the above conditions must be cumulatively satisfied before the exercise of power under Article 213. The re-promulgation of Ordinances by its very nature cannot and does not satisfy the pre-conditions of urgency, emergency and the need for immediate action.

53. It is true that Article 213 (2) provides that an Ordinance promulgated by the Governor shall have the same effect as a law passed by the state legislature. There is, however, one crucial difference between the two. The legislation made by the state legislature is of permanent character, unless specified otherwise therein. But no Ordinance can have a life of more than six weeks from the date of reassembly of the legislature after its promulgation.

54. A limitation as to the duration of the Ordinances has been constitutionally imposed because the Ordinance-making power is a deviation from the normal process of law-making which, in a democracy, vests in the legislature. This limited deviation has been incorporated into our Constitution by the framers of the Constitution only to enable the Executive to make laws in situations which can brook no delay.

55. In *R. K. Garg v. Union of India* (1982, 1 S.C.R. 947 at 965), this Hon'ble Court has held:

“It may be noted, and this was pointed out forcibly by Dr. Ambedkar while replying to the criticism against the introduction of Article 123 in the Constituent Assembly, that the legislative power conferred on the President under this Article is not a parallel power of legislation. It is a power exercisable only when both Houses of Parliament are not in session and it has been conferred ex-necessitate in order to enable the Executive to meet an emergent situation. Moreover, the law made by the President by issuing an Ordinance is of strictly limited duration. It ceases to operate at the expiration of six weeks from the reassembly of Parliament or if before the expiration of this period, resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions.”

56. In *A. K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 288), this

Hon'ble Court has held that

“the only distinction which the Constitution makes between a law made by the Parliament and an Ordinance issued by the President is that whereas the life of a law made by the Parliament would depend upon the terms of that law, an Ordinance, by reason of sub-clause (a) of clause (2), ceases to operate at the expiration of six weeks from the reassembly of Parliament, unless resolutions disapproving it are passed by both Houses before the expiration of that period.”

57. The limited emergency legislative power of the Executive is itself an essential feature of the Constitution, a part of its basic structure, namely, the separation of powers. If the limited emergency legislative power of the Executive is converted into an unlimited one, the entire character of the Constitution with respect to the separation of powers would change. Thus, any attempt to enlarge, directly or indirectly, the limited emergency legislative power of the Executive into an unlimited ordinary legislative power would be violative of the basic structure of the Constitution. Article 213 did not confer power on the Executive to promulgate Ordinances so as to destroy the basic structure of the Constitution.

58. Since the Constitution has conferred only an extraordinary limited legislative power on the Executive, the Executive cannot through the exercise of that limited power enlarge that very power into an absolute or unlimited power. In other words, the Executive cannot, under any circumstances, expand its extraordinary limited legislative power under Article 213 so as to confer upon itself the power to make permanent laws. If it were permissible for the Executive to enlarge its extraordinary limited legislative power into an ordinary unlimited one, then it was meaningless to place a limitation on the original emergency legislative power of the Executive. The Executive having a limited emergency legislative power cannot get rid of that limitation by any means, directly or indirectly. The re-promulgation of Ordinances is clearly in excess of the limited emergency legislative power of the Executive.

59. In *Minerva Mills Ltd. and others v. Union of India and others* (1981, 1 S.C.R. 206 at 240), this Hon'ble Court has held:

“The donee of a limited power cannot by the exercise of that power convert the limited power into an unlimited one.”

60. The practice of successively re-promulgating Ordinances in Bihar, therefore, violates the constitutional scheme in the following manner:

*Firstly*, the Executive comes to exercise the functions of the legislature in a manner not contemplated in the Constitution. It assumes the normal legislative power of the State Legislature in its own hands and thereby encroaches upon the domain of the legislature.

*Secondly*, the legislature, which is the repository of the legislative power of the state and is obliged to legislate after mature deliberation and discussion, is prevented from exercising its legislative functions.

*Thirdly*, the Executive in Bihar has converted its extraordinary limited legislative power into an ordinary unlimited legislative power so as to supplant the normal legislative process. It transgresses the limitation on the legislative power of the Executive as laid down in Article 213.

*Fourthly*, the power of promulgation of an Ordinance is abused by its exercise without the existence of the emergent situation postulated as a constitutional condition precedent for such exercise.

### *XII. Etymological and Dictionary Meaning of the Word 'Ordinance'*

61. The position that Ordinances are temporary measures would emerge clearly if one examines the etymological and dictionary meaning of the word 'Ordinance'.

The word is derived from the Latin word *Ordo* (out of course, uncommon, in an unusual or extraordinary manner, etc.) and is defined for legal purposes as "an authoritative direction, decree or command; in more restricted sense, a public injunction or rule of narrower scope, less permanent nature, or less constitutional character than a law or statute, as a decree of a sovereign, an enactment of a municipal or other local body, etc." (*vide A New English Dictionary on Historical Principles* edited by James A. H. Murray, Oxford, 1905, Vol. 7, Part 1, p. 186, column 2).

Thus, an Ordinance is meant only for temporary measures. The temporary nature of the Ordinances cannot be made permanent by continuous re-promulgation.

### *XIII. Maximum Life of an Ordinance*

62. From the provisions of Article 213 of the Constitution it is clear that an Ordinance promulgated by the Governor of a state can remain in force as long as the legislature of the state does not meet. Even when the legislature meets, the Ordinance does not expire immediately and can remain in force for six weeks from the date of reassembly of the legislature unless before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, in which case it will cease to be in force upon the passing of the resolution or on the resolution being agreed to by the Legislative Council as the case may be.

63. Article 174 (1) of the Constitution, dealing with the sessions of the state legislatures, provides that the House or Houses of the legislature of a state shall be summoned to meet at least twice a year, and six months shall not intervene between their last sitting in one session and the date appointed for their first sitting in the next session.

64. Since Article 213 gives life to an Ordinance at the most for a period of six weeks from the reassembly of the State Legislature, the maximum life of an Ordinance would be governed by Article 174. Thus, the maximum life of an Ordinance can be 7½ months unless it is replaced by an Act or disapproved by the resolution of the legislature before that period. In case the interval between the last sitting of the legislature and the date appointed for its first sitting in the next session is less than six months, the life of an Ordinance expires at the end of six weeks from the reassembly of the legislature, if not replaced by an Act of the legislature or disapproved by its resolution by then. So, within six weeks the legislature must make a law to replace the Ordinance if the continuance of its substance is deemed desirable. If the Ordinance is not replaced by an Act of the legislature within this period, it automatically lapses. Neither the Governor nor the legislature of the state can extend the life of an Ordinance directly or indirectly.

### *XIV. Satisfaction of the Governor under Article 213 is Justiciable*

#### **A. A LONG LINE OF PRECEDENTS**

65. A long line of authority goes to show that when a Statute confers

powers on an authority to take certain action conditioned upon the satisfaction of that authority, the courts have the jurisdiction to intercede and scrutinise whether the facts on which the satisfaction is purported to be based existed at all and whether the facts were such as could lead any reasonable person to come to the satisfaction which was arrived at:

- (i) *Nakkuda Ali v. M. F. De S. Jayaratne* L.R. (1951) A.C. 66.
- (ii) *The Barium Chemicals Ltd. v. The Company Law Board* (1966) Supp. S.C.R. 311.
- (iii) *Alfred Thangarajah Durayappah v. W. J. Fernando* L.R. (1967) 2 A. C. 337.
- (iv) *Padfield v. Minister of Agriculture, Fisheries and Food* (1968) 1 All E. R. 694.
- (v) *Rohtas Industries Ltd. v. S. D. Agarwal* (1969) 3 S.C.R. 108.

#### B. THE CONSTITUTION 38th & 44th AMENDMENTS

66. In 1975, the Constitution was amended. Section 3 of the Constitution (38th Amendment) Act, 1975, inserted clause 4 into Article 213 retrospectively which provided that the satisfaction of the Governor in promulgating an Ordinance

“shall be final and conclusive and shall not be questioned in any court on any ground.”

67. That clause was, however, deleted by section 27 of the Constitution (44th Amendment) Act, 1978, with effect from June 20, 1979. The felt need to amend the Constitution to make the satisfaction of the Governor in promulgating an Ordinance as final and conclusive clearly suggests that prior to the 38th Amendment of the Constitution there was no such finality or immunity from judicial scrutiny. Moreover, the express deletion of a constitutional provision which had provided that the satisfaction of the Governor shall be beyond the ken of judicial review clearly manifests the intention of the Parliament acting in its constituent capacity not to make the satisfaction of the Governor “final and conclusive”.

68. In *A.K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 297), this Hon’ble Court has held:

“It is arguable that the 44th Constitution Amendment Act leaves no

doubt that judicial review is not totally excluded in regard to the question relating to the President's satisfaction."

69. If this is the case with regard to an Ordinance to be promulgated for the first time, it goes without saying that the Court can certainly question and decide the constitutionality of Ordinances that are re-promulgated again and again for a number of years.

70. In *R. C. Cooper v. Union of India* (1970, 3 S.C.R. 530 at 559-560), this Hon'ble Court has, with regard to the power to promulgate an Ordinance under Article 123, held as under:

"Exercise of the power is strictly conditioned. The clause relating to the satisfaction is composite: the satisfaction relates to the existence of circumstances, as well as to the necessity to take immediate action on account of those circumstances. Determination by the President of the existence of circumstances and the necessity to take immediate action on which the satisfaction depends, is not declared final."

### C. BAD FAITH

71. In *R. C. Cooper v. Union of India* (*supra* at 659), Ray, J. (as the learned Chief Justice then was) made the following observation about the challenge to the President's satisfaction in promulgating an Ordinance:

"The only way in which the exercise of power by the President can be challenged is by establishing bad faith or *mala fide* and corrupt motive. *Bad faith will destroy any action*" (emphasis added).

72. In *State of Rajasthan v. Union of India* (1978, 1 S.C.R. 1 at 82-83), Bhagwati, J. (as the learned Chief Justice then was) examined the issue of the satisfaction of the Executive under Article 356 of the Constitution and concluded that

"the existence of the satisfaction can always be challenged on the ground that it is *mala fide* or based on wholly extraneous and irrelevant grounds. This proposition derives support from the decision of the Judicial Committee of the Privy Council in *King Emperor v. Banwari Lal Sarma* (72 I.A. 57) where Viscount Simon, L. C. agreed that the Governor-General in declaring that emergency exists must act *bona fide* and in accordance with his statutory powers."

73. In *Minerva Mills Ltd. and others v. Union of India and others* (1981,



1 S.C.R. 206 at 310), Bhagwati, J. (as the learned Chief Justice then was) reiterated the above rule as being applicable to the President's satisfaction under Article 352 with the following observation:

“One thing is certain that if the satisfaction is *mala fide* or is based on wholly extraneous and irrelevant grounds, the court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter on which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power under Article 352 cl. (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. ... In such a case, it is not the satisfaction arrived at by the President which is challenged but the existence of the satisfaction itself. Where, therefore, the satisfaction is absurd or perverse or *mala fide* or based on a wholly extraneous and irrelevant ground, it would be no satisfaction at all and it would be liable to be challenged before a court.”

#### D. PRIMA-FACIE CASE

74. In *A. K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 297-298), this Hon'ble Court expressed its reluctance in going into the question of justiciability of the existence of the circumstances and their relevance for the formation of opinion in regard to the necessity to take immediate action and promulgate an Ordinance with these observations:

“Why we are not inclined to go into the question as regards the justiciability of the President's satisfaction under Article 123 (1) is that on *the material which is placed before us, it is impossible for us to arrive at a conclusion one way or the other* (emphasis added). ... We are prepared to proceed on the basis that the existence of circumstances which led to the passing of the Ordinance is especially within the knowledge of the Executive. But before casting the burden on the Executive to establish those circumstances, at least a *prima-facie* case must be made out by the challenger to show that there could not have existed any circumstances necessitating the issuance of the Ordinance. Every casual or passing challenge to the existence of circumstances, which rendered it necessary for the President to take immediate action by issuing an Ordinance, will not be enough to shift the burden of proof to the Executive to establish those

circumstances. Since the petitioners have not laid any acceptable foundation for us to hold that no circumstances existed or could have existed which rendered it necessary for the President to take immediate action by promulgating the impugned Ordinance, we are unable to entertain the contention that the Ordinance is unconstitutional for the reason that the pre-conditions to the exercise of the power conferred by Article 123 are not fulfilled. That is why we do not feel called upon to examine the correctness of the submission made by the learned Attorney General that in the very nature of things, the “satisfaction” of the President which is the basis on which he promulgates an Ordinance is founded upon materials which may not be available to others and which may not be disclosed without detriment to public interest and that, the circumstances justifying the issuance of the Ordinance as well as the necessity to issue it lie solely within the President’s judgement and are, therefore, not justiciable.”

75. In this context, the petitioners respectfully submit that the following facts having clear and cogent material not only make out a *prima-facie* case but establish, beyond a shadow of doubt, the non-existence of circumstances necessitating the promulgation of about 50 Ordinances or so a day by the Governor of Bihar for the last so many years. (The dates of different sessions of the Bihar Legislature, the total number of Ordinances promulgated by the Governor of Bihar on different dates and the number of the new Ordinances promulgated by him on different dates, given below, can be seen from Tables 6, 3 and 8 respectively contained in the Annexure ‘A’<sup>1</sup> to the Writ Petition, the Book).

- (i) The Legislative Assembly of Bihar met from July 9 to August 24, 1973, and the Legislative Council from July 16 to August 25, 1973. As all the Ordinances that were in force, after that session of the Legislature, could continue in operation, according to the provisions of the Constitution, only up to August 26, 1973, 54 Ordinances were promulgated on that date itself, that is, August 26, 1973, to replace the expiring Ordinances. One new Ordinance also was promulgated on that date.
- (ii) After that both the Houses of the Legislature met on December 7, 1973. The session of the Legislative Assembly continued up

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<sup>1</sup> Not printed in this volume

to December 21, 1973, and that of the Legislative Council up to December 22, 1973. As all the then existing Ordinances could remain in force only up to January 17, 1974, 49 Ordinances were promulgated on that date, that is, January 17, 1974, to take the place of the old Ordinances.

- (iii) After that both the Houses met from March 18 to April 8, 1974, with the result that all the then existing Ordinances became liable to expire on April 29, 1974. But before their expiry, 50 Ordinances were promulgated — seven on April 27, 34 on April 28, and nine on April 29, 1974 — to take the place of those expiring Ordinances. Four new Ordinances also were promulgated on those dates — two on April 27, one on April 28 and one on April 29, 1974.
- (iv) After that the Legislative Assembly met from June 5 to July 12, 1974, and the Legislative Council from June 12 to July 13, 1974, as a result of which all the then existing Ordinances could remain in force only up to July 23, 1974. Therefore, 51 Ordinances were promulgated on July 23, 1974, itself to replace them. This practice went on and on.
- (v) In 1979, for example, both the Houses reassembled on March 19. The session of the Legislative Assembly lasted up to March 31, 1979, while that of the Legislative Council up to April 8, 1979. After that session of the Legislature, all the then existing Ordinances became due to expire on April 30, 1979. But on April 28, 1979, 49 Ordinances were promulgated to take the place of the expiring Ordinances.
- (vi) After that the Legislative Assembly met from June 26 to July 30, 1979, and the Legislative Council from July 9 to August 1, 1979. As all the then existing Ordinances became liable to expire on August 20, 1979, 51 Ordinances were promulgated on August 18, 1979, to replace those Ordinances.
- (vii) After that both the Houses met from January 24 to February 13, 1980. As all the then existing Ordinances could continue to be in force up to March 5, 1980, only, 52 Ordinances were promulgated on that date, that is, March 5, 1980, itself to replace the old Ordinances.

- (viii) After that the Legislative Assembly met from June 23 to July 25, 1980, and the Legislative Council from June 30 to July 25, 1980, which made all the then existing Ordinances due for expiry on August 11, 1980. Therefore, 49 Ordinances were promulgated on August 11, 1980, itself to replace those Ordinances. One new Ordinance also was promulgated on that date.
- (ix) After that both the Houses met from December 9 to December 22, 1980, and, therefore, all the then existing Ordinances were rendered liable to expire on January 20, 1981. On January 19, 1981, however, 53 Ordinances were promulgated to replace the expiring Ordinances.
- (x) After that both the Houses met from March 12 to March 30, 1981, which made all the then existing Ordinances due for expiry on April 23, 1981. But 59 Ordinances were promulgated — 30 on April 22 and 29 on April 23, 1981 — to replace those dying Ordinances.
- (xi) After that the Legislative Assembly met on June 29 and the Legislative Council on July 1, 1981. The sessions of both the Houses lasted up to July 28, 1981. That rendered all the then existing Ordinances liable to expire on August 12, 1981. But 60 Ordinances were promulgated — 35 on August 11 and 25 on August 12, 1981 — to replace the expiring Ordinances. Two new Ordinances also were promulgated on those dates — one on August 11 and one on August 12, 1981. The practice continues till date.

76. The above massive data prove beyond an iota of doubt that the only circumstances which existed and which made the Governor promulgate about 50 Ordinances or so on different subjects on each occasion was the certainty of expiry of the then existing exactly identical Ordinances on that date.

77. The petitioners submit that the emergent circumstances necessitating the promulgation of an Ordinance within the contemplation of Article 213 cannot include the circumstances arising out of the expiry of an exactly identical Ordinance in accordance with the provisions of the Constitution. It is so because before the expiry of an Ordinance the session of the Legislature is held according to the constitutional provisions and if the emergent situation necessitating the promulgation of that Ordinance continues and if it is deemed

desirable that the provisions of that Ordinance should continue to be in force permanently or for some more time then the legislature should legislate those provisions, that is, it should make an Act of its own to replace the temporary legislation, namely, the Ordinance.

78. The idea behind giving an Ordinance a life of six weeks after the reassembly of the legislature obviously is to enable the Executive to bring a Bill before the legislature and get an Ordinance replaced by the Act of the legislature if the continuation of its provisions is considered necessary. An Ordinance-making power is meant to take a temporary measure to meet an emergent situation. It cannot be used to make permanent or semi-permanent laws.

79. When the session of the legislature is held and the legislature neither replaces an existing Ordinance by its own Act nor disapproves it by its resolution, the fate of the Ordinance is sealed. As the Ordinance is not replaced by an Act of the legislature, it is not approved, by the legislature, for continuation beyond six weeks after the reassembly of the legislature after the promulgation of the Ordinance. In other words, it leads to the conclusion that the legislature does not think that the circumstances requiring the promulgation of that Ordinance continue to exist, which justify the continuation of the provisions of that Ordinance beyond six weeks after the date of its first reassembly.

80. Secondly, as said earlier, an Ordinance can be promulgated only if an emergent situation arises and that situation cannot be dealt with under an existing law and the enactment of a new law becomes absolutely necessary to meet that emergent situation. In the case of re-promulgation of Ordinances this ingredient is missing. No new emergent situation arises for immediate action. Even if one accepts for the sake of argument that the emergent situation which had necessitated the promulgation of the Ordinance for the first time to meet that situation continues, then it can be argued that the law to meet that emergent situation, namely, the earlier Ordinance, also is in existence to meet that situation. No new law is required as no new emergent situation has arisen. That is why no new Ordinance is promulgated. If the emergent situation continues and requires the continuation of the emergent legislation, all that is needed is the replacement of the Ordinance promulgated to meet that situation by a law made by the legislature. But instead of doing that, what is done is to repeal the existing Ordinance and promulgate another Ordinance containing exactly identical terms. Article 213 does not envisage

the repeal of an existing law to create a situation for the promulgation of an exactly identical law (Ordinance) to meet an existing situation. Strictly speaking, even the situation for the promulgation of the new law is not first created to show the non-existence of a law to meet the emergent situation because there is no gap between the repeal of the existing Ordinance and the promulgation of an identical new Ordinance. Both (the repeal of the earlier Ordinance and the promulgation of another exactly identical Ordinance) take place at the same time. The new Ordinance which takes the place of the earlier Ordinance contains a repeal clause by which the earlier Ordinance is declared to have been repealed at the commencement of the new Ordinance. As the entire Ordinance comes into force at the same time, the repeal clause comes into effect only when the new Ordinance comes into force. In this way, both the actions (the repeal of the earlier Ordinance and the promulgation of the new Ordinance) take place exactly at the same time. So, one can say that at the time of promulgation of that Ordinance an exactly identical law (the earlier Ordinance) was in force which was repealed by the new Ordinance.

81. The whole conduct of the Executive in this matter shows its hands which do not indicate its *bona fides*. It is obvious that a secret purpose subsists in execution of which the real intention of the Executive is carefully, designedly and craftily concealed, breaking the statutory provisions by a course of cunning contrivance. The existence of both the intentions, the patent and the latent, is clear, and they form parts of one machination, wholly illegal. It is as clear as the daylight that the object of the Governor in repealing an existing Ordinance and re-promulgating the same, with exactly the same contents, is to disguise his collateral unlawful object of indirectly extending the life of the repealed Ordinance. Not only it is highly improper to break the constitutional provisions by a course of contrivance in this way, but the re-promulgation is also, even *ex-facie*, unconstitutional because the whole scheme of re-promulgation is, in effect, such as proves, beyond an iota of doubt, that it is framed for an illegal purpose, namely, to extend the life of an expiring Ordinance. Taking the bare facts into consideration, it would be difficult to figure out a case which leaves less room for doubt about want of *bona fides*. No one can abstract oneself from one's common feelings and shut one's eyes to the plainest indications of common sense as to hesitate for a single moment about the manner in which one should regard such promulgation of an Ordinance. To call it promulgation at all is incorrect; indeed, it is an abuse of the term. It is manipulation through re-promulgation.

Suspension, nay supersession, of the legislature for indefinite periods, like up to 14 years, is a perversion of the constitutional scheme.

***XV. Governor's Satisfaction in a Constitutional Sense is Based on the Aid and Advice of His Council of Ministers***

82. In *R. C. Cooper v. Union of India* (1970, 3 S.C.R. 530 at 559), this Hon'ble Court has held:

“Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers. ... 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.”

83. In *Shamsher Singh v. State of Punjab* (1975, 1 S.C.R. 814 at 836), this Hon'ble Court has held that

“the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vest in the executive whether those functions are executive or legislative in character.”

84. In *A.K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 296), this Hon'ble Court has held:

“The President's 'satisfaction' is ... nothing but the satisfaction of his Council of Ministers.”

85. Thus, though the emergency legislative power of the Centre vests in the President and that of a state in the Governor, both must act not on their personal satisfaction but on the strength of the advice tendered to them by their Council of Ministers. The decision of the Governor to promulgate an Ordinance must be based on the advice of his Council of Ministers. The circumstances which render it necessary for the Governor to take immediate action must be in existence in the opinion of the Council of Ministers.

86. The advice given by the Council of Ministers for the promulgation of an Ordinance exhausts itself once that Ordinance is promulgated. The recommendation of the Council of Ministers to promulgate an Ordinance is not a *carte blanche* to the Governor to re-promulgate the same Ordinance

again and again at his own sweet will and desire without fresh advice of his Council of Ministers. One advice does service for only one Ordinance and not for successive repetitions of that Ordinance on an indefinite number of occasions. The Constitution contemplates that each and every act of the Governor, of such a nature, must be based on the aid and advice of his Council of Ministers. The promulgation of an Ordinance on a certain date and its re-promulgation after some months, when the earlier Ordinance expires, are two different constitutional acts, each requiring the advice of the Council of Ministers. The need for the "existence of circumstances" and the need for "immediate action" within the meaning of Article 213 imply that the judgement regarding action to be taken on the basis of certain circumstances must be exercised afresh each time when the Ordinance-making power is exercised. The constitutional scheme shows unmistakably that not only must the satisfaction regarding the existence of circumstances requiring immediate action be reached but an Ordinance once promulgated must continue to receive constant and vigilant scrutiny of the Council of Ministers, even when it is in operation, because it is entitled and, indeed, bound to advise the Governor to withdraw the Ordinance if the need for its existence has disappeared.

87. As the advice of the Council of Ministers is not sought where no amendment to the terms of an expiring Ordinance is to be made while re-promulgating the Ordinance, this is clearly violative of the Constitution. Even if no change is made in the re-promulgated Ordinance, the new Ordinance being identical to the previous one, the Council of Ministers must exercise its functions afresh and render aid and advice on the question as to whether at the time of re-promulgation there exist circumstances which require immediate action to be taken. The petitioners do not ask as to what advice was given by the Council of Ministers. Their submission is that no advice at all is obtained from the Council of Ministers while re-promulgating Ordinances in the circumstances mentioned above. The distinction is between what advice was given and whether any advice was at all given by the Council of Ministers. The lack of aid and advice of the Council of Ministers while re-promulgating Ordinances is fatal to the validity of those Ordinances. If the maximum duration of an Ordinance — about 7½ months — is over and if it is intended to be re-promulgated, a fresh constitutional support in the form of the fresh advice of the Council of Ministers is obligatory and cannot be dispensed with.



***XVI. The Present Writ Petition Does Not  
Raise a Political Question***

88. The question which this Writ Petition raises is whether the legal and constitutional requirements set out in Article 213 of the Constitution have been satisfied in the case of Ordinances re-promulgated by the State of Bihar. This is a question as to the interpretation of the Constitution and related to it is the question as to whether constitutional requirements have been followed or not. It is respectfully submitted that the doctrine of political questions, which has been evolved by the courts of the United States of America, is inapplicable in the circumstances present in the instant case.

89. The doctrine of political questions traces its evolution in India to the judgement of Bhagwati, J. (as the learned Chief Justice then was) in the *State of Rajasthan v. Union of India* (1978, 1 S.C.R. 1 at 79-81) and the *Minerva Mills Ltd. v. Union of India* (1981, 1 S.C.R. 206 at 308). His Lordship observed in the *State of Rajasthan* case as under:

“Of course, it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. A constitution is a matter of purest politics, a structure of power and as pointed out by Charles Black in *Perspectives in Constitutional Law*, constitutional law symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think.

It was pointed out by Mr. Justice Brennan in the opinion of the Court delivered by him in *Baker v. Carr* (369 US 186), an epoch-making decision in American constitutional history, that ‘the mere fact that the suits seek protection of a political right does not mean that it presents a political question.’ This was put in more emphatic terms in

*Nixon v. Herndon* (273 US 536) by saying that such an objection 'is little more than a play upon words.' The decision in *Baker v. Carr* (*supra*) was indeed a striking advance in the field of constitutional law in the United States. Even before *Baker v. Carr*, the courts in the United States were dealing with a host of questions 'political' in ordinary comprehension. Even the desegregation decision of the Supreme Court in *Brown v. Board of Education* (347 US 483) had a clearly political complexion. The Supreme Court also entertained questions in regard to the political right of voting and felt no hesitation about relieving against racial discrimination in voting and in *Gomillion v. Lightfoot* (364 US 339), it did this even when the racial discrimination was covert, being achieved by so redrawing a municipal boundary as to exclude virtually all Negroes, and no whites, from the city franchise. It is true that in *Colegrove v. Green* (328 US 549) the Supreme Court refused relief against Congressional districting inequities in Illinois, but only three out of seven Justices who sat in that case based their decision on the ground that the question presented before them was political and non-justiciable and this view was in effect and substance reversed by the Supreme Court in *Baker v. Carr*. The Supreme Court in *Baker v. Carr* held that it was within the competence of the federal Courts to entertain an action challenging a statute apportioning legislative districts as contrary to the equal protection clause. This case clearly decided a controversy which was political in character, namely, apportioning of legislative districts, but it did so because a constitutional question of violation of the equal protection clause was directly involved and that question was plainly and indubitably within the jurisdiction of the Court to decide. It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare 'judicial hands off'. So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. ... There are indeed numerous decisions of this Court where constitutional issues have been adjudicated upon though enmeshed in questions of religious tenets, social practices, economic doctrines or educational policies. The Court has in these cases adjudicated not upon the social, religious, economic or other issues, but solely on the constitutional questions brought before it and in doing so, the Court has not been deterred by the fact

that these constitutional questions may have such other overtones or facets.”

90. In *Minerva Mills Ltd. v. Union of India* (1981, 1 S.C.R. 206 at 308), Bhagwati, J. (as the learned Chief Justice then was) reiterated his earlier observation in the *State of Rajasthan* case as under:

“I pointed out in my judgement in that case and I still stand by it, that merely because a question has a political colour, the court cannot fold its hands in despair and declare “judicial hands off”. So long as the question is whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed, it would be its constitutional obligation to do so.”

91. In *A.K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 296 and 297), this Hon’ble Court has held:

“The doctrine of the political question was evolved in the United States of America on the basis of its Constitution which has adopted the system of a rigid separation of powers, unlike ours. There is also a sharp difference in the position and powers of the American President on the one hand and the President of India on the other. ... It must also be mentioned that in the United States itself, the doctrine of the political question has come under a cloud and has been the subject matter of adverse criticism. It is said that all that the doctrine really means is that in the exercise of the power of judicial review, the courts must adopt a ‘prudential’ attitude, which requires that they should be wary of deciding upon the merit of any issue in which claims of principle as to the issue and claims of expediency as to the power and prestige of courts are in sharp conflict. The result, more or less, is that in America the phrase ‘political question’ has become a little more than a play of words.”

92. Apart from the fact that the doctrine of political question has been held to be inapplicable to the Indian context by the Supreme Court in *A.K. Roy’s* case, the petitioners submit that even under that doctrine this Writ Petition raises issues which are not political questions. The question which the present Writ Petition raises is about the violation of constitutional requirements set out in Article 213. It is a well-known principle of constitutional law in America that the courts will not shut off judicial review if there is a legal and constitutional question involved merely because it is a

political case. The doctrine, even in America, is one of political questions and not of political cases. The present case by no stretch of imagination raises a political question; the question is purely legal and constitutional.

93. In *A.K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 296), this Hon'ble Court has held:

“We see the force of the contention that the question whether the pre-conditions of the exercise of the power conferred by Article 123 are satisfied cannot be regarded as a purely political question.”

94. The petitioners respectfully submit that the observations of this Hon'ble Court in the *Rajasthan* case to the effect that the courts should not enter the “political thicket” have been confined to its peculiar facts by the subsequent decision in *A.K. Roy's* case in which this Hon'ble Court has held (*supra* 297):

“It has to be borne in mind that at the time when that case was decided, Article 356 contained clause (5) which was inserted by the 38th Amendment, by which the satisfaction of the President mentioned in clause (1) was made final and conclusive and that satisfaction was not open to be questioned in any court on any ground. Clause (5) has been deleted by the 44th Amendment and, therefore, any observation made in the *Rajasthan* case on the basis of that clause cannot any longer hold good.”

***XVII. Chakardharpur Biri and Tobacco Merchants' Association and others v. The State of Bihar and another* (1973, Tax L.R. 2132 at 2139), and *Mathura Prasad Singh and others v. The State of Bihar* (A.I.R. 1975 Patna 295 at 297-298): *Wrongly Decided***

95. The petitioners respectfully submit that the Hon'ble Patna High Court has erred in its abovementioned decisions while interpreting Article 213 of the Constitution. In the first of these cases, the High Court held that the fact that the State Legislature met between the promulgation of an Ordinance and its re-promulgation cannot give rise to an inference of a fraudulent exercise of power. In the second case cited above, the High Court held that though rule by successive Ordinances was not within the contemplation of the founding fathers of the Constitution and the Governor cannot by-pass the Legislature by promulgating successive Ordinances, yet, since Ordinances

have the same effect as Acts passed by the Legislature, it is not for the court to declare them *ultra vires*. The remedy of the citizen must lie with the Legislature or with the electorate.

96. It is submitted that both these decisions are wrong for the following reasons:

- (i) The meeting of the Legislature is the only factor which decides the question of life of an Ordinance. Once the Legislature meets, the life of an Ordinance gets fixed. There are no two opinions that an Ordinance must expire after six weeks from the beginning of the session of the Legislature after its promulgation if it is not converted into an Act of the Legislature or is not disapproved by the Legislature during that period. Its successive repeal and re-promulgation by the Governor by another exactly identical Ordinance after each session of the Legislature is meant to indirectly extend the life of the earlier Ordinance which is against the provisions of Article 213 (2) (a) of the Constitution. Once the emergent circumstances have been utilized by promulgating an Ordinance and there has been a session of the State Legislature after its promulgation, the power to deal with the situation by an Ordinance has exhausted itself.
- (ii) Even though an Ordinance has the same force and effect as an Act of the Legislature, there is a fundamental difference between the two. The legislation made by the Legislature lives as per its terms while the Ordinance promulgated by the Executive dies unless converted into an Act by the Legislature. The Ordinances are temporary measures designed to meet only urgent situations which cannot brook delay. The Governor is not the repository of the legislative power of a state.
- (iii) Want of disapproval of an illegal Ordinance by the Legislature is not conclusive of its constitutional validity. Absence of disapproval of an Ordinance by the Legislature and the need for legal compliance with constitutional requirements for its promulgation are two distinct and separate facets. Each exercise of a constitutional power must take its rise or fall from the constitutional provision that is the fountain of power under consideration. No other constitutional provision can act as a fortifying element. Therefore, one must go to the specific

wording of the Article of the Constitution conferring power to promulgate an Ordinance and must determine the source of power by a strict construction of that wording. This is particularly so because the power is of an extraordinary limited character meant for unforeseen circumstances. As this particular exercise of the power goes beyond what is sanctioned by Article 213 of the Constitution, it must be held to be void, and want of disapproval by the Legislature has no legal relevance for determining the constitutional validity.

- (iv) The electorate gets an opportunity to elect its representatives once in five years. If after an election, the elected representatives start playing a fraud on the Constitution, the electorate cannot be asked to wait helplessly till it gets another opportunity after five years. It has a right to approach the vigilant sentinel, namely, the court because the situation involves an illegality calling for appropriate judicial intervention. It is more so if all the political parties in power, irrespective of their political philosophies, commit this breach of the constitutional provisions as it has been happening in Bihar.
- (v) As Ordinance-making power is meant to be used in extraordinary situations, the pre-conditions of the exercise of this power must be fulfilled strictly.
- (vi) As the Constitution has conferred powers and imposed duties on a court of law to uphold the Constitution, adherence to the constitutional mandate and conformity with its requirements has to be ensured by the courts. Where a constitutional authority usurps the power of another constitutional authority or transgresses its own power, directly or indirectly, it is the duty of the courts, as interpreters of the Constitution and on account of their commitment to legality and due process of law, their commitment against arbitrariness in State action and their commitment to just standards of procedure, to restore the constitutional balance. The judiciary is required to play an important role in the system of checks and balances under the Constitution and a constitutional wrong must be redressed by judicial remedy. The court cannot ask a person with a grievance with regard to what somebody might believe to be an abuse of

the constitutional power to seek redressal of the grievance not in the court of law but somewhere else. Such a view is fraught with grave constitutional danger.

- (vii) In *State of Rajasthan v. Union of India* (1978, 1 S.C.R. 1 at 82-83), Bhagwati, J. (as the learned Chief Justice then was) observed about the role of the Supreme Court as under:

“It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is *suprema lex*, the paramount law of the land, and there is no department or branch of government above or beyond it. Every organ of government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law. To quote the words of Mr. Justice Brennan in *Baker v. Carr*, ‘Deciding whether a matter has in any measure been committed by the Constitution to another branch of government or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation and is a responsibility of this Court as ultimate interpreter of the Constitution’. Where there is manifestly unauthorised exercise of power under the Constitution, it is the duty of the Court to intervene. Let it not be forgotten, that to this Court as much as to other branches of government, is committed the conservation and furtherance of democratic values. The Court’s task is to identify those values in the constitutional plan and to work them into life in the cases that reach the Court. ‘Tact and wise restraint ought to temper any power but courage and the acceptance of responsibility

have their place too'. The Court cannot and should not shirk this responsibility, because it has sworn the oath of allegiance to the Constitution and is also accountable to the people of this country”.

The above observation was repeated by the learned judge in his judgement in *Minerva Mills Ltd. and others v. Union of India and others* (1981, 1 S.C.R. 206 at 288).

(viii) In *Minerva Mills Ltd. and others v. Union of India and others* (1981, 1 S.C.R. 206 at 241), this Hon'ble Court has held:

“Our Constitution is founded on a nice balance of power among the three wings of the State, namely the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled.”

(ix) In *Minerva Mills Ltd. and others v. Union of India and others* (1981, 1 S.C.R. 206 at 287-288 and 308), Bhagwati, J. (as the learned Chief Justice then was) in a concurring judgement with the above judgement has rightly observed as under:

“It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State such as the executive and the legislature within the limits of the power conferred upon them by the Constitution. This power of judicial review is conferred on the judiciary by Articles 32 and 226 of the Constitution”.

(x) Speaking about draft Article 25, corresponding to present Article 32 of the Constitution, Dr. Ambedkar, the principal architect of our Constitution, said in the Constituent Assembly on December 9, 1948, as under:

“If I was asked to name any particular article in this Constitution as the most important — an article without which this Constitution would be a nullity — I could not refer to any other article except this one. It is the very soul of the Constitution



and the very heart of it and I am glad that the House has realised its importance (Constituent Assembly Debates, Vol. VII, p. 953).”

“The power of judicial review is an integral part of our constitutional system and without it, there will be no Government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution.”

- (xi) In *S.P. Gupta and others v. Union of India and others* (1982, 2 S.C.R. 365 at 537), Bhagwati, J. (as the learned Chief Justice then was) again affirmed his earlier observation as under:

“If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective. It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armoury of law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive.”

- (xii) In *Chaitanya Kumar and others v. State of Karnataka and others* (1986, 2 S.C.R. 594 at 606), this Hon’ble Court has held:

“The court cannot close its eyes and persuade itself to uphold publicly mischievous executive actions which have been so exposed. When arbitrariness and perversion are writ large and brought out clearly, the Court cannot shirk its duty and refuse its writ.”

(xiii) Under the provisions of the Constitution it is not permissible to extend the life of one Ordinance by another Ordinance. As already mentioned, there were two sections, namely, 42 and 43, in the Government of India Act, 1935, which empowered the Governor-General of India to promulgate Ordinances. Section 42 empowered him to promulgate Ordinances during the recess of the Legislature while section 43 gave him that power even when the Legislature was in session. As regards the power of the Governor-General to extend the life of an Ordinance by a subsequent Ordinance, he was empowered to do so under section 43 only, and that too only once, that is, for a period of six months. As already pointed out, sections 42 and 43 were never brought into force. Leaving that question apart, as section 43 had expressly empowered the Governor-General to extend the life of an Ordinance by a subsequent Ordinance and section 42 of the same Act was silent on the point, this omission is a clear indication, based on the application of the well-known maxim *expressio unius est exclusio alterius*, that the legislature did not intend to empower the Governor-General to extend the life of an Ordinance, promulgated by him under the provisions of section 42, by another Ordinance. Dr. Ambedkar emphatically declared in the Constituent Assembly that "article 102 does not contain any of the provisions which were contained in section 43 of the Government of India Act. ... All that we are doing is to continue the powers given under section 42 to the Governor-General to the President under the provisions of Article 102" (*vide Constituent Assembly Debates*, Volume 8 (1949), 16.5.1949 to 16.6.1949, p. 213). It is clear, beyond all rational doubt, that the President also does not have any power to extend the life of one Ordinance by another Ordinance. As Article 213 of the Constitution is analogous to Article 123, it goes without saying that the Governor of a state also does not possess any such power.

97. When the history of legislation tells the court what the object of the Legislature was, the court must interpret the Statute in a manner that carries out that object and no other.

98. In *Kedar Nath Singh v. State of Bihar* (1962, Supp. 2 S.C.R. 769 at 809), this Hon'ble Court has held:

“It is also well settled that in interpreting an enactment the Court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose.”

***XVIII. Tamizuddin Ahmed v. Province of East Bengal***  
**(A.I.R. 1949 Dacca 33) : A Right Decision**

99. The Dacca High Court has held in the abovementioned case that if an Ordinance is neither replaced by an Act of the legislature nor disapproved by its resolution then it must expire in accordance with the provisions of the Constitution. It has further held that the legislature cannot extend the life of an Ordinance. That is why it converts it into an Act to continue its provisions in operation. As the legislature cannot extend the life of an Ordinance, the Governor also has no power to do so. He cannot extend the life of one Ordinance by another Ordinance specifically promulgated for that purpose otherwise government by Ordinances might be continued indefinitely.

100. In Bihar, the Governor does not promulgate an Ordinance directly providing for the continuance of the earlier Ordinance. Yet, he does precisely this, only indirectly. If the promulgation of an Ordinance for continuing the life of an earlier Ordinance is illegal, re-promulgation of an Ordinance as a device for achieving the same purpose would also be illegal.

***XIX. Re-promulgation of Ordinances is a Fraud on the Constitution of India***

101. Julius Paulus observed in 204 B.C. (*vide* Dig. 1, 3, 29: *Select Titles from the Digest of Justinian* edited by Thomas Erskine Holland and Charles Lancelot Shadwell, Oxford, 1874, p. 15 and the *Digest of Justinian* translated by Charles Henry Monro, Cambridge, 1904, Vol. 1, p. 21):

“One who does what a Statute forbids transgresses the Statute; one who contravenes the intention of a Statute, without disobeying its actual words, commits a fraud on it.”

102. In *State of Bihar v. Kameshwar Singh* (1952, S.C.R. 889 at 1003), this Hon’ble Court has held:

“The failure to comply with this constitutional condition for the exercise of legislative power may be overt or it may be covert. When

it is overt, we say that the law is obviously bad for non-compliance with the requirements of the Constitution, that is to say, the law is *ultra vires*. When, however, the non-compliance is covert, we say that it is a fraud on the Constitution, the fraud complained of being that the Legislature pretends to act within its power while in fact it is not so doing.”

103. The Governor of the State of Bihar does not directly extend the life of an Ordinance by another Ordinance. It is done indirectly by re-promulgating it, on or before the date of its expiry, in identical terms. While pretending to comply with the constitutional provisions when he repeals the earlier Ordinances, he, in effect, produces a scheme for the continuation of those Ordinances by shift or contrivance. The colourable nature of the re-promulgation of Ordinances lies in its device or contrivance to evade the limitation as to the duration of those Ordinances imposed under the Constitution that every Ordinance shall cease to operate at the expiration of six weeks from the reassembly of the legislature. The successive repeal and re-promulgation of the same Ordinances is in truth a mere device to accomplish a bye or collateral or sinister object of extending the lives of those Ordinances, an act substituted for another, *mala fide* substituted, an illegal act in the teeth of the Constitution. The colourable use of the repeal of earlier Ordinances cannot serve to disguise the real object which is to keep them alive, and therefore cannot be unavailing to cloak the reality of the extension of the lives of those Ordinances by a sham repeal and re-promulgation. Thus, the successive repeal and re-promulgation of the same Ordinances, before their dates of expiry, with the intention of keeping them alive, a purpose which cannot be attained directly under the provisions of the Constitution, is a fraudulent device to circumvent the constitutional provisions. In this sense, re-promulgation of Ordinances is a fraud on the Constitution.

104. Not only has the power to promulgate Ordinances been misused in the State of Bihar, its abuse in the State has been altogether of a novel kind which was not even within the contemplation of the framers of the Constitution.

105. In *A.K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 291), this Hon’ble Court has held with an obvious reference to the re-promulgation of Ordinances in the State of Bihar as under:

“The Constituent Assembly. ... conferred upon the executive the

power to legislate, not of course intending that the said power should be used recklessly or by imagining a state of affairs to exist when, in fact, it did not exist; nor, indeed, intending that it should be used *mala fide* in order to prevent the people's elected representatives from passing or rejecting a Bill after a free and open discussion, which is of the essence of democratic process. ... The debates of the Constituent Assembly (Vol. 8, Part V, Chapter III, pp. 201 to 217) would show that the power to issue Ordinances was regarded as a necessary evil. That power was to be used to meet extraordinary situations and not perverted to serve political ends. The Constituent Assembly held forth, as it were, an assurance to the people that an extraordinary power shall not be used in order to perpetuate a fraud on the Constitution which is conceived with so much faith and vision. That assurance must in all events be made good and the balance struck by the founding fathers between the powers of the Government and the liberties of the people not disturbed or destroyed."

***XX. Article 213 Must be Interpreted in a Manner Which Will  
Implement the Intention of the Makers of the Statute  
and Suppress the Mischief***

106. A cardinal rule in the interpretation of Statutes is that such exposition of a Statute ought to be favoured as hinders the Statute from being eluded. It should be so construed as to defeat all attempts to do in an indirect or circumlocutory manner that which cannot be done directly under its provisions and prevent and render unavailing all such attempts in order that the real object and intention of a Statute are not frustrated but effectively carried out.

**A. CARRYING OUT THE INTENTION OF THE STATUTES**

107. In *Henry Willion v. Henry Berkley* 1 Plowd. 223 at 231, it was held as under:

"Whoever would consider an Act well ought always to have particular regard to the intent of it, and according as the intent appears he ought to construe the words", for *qui haeret in litera, haeret in cortice*.

108. In *Rosamund Brett v. John Brett* 3 Add. 210 at 216, it was held as under:

The “key to the opening of every law is the reason and spirit of the law — it is the *animus imponentis*, the intention of the law-makers.”

109. In *Sir Thomas Stradling v. Rowland Morgan* 1 Plowd. 199 at 204, it was held as under:

“The judges of the law in all times past have so far pursued the intent of the makers of Statutes, that they have expounded Acts which were general in words to be but particular where the intent was particular.”

110. In *Thomas Eyston v. Richard Studd* 2 Plowd. 459 at 464-465, it was held as under:

“The intent of the Statutes is more to be regarded and pursued than the precise letter of them, for often times things, which are within the words of Statutes, are out of the purview of them, which purview extends no further than the intent of the makers of the Statutes, and the best way to construe a Statute is according to the intent rather than according to the words.”

111. In *R.v. Vasey* 2 K.B. 748, it was held as under:

In pursuing the intention of a Statute, “if, in order to make that intention effective, it is necessary to suppress words in the Statute, the words must be suppressed.”

112. In *Caledonian Railway Company v. North British Railway Company* 6 App. Cas. 114 at 122, the House of Lords have held that

“the mere literal construction ought not to prevail if it is opposed to the intention of the legislature, as apparent by the Statute.”

113. In *Henry A. Symthe v. Henry C. Fiske* 23 Law ed. 47 at 49, the Supreme Court of the United States of America has held:

“A thing may be within the letter of a Statute and not within its meaning, and within its meaning though not within its letter. The intention of the law maker is the law.”

114. In the *State of Bihar v. Kameshwar Singh* (1952, S.C.R. 889 at 980-981), this Hon’ble Court has held that

“if two constructions are possible, the Court should adopt that which

will implement and discard that which will stultify the apparent intention of the makers of the Constitution.”

### B. SUPPRESSING THE MISCHIEF

115. In *Attorney General v. Heydon* 3 Co. Rep. 7a at 7b; New Edition — 2 Co. Rep. 18 at 19, it was held as under:

“It is settled principle of interpretation that the courts must suppress the mischief, advance the remedy and suppress subtle inventions and evasions for continuance of the mischief, and to add force and life to the cure and remedy according to the true intent of the makers of the Act.”

116. In *Fox v. Bishop of Chester* 2 B. and C. 635 at 655, per Abbott, C.J., it was held as under:

“The provisions of an Act of Parliament shall not be evaded by shift or contrivance.”

117. In *Solarte v. Melville* 1 Man. and Ry. K.B. 198 at 204, per Lord Tenterden, it was held as under:

“Whatever form or colour they [the parties] may think fit to give it [the contract], the law will act upon the substance of the transaction, regardless of the form or colour.”

118. In *re Watson* 25 Q.B.D. 27 at 37, it was held as under:

“When people evade an Act of Parliament by putting forward documents which affect to be one thing when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the Court will go through the documents in order to arrive at the truth.”

119. In *Felix Booth v. Governor and Company of the Bank of England* 7 Cl. and Fin. 509 at 540, per Lord Tindal, C.J., it was held as under:

“Whatever is prohibited by law to be done directly, cannot legally be effected by an indirect and circuitous contrivance.”

120. In *James Jeffries v. John Biddle Alexander* 8 H.L. Cas. 594 at 623, the House of Lords has held that

“whenever it can be shown that the acts of the parties are adopted

for the purpose of effecting a thing which is prohibited, and the thing prohibited is in consequence effected, the parties have done that which they have purposely caused, though they may have done it indirectly, and endeavoured to conceal that they have done so.”

121. In *Thomas Philpot v. President and Governors of St. George's Hospital* 6 H.L. Cas. 338 at 349, the House of Lords (per Lord Chancellor) held as under:

“And whenever you can find that anything done that is substantially that which is prohibited, I think it is perfectly open to the court to say that that is void.”

122. A similar view was taken by the Privy Council in *Attorney-General for the Province of Alberta v. Attorney-General for the Dominion of Canada* (1939 A.C. 117 at 130) that

“what cannot be done directly cannot be done indirectly.”

123. In *The Bengal Immunity Co. Ltd. v. The State of Bihar and others* (1955, 2 S.C.R. 603 at 632), this Hon'ble Court has followed the above principle laid down in the *Heydon's* case and held:

“It is sound rule of construction of a Statute firmly established in England as far back as 1584 when *Heydon's* case was decided.”

124. In *K.C. Gajapati Narayan Deo v. State of Orissa* (1954, S.C.R. 1 at 12), this Hon'ble Court has held that

“it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method.”

125. In *A.K. Roy v. Union of India* (1982, 2 S.C.R. 272 at 345), this Hon'ble Court has held that

“the Boards should not permit the authorities to do indirectly what they cannot do directly ... Regard must be had to the substance and not the form.”



126. In *Collins v. Blantern* 2 Wils. 347 at 349, the Court of the King's Bench has held that when

“the manner of the transaction was to gild over and conceal the truth; and whenever Courts of Law see such attempts made to conceal such wicked deeds, they will brush away the cobweb varnish, and shew the transactions in their true light.”

*Drawn By*

D. C. Wadhwa  
Petitioner

*Filed By*

J.B. Dadachanji & Co.,  
Advocates, Supreme Court,  
New Delhi

*Filed on*

November 17, 1986

# DOCUMENT 14

## Written Submissions of the State of Bihar

In the Supreme Court of India  
Civil Original Jurisdiction  
Civil Writ Petition No. 412-415 of 1984

*In the Matter of*

### **Petitioners**

Dr. D.C. Wadhwa and others

### **Respondents**

v.

State of Bihar and others

## **Written Submissions of the State of Bihar**

### *Facts regarding Petitioners*

The first Petitioner is a research scholar. He does not claim any grievance of his own but he has come to the Court for the protection of rights of citizens generally and has associated with himself three other petitioners.

2. The second Petitioner claims that he is the owner of certain forest lands and grows forest produce in the lands and is directly affected by the provisions of the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983.

3. The Petitioner No. 3 who was a student studying in the Intermediate Science class in A. N. College, Patna, says that he is directly affected by the provisions of the Bihar Intermediate Education Council Third Ordinance, 1983.

4. The Petitioner No. 4 claims that he has a brick kiln and is directly affected by the provisions of the Bihar Bricks Supplies (Control) Third Ordinance, 1983.

5. None of the three Petitioners Nos. 2 to 4 give any particulars of their claims, nor do they state as to in what respect their rights, fundamental or otherwise, were affected by the provisions of the Ordinances which they were challenging.

6. The Ordinance [*sic*]<sup>1</sup> challenged by the Petitioners Nos. 2 and 4 are no longer in operation. Their place has been taken by Acts of the same name with the usual retrospective provisions antedating [*sic*]<sup>2</sup> the Acts so that action under the Ordinances were deemed to be taken under the Acts as if the Acts were in operation when any thing was done or action taken.

7. So far as the Ordinance complained against the Petitioner No. 3 is concerned, the position is that the Ordinance is no longer in operation. A Bill in terms of the Ordinance is pending for consideration before a Select Committee. Moreover, as the petitioner himself says that he was studying in the Intermediate Science class when he made the application, so that the Ordinance had not stood in the way of his either getting admitted to the college or prosecuting his studies. It is hoped that by this time he has passed the examination and gone beyond the stage of Intermediate Science class. It may be further pointed out that the grievance of the Petitioner No. 3 is otherwise not of any consequences [*sic*]<sup>3</sup> since at least the first Ordinance in respect of the matter by section 3 validly provided for the establishment and incorporation of a Council. Sub-section (2) of the Ordinance is quoted for ready reference:

“The Council shall be a corporate body called Bihar Intermediate Education Council and shall have perpetual succession and a common seal and shall sue and be sued by the said name and shall have power to acquire and possess both moveable and immovable property and take final decision in respect thereof and to enter into contract and for this purpose do all other necessary acts. The headquarters of the Council shall be at Patna.”

8. The purposes and powers of the Council are provided by section 14. “The Council shall have general powers of direct supervision and control of intermediate education.” Thereafter particular purposes and powers are set out in great detail comprehending all aspects in respect to the education in Intermediate classes. The first paragraph of the Preamble of the Ordinance was as follows:

“And whereas the Governor of Bihar is satisfied that circumstances exist which render it necessary for him to take immediate action for the establishment of Intermediate Education Council for bringing

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<sup>1</sup> Ordinances, should be plural, corrected by the author

<sup>2</sup> antedating, spelling incorrect, corrected by the author

<sup>3</sup> consequence, should be singular, corrected by the author

uniformity in intermediate education in the State of Bihar, for establishing coordination between different institutions imparting intermediate education, for separating intermediate education from the universities and proper conduct, management and control of institutions of intermediate standards.”

It may incidentally be stated that the national policy has separated the intermediate class from the college and has prescribed three years course for the B.A. classes.

9. The reliefs asked for are: Firstly, to declare the practice followed by the State of Bihar and the Governor of Bihar for re-promulgating Ordinances to be *ultra vires* the Constitution as also for prohibiting them from doing so in the future, and secondly, to declare the three Ordinances affecting the Petitioners Nos. 2 to 4 as *ultra vires*.

#### *Proposition*

In view of the decision of this Court in *Gujarat Pottery Works versus B.P. Sood, Controller of Mining Leases* 1967 (1) S.C.R. 695, the question about the validity of the two Ordinances replaced by Acts does not require adjudication. Their Lordships quoted with approval the decision in the case of *Abdul Majid vs. Naik* (1951) Bombay 440 [*sic*]<sup>4</sup>. The passage quoted by their Lordships may be reproduced for ready reference:

“The repeal by this Act (S. 58 of Act 31, 1950) of the Administration of Evacuee Property Ordinance 1949 (XXVII of 1949) shall not affect the previous operation thereof and subject thereto anything done or any action taken in the exercise of any power conferred by or under that ordinance shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act as if this Act was in force on the day on which such thing was done or action was taken.”

Thereafter, their Lordships referred to the construction placed by the High Court quoting the language of the High Court which is again reproduced:

“The language used in section 58 is both striking and significant. It does not merely provide that the orders passed under the Ordinance shall be deemed to be orders passed under the Act but it provides that the orders passed under the Ordinance shall be deemed to be orders

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<sup>4</sup> Report not mentioned

under this Act as if this Act was in force on the day on which certain things were done or action was taken. Therefore, the object of this section is as it were to antedate this Act so as to bring it into force on the day on which a particular order was passed which is being challenged. In other words, the validity of an order is to be judged not with reference to the Ordinance under which it was passed, but with reference to the Act subsequently passed by Parliament.”

The language of section 58 of that Act has become the general pattern of repeal of Acts similarly repealing ordinances. Such was the provision of the Acts which replaced the impugned Ordinances relating to forest produce and brick kilns in the present case. It follows therefore that the question of the validity of those two Ordinances is really not a matter for adjudication.

10. With regard to the Ordinance which was originally passed in regard to Intermediate education, the position is that subject to the enactment of any law by the Legislature in the present case, this does not affect the continuance of the Council established thereunder with the powers and functions as defined in that Ordinance for the fulfilment of the object which was indicated in the preamble. The rule of construction in such a case is governed by the decision in the case of *State of Orissa versus Bhupender Kumar Bose* (1962) Supplement Vol. 2 Supreme Court Reports, page 380. That was a case in which municipal elections were declared invalid because of certain technical defects. Those defects were cured by an Ordinance which was challenged before the Courts. The High Court sustained the challenge and therefore, the State filed an appeal to this Court.

An objection on behalf of the respondents was taken that the appeal had become infructuous because the Ordinance was no longer in operation and therefore the validation sought to be affected by the Ordinance no longer subsisted. Their Lordships considered this question at considerable length. At page 398, their Lordships stated: “In our opinion what the effect of the expiration of a temporary Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary Act and upon their character whether such right and liability are enduring or not.”

Their Lordships considered English cases on the point and at page 401, referred to the exposition as expressed by the Lord Ellenborough, Chief Justice, “a law though temporary in some of its provisions may have a permanent operation in other respects” and rejected the preliminary objection and on the merits also sustained the validity of the election by affirming the

competence of the legislature to make a retrospective law for the purpose of validation of something declared invalid by changing the basis of [sic]<sup>5</sup> earlier decision.

11. It is therefore even in this case, class [sic]<sup>6</sup> that the question of the validity of the Ordinance of 1983 does not call for adjudication both because that Ordinance as such has lapsed as also that the original Ordinance itself effectively created the Council with all the powers.

12. As already stated, the ground of challenge is not by defining any fundamental right of any person or the nature of the violation but with reference to the general question of nature and extent of the power of the Governor under Article 213 in regard to making Ordinances. In view of what has been stated above, the question arises whether the matter falls within the domain of adjudication. Attention is invited to the case of the special reference No. 1 of 1964 made by the President under Article 143 (1) of the Constitution in which the question of the privileges of the Legislature on the one hand and the jurisdiction of the High Court under Article 226 of the Constitution on the other hand [sic]<sup>7</sup> to be examined. A bench of seven judges presided over by Chief Justice Gajendragadkar examined the matter at great length. In respect of the function of the Supreme Court on a reference, their Lordships observed at page 446 [sic]<sup>8</sup> as follows:

“Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions all the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the judicature in this country lie within the domain of adjudication.”

They also upheld the validity of Mr. Seervai's contention that “the advisory function rendered in a reference proceeding is not adjudication properly so called and would bind no parties as such” [sic]<sup>9</sup>. The nature of “judicial power” was considered in a decision of the High Court of Australia, in *Re. Judiciary Act 1903*, 20 C.L.R. page 257. Neither the Australian Constitution, nor the American Constitution contains any power corresponding to what is provided in Article 143 of the Constitution of India. But a provision had been made in the Judicature Act for making a reference and thereunder a reference was made with regard to another Act. The High Court had to

<sup>5</sup> an, added by the author

<sup>6</sup> Not clear

<sup>7</sup> were, added by the author

<sup>8</sup> Report not mentioned

<sup>9</sup> Source not given

examine the nature of judicial power and having examined the contents of that power, their Lordship [*sic*]<sup>10</sup> declined to entertain the reference on the view that the Constitution vested in them only judicial power and the Judicature Act could not enlarge it. Their Lordships also noted at page 275 that in United States the Supreme Court has steadfastly refused to advise the executive on its request and they referred to a number of American decisions. It is, therefore, submitted that at the request of the petitioners the Court could not exercise an advisory jurisdiction. The condition precedent for exercise of such a jurisdiction is a reference by the President.

13. That it may also be pointed out that the Writ Petition does not disclose in definite terms any fundamental right and the nature of the alleged violation of such a right.

14. That the Writ Petition also, as already stated, asked for a writ prohibiting the Governor from following the practice and making an Ordinance similar to an earlier one on the ground that it would be in violation of Article 213. No Court can entertain a relief of that kind. Evidently, if the legislature cannot be prohibited from exercising its functions of legislation as this proposition is well settled, nor can the Governor or the President be restrained by the Court from promulgating an Ordinance [*sic*]<sup>11</sup> that such a law or an Ordinance will be invalid, when passed does not enable the Court to entertain such a plea in advance and to issue a writ restraining the making of such a law or an Ordinance.

15. It may be pointed out that so far as the Governor and the President are concerned, Article 361, clause (1) provides: "The President or the Governor or Raj Parmukh [*sic*]<sup>12</sup> of a State shall not be answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties." Indeed, Article 361, does not bar the Court from examining the validity of the laws or the Ordinances, if they are passed.

16. Since the principal question is whether the matter falls within the scope of a writ under Article 32, the merits need not be examined at all. This court has otherwise also adopted the principle of self restraint. At page 434 in the special reference case already referred to, it was observed as follows:

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<sup>10</sup> lordships, plural, corrected by the author

<sup>11</sup> on the ground, added by the author

<sup>12</sup> Rajpramukh, spelling incorrect, corrected by the author

“During the course of the debate several propositions were canvassed before us and a very large area of constitutional law was covered. We are, therefore, to make it clear at the outset that in formulating our answers to the questions framed by the President in the present reference, we propose to deal with only such points as, in our opinion, have a direct and material bearing on the problems posed by the said question. It is hardly necessary to emphasise that in dealing with constitutional matters, the court should be slow to deal with questions which do not strictly arise.”

In a number of cases, this court has pointed out the same. For instance, in 1959 Supplement 1, Supreme Court Reports, 528, at pages 589-90, this Court made similar observations quoting Weaver on constitutional law, page 69 [sic]<sup>13</sup>.

17. Courts have by and large refused to adjudicate upon abstract questions of law, particularly constitutional questions. Reference may be made to some cases from the Supreme Court of the United States, *State of New Jersey versus John G. Sergeant*, 70, L. Ed. 289 and *Ashwander versus Tennessee Valley Authority*, 80 L. ed. 688. The relevant observations are reproduced hereinunder:

“The Court has frequently called attention to the ‘great gravity and delicacy’ of its function in passing upon the validity of an act of the Congress and has restricted exercise of this function by rigid insistence that the jurisdiction of Federal Courts is limited to actual cases and controversies and that they have no power to give advisory opinions.”

Then they referred to a large number of illustrative cases. It may be pointed out that in the American cases, some private citizens, as in the present case, presented a writ before the American Supreme Court.

Reference may also be made to a case reported in 67 Lawyers Edition, page 1078, *Massachusetts versus Mellon*. At page 1085, the relevant passage is quoted below:

“The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws, to the executive the duty of executing them; and to the judiciary, the duty of interpreting and applying them in cases properly brought [sic]<sup>14</sup> the Courts. The general rule is that neither department may

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<sup>13</sup>Reference not complete

<sup>14</sup> before, added by the author



invade the province of the other, and neither may control, direct or restrain the action of the other. We are not now speaking of the merely ministerial duties of officials. *Gaines v. Thompson*, 7 Wall. 347, 19 L. ed. 62. We have no power *per se* to review and annual [*sic*]<sup>15</sup> acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting adjudiicable issue, is made to rest upon such an Act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment which otherwise would stand in the way of the enforcement of a legal right. The party who invokes the powers must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.”

18. Unlike the Australian case the American [*sic*]<sup>16</sup> were brought to the Court by persons who generally sought to challenge the validity of Acts of Congress on the assertion that they were adversely affected by the invalid Act but without sufficient plea about their right or injury constituting the course of action.

19. However, as the question has been raised before this Court, subject to all that I have stated earlier, briefly the relevant considerations may be stated. The Governor or the President do not control the proceeding [*sic*]<sup>17</sup> in the legislature. Whether for the [*sic*]<sup>18</sup> reason or another there is a backlog in regard to legislative business, the Houses themselves are the final authority to consider the question of priorities and how much [*sic*]<sup>19</sup> legislative enactments therefore, become possible to conclude.

20. The jurisdiction of the Governor under Article 213 is to apply his mind to the circumstances as they exist when he is considering the question of promulgation of an Ordinance. The language of Article 213 and the exercise of the powers thereunder has [*sic*]<sup>20</sup> reference to the particular point of time when the exercise of that power is under consideration. If at that point of time the action is called for the fact that similar circumstances had

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<sup>15</sup> annul, spelling incorrect, corrected by the author

<sup>16</sup> American cases, corrected by the author

<sup>17</sup> proceedings, plural, corrected by the author

<sup>19</sup> many, corrected by the author

<sup>18</sup> one reason, corrected by the author

<sup>20</sup> have, corrected by the author

existed earlier can neither alter the fact of necessity of the passing of an Ordinance or the need of urgent action, nor take away the power of the Governor. Same is the case with the President.

21. The question is not really of power but it may raise in an appropriate case a question whether the Governor has applied his mind to the existing state of affairs when he is exercising the jurisdiction. Normally this court had either declined to entertain the question or insisted upon the clearest proof in individual cases to establish legal *mala fides* by proving the facts showing the non-application of the mind by the Governor. The mere fact that similar Ordinances had been promulgated earlier does not by itself constitute proof that circumstances did not exist for the exercise of the power. The Governor is not under a duty either to state or prove the existence of circumstances.

22. The question of usurpation of the power of the legislature does not arise at all. The legislature is free to disapprove of an Ordinance.

It is not prevented from completing the process of legislation. The Governor exercises his powers only when the conditions for the exercise of such power exist.

23. Incidentally referred [*sic*]<sup>21</sup> may be made to what happened once. The opposition parties had walked out in protest on some issue but because there was sufficient quorum in the House it became possible to replace a very large number of Ordinances into enactments. Later, the leader of the opposition filed an application under Article 226 before the Patna High Court challenging the validity of those Acts on the ground that opportunity was unjustly taken of [*sic*]<sup>22</sup> rushing through the legislations in the absence of opposition parties. I had occasion to appear to oppose that writ. The writ was rejected but that is immaterial. It shows that if the opposition parties had not walked out, then hardly many of the Ordinances would have been possible to be replaced by Acts during the Session. Thereafter if the House is not in Session and if the urgencies [*sic*]<sup>23</sup> present, it is difficult to imagine what remedy is there or what solution is there except an Ordinance under Article 213.

24. The function of the President in giving or withholding approval to promulgation of Ordinances by the Governor is a limited one. The President

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<sup>21</sup> reference, corrected by the author

<sup>22</sup> by, added by the author

<sup>23</sup> are, added by the author

does not sit to exercise a parallel jurisdiction if on the face of the proposed Ordinance and in light of the existing circumstances the President finds no justification for withholding the approval he is expected by the Constitution to give it. When different parties are in power at the Centre and the States sometimes a grievance is made against the Centre about delay in according the necessary sanction to an Ordinance or a legislation.

25. The writ application uses expressions which proceed on a certain amount of emotion. The allegation of habit on the part of the Governor in making and promulgating Ordinances does not appear to be very appropriate. The expression 'repromulgation' is misconceived. Every Ordinance is a fresh Ordinance with reference to situation existing at the date of the respective Ordinance. The similarity of the provisions will not make it a case of repromulgation. In the special Reference case, their Lordships observed at page 447: "There is no occasion to import heat into the debate or discussion and no justification for the use of a strong language."

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*Note:* The exact date of the filing of this document is not available, but this copy was received by the Advocates of the petitioners on November 19, 1986; the copy did not indicate as to who drew and filed this Written Submissions on behalf of the Respondent No. 1.

# DOCUMENT 15

## Additional Written Submissions of the State of Bihar

(After the Hearing)

In the Supreme Court of India  
Civil Original Jurisdiction  
Writ Petition No. 412-415 of 1984

*In the Matter of*

**Petitioners**

Dr. D.C. Wadhwa and others

v.

**Respondents**

State of Bihar and others

### Additional Written Submissions of the State of Bihar

#### Part I

1. The Constituent Assembly was legally possessed of the powers at least as large as those of the British Parliament. It had full competence to create the various limbs of the State and to confer on them such powers as it considered appropriate.

2. The Constituent Assembly itself was composed out of the members of the Dominion Legislature constituted under a [*sic*]<sup>1</sup> Government of India Act, 1935. The Constitution framed by the Constituent Assembly was adopted by the people of India on the 26th day of November, 1949 and most of the provisions came into effect on the 26th day of January, 1950. The Parliament and the State Legislature [*sic*]<sup>2</sup> as provided in the Constitution, had to be elected on the basis of universal adult suffrage which was bound to take time. The Constitution, therefore, provided in Part XXI temporary, transitional and special provisions. One of such provisions was Article 379 which provided for the Legislative machinery in the internal [*sic*]<sup>3</sup> till the regular

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<sup>1</sup> the, corrected by the author

<sup>2</sup> state legislatures, corrected by the author

<sup>3</sup> interim, corrected by the author

Parliament, as provided in the Constitution, was constituted and commenced its sittings and the body which was functioning as the Constituent Assembly of the Dominion was to be the provisional Parliament to 'exercise all the powers and perform all the duties conferred by the provisions of the Constitution on Parliament'. This provisional Parliament, as already indicated, had a temporary existence. From the date of the commencement of the Constitution till the duly constituted Parliament was summoned to meet for the first session under the provisions of the Constitution was the total life of the provisional Parliament. The power, therefore, which was vested in it was for that gap period only. That power was to perish along with the very existence of the provisional Parliament. The body had come into existence on the basis of communal electorates and limited franchise.

3. Thus, there is a clear difference between the duration for which the power exists and the extent and quality of that power.

4. To validate the Bihar Land Reforms Act, 1950, which had been declared void by a full bench of the Patna High Court, Articles 31A and 31B were enacted by this provisional Parliament. Article 31A enlarged the legislative powers of the Legislatures permanently. Article 31B validated a number of enumerated enactments, the first in the list being the Bihar Land Reforms Act, 1950.

5. Parliament and the Legislatures of the States were competent to enact a law which will come to an end after a certain period during yet [*sic*]<sup>4</sup> such law could constitute a permanent institution in all respects complete or permit other authorities constituted thereunder to supply the details as and when required.

6. Articles 123 and 213 vested legislative powers in the President and the Governors of States respectively to promulgate Ordinance in certain circumstances. The life of the Ordinance was limited in duration but the qualify [*sic*]<sup>5</sup> of the power which any particular Ordinance would create as also the rights and obligations created by the Ordinance may be temporary or enduring. The power of the President was extensive enough to create ordinance of both kinds. Clause 2 of Article 213 expressly provides that ordinance "shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor." It was also, therefore, subject to the limitations placed by the Constitution on the powers of the Legislature of the State and this was specifically provided by clause 3 of Article 213.

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<sup>4</sup> which, corrected by the author

<sup>5</sup> quality, corrected by the author

7. The competence of the Governor to make laws through the ordinance-making power is as large as those [sic]<sup>6</sup> of Parliament [sic]<sup>7</sup> is directly established by the very case referred to by Mr. Sorabjee in *State of Punjab versus Satpal* (1969) 1 Supreme Court Reports, page 478. In the words of Chief Justice Hidayatullah: "The power of legislation in the Ordinance is as wide as the power of legislature of the State". The learned Chief Justice thereafter referred to Article 213, clause (2) in support of the said enunciation.

8. The existence of power is different from the exercise of such power. The power must exist and then only it can be exercised in circumstances contemplated as the proper condition for the exercise of such power. The decision in the case of *State of Orissa versus Bhupender [Kumar Bose]*<sup>8</sup> (1962) Suppl. (2) Supreme Court Reports, page 380, may be referred [sic]<sup>9</sup>. This was a case dealing with an Ordinance made for removing the defect in an election law because of which the elections to a municipality had been declared void by the High Court. The validating Ordinance was challenged before the High Court and [sic]<sup>10</sup> declared invalid. From which the State preferred the appeal. During the pendency of the appeal, the Ordinance itself had spent its life and lapsed. The contention of the respondent was that the Ordinance having lapsed it was unnecessary to consider as to whether it was valid or invalid. This contention was overruled. Their Lordships relied on the effect of temporary Acts which had come up for considerations in the English Courts. At page 400, their Lordships observed: "If the right created by the Statute is of an enduring character and has vested in the person that right, it cannot be taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and had been imposed upon a person, the imposition of the penalty would survive the expiration of the statute" and at page 401 they quoted with approval the exposition tersely expressed by Lord Ellenborough, Chief Justice in the words: "A law though temporary in other respects" [sic]<sup>11</sup>. This case directly establishes that a temporary Act may create rights and obligations or powers which may survive the expiry of the life of the law itself.

9. The question squarely arises whether the period of life of Ordinances fixed by Articles 213 necessarily controls the operation of its provisions limiting it to the same duration. The answer must be either yes or no. If its duration can survive in appropriate cases then it is no longer a

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<sup>6</sup> that, corrected by the author

<sup>7</sup> Legislature, corrected by the author

<sup>8</sup> added by the author

<sup>9</sup> to, added by the author

<sup>10</sup> was, added by the author

<sup>11</sup> The quotation is incomplete

question of Article 213 imposing an inflexible time limit. It will differ from ordinance to ordinance. It was at page 398 in the *Orissa* case referred to that his [sic]<sup>12</sup> Lordships say: “In our opinion it would not be reasonable to hold that the general rule about the effect of expiration of a temporary Act, on which Mr. Chetty relies, is inflexible” and thereafter his [sic]<sup>13</sup> Lordships say: “In our opinion, what the effect of the expiration of a temporary Act would be must depend upon the nature of the right or obligation resulting from the provisions of the temporary character and upon their character whether the said right and liability are enduring or not.” The *Orissa* case was dealing with the rights of the elected persons and therefore they are using the words ‘rights and obligations’. That does not mean that only the rights and obligations may survive. Reference may be made also to the case of *A.K. Roy versus Union of India* (1982, Volume 2, Supreme Court Reports page 272), on which Mr. Sorabjee had relied. That case was argued for a long time and the petitioner had drawn attention to the constitution[s] of other democracies to show that except under war conditions it was impersibble [sic]<sup>14</sup> to give power to the executives to detain persons without trial and at page 293, their Lordships had pointed out that ‘enduring rights and obligations can be created by Ordinance’ and amongst the cases referred to by them was the above case of *State of Orissa versus Bhupender Kumar Bose*. Article 31A which was held to be valid in *Sankari Parsad’s* case (1952), Supreme Court Reports, page 89, created legislative powers of enduring character to survive after the power of the provisional Parliament expired and Article 318 [sic]<sup>15</sup> held to be valid deals with the rights and obligations actually created by the Bihar Land Reforms Act and other legislaturesu [sic]<sup>16</sup> included in Schedule IX.

10. The Bihar Intermediate Education Council, Ordinance, 1979 was the first Ordinance to be made on that matter. This was promulgated on the 31st of December, 1979. It is conceded that this Ordinance was valid. The question arises as to what is the nature of this Ordinance and whether the Council which was created and the powers which were vested in it did or did not survive after the expiry of that Ordinance. Because if that survives, it is unnecessary to examine the validity of the subsequent Ordinances. This Ordinance created rights and obligations as well as powers.

Clause 3 of the Ordinance provides for the incorporation of a Council

<sup>12</sup> their, corrected by the author

<sup>13</sup> their, corrected by the author

<sup>14</sup> impermissible or impossible, corrected by the author

<sup>15</sup> Article 31B, corrected by the author

<sup>16</sup> legislations, corrected by the author

and that Council is to have perpetual succession and a common seal. It may sue or be sued. It was entrusted with the powers of acquiring both movable and immovable property. It was to have the power to make contracts. It had to be headed by a Chairman appointed by the State Government and a number of members. The term of the Chairman and the members of the Council was up to three years *vide* clauses 4, 5 and 7.

Clause 14 prescribed the purposes and the powers of the Council in great detail which included the power to make appointments of officers of the Council other than the Chairman and the Secretary. There are also the powers to make bye-laws.

Clause 26 provided that meetings including annual meetings [*sic*]<sup>17</sup>

11. If the Governor had the power to promulgate such an ordinance and it is not disputed that the first ordinance fell within the ambit of the power of the Governor, then it only remains to be examined whether the ordinance discloses an intention and makes provisions which must have an operation of an enduring nature.

12. Students admitted to that institution undoubtedly had to complete their studies. Therefore, the institution must continue to exist and function for a duration surviving the expiry of the ordinance. The continuance of the institution and the continuance of its functioning will be possible only if the whole apparatus created by the Ordinance continues to exist.

There must be teachers and if some of them died or resigned, their places had to be filled up. Therefore, the appointing authority with the power to appoint must continue to exist and if their powers continued, then during the continuance of the institution those who were admitted initially would be promoted to the next higher class and more students would be admitted even after the expiry of the Ordinance itself.

13. The Chairman and the teachers and the other members who are all salaried persons have a right to continue as such for up to a period of three years. Their right is a vested right. The Council which is an incorporated body is expressly enabled by clause 3 to have perpetual succession. In other words, the Chairman is to exist perpetually. The Council acquires property both movable, such as almirahs, books and instruments needed for the education of their students, and immovable property for the purpose of running of class[es]. The title to these properties is necessarily of a permanent character. If the Council were to cease to exist, the title to the property would

<sup>17</sup> Sentence incomplete



be in vacuum. The property acquired is not the personal property of the Council for their own use. It is earmarked for purposes to serve the institution and to provide the facilities for students. It is humbly submitted that the permanent character of the institution is writ large involving rights and obligations and which can be effective only when the necessary powers in the appropriate body were exercisable for the running of the institution. It is, therefore, submitted that the first Ordinance effectively created the institution perpetually and in the circumstances it is academic to consider the question of the validity of the subsequent Ordinances.

14. It is contended that to give such an effect to Ordinances would be contrary to the principles of democracy. It is submitted that democracy has nowhere been defined in concrete terms. All democracies are not of the same character. The powers of Parliament in England are different from those of the legislative body in the United States or in France. Both France and the United States have the presidential form of Government. But there is considerable difference between the two. So far as the Indian Constitution is concerned, the democracy contemplated thereby is the democracy which its provisions disclose. India had to meet its own problems by the means which it considered necessary even though some of them may be unavoidable evils. The Indian democracy is not inconsistent with the power to detain persons without trial. The Indian Constitution permits the President to create the whole machinery for the administration of Union Territories *vide* Article 239. The President has been granted very large powers by Article 371D in respect of the State of Andhra Pradesh, provisions which are under consideration by this Court. The Constitution contains Article 244, read with [sic]<sup>18</sup> Schedule and Articles 244, clause (2) and Article 275, clause (1) read with Sixth Schedule dealing with scheduled areas and scheduled tribes which are qualitatively different from the machinery prevailing in most part of the country. India is a large country composed of a large population settled in different areas, speaking different languages, professing different religions. India has neighbours not too friendly and inside within its own citizens therefore [sic]<sup>19</sup> persons not too much devoted to the interest of the country. It has problems of its own with perhaps no parallels. In the circumstances, having regard to its own problems, the Indian Constitution is different from other Constitutions. It is democratic because the constitution is created and accepted by the people. The ordinance-making power is not inconsistent with democracy because the Legislature is entitled to disapprove at the earliest

<sup>18</sup> Sentence not clear

<sup>19</sup> there are, added by the author

and to repeal retrospectively ordinances which may have operated beyond their expiry making such suitable arrangements consequential to such repeal as it may think fit.

15. It is not practicable for the people of India to have a democracy which may be possible in city estates [*sic*]<sup>20</sup>. A state is democratic where the executives are [*sic*]<sup>21</sup> responsible to the legislature. Ultimately, the Government in power is answerable to the Legislature for actions taken in the making of Ordinances.

In Keshvanand's case, it was pointed by Justice Khanna that large powers have necessarily to be placed in the hands of the executives and the legislatures. His Lordship pointed out: "It is axiomatic that involvement of a nation in war by declaration of war against another country can change the entire course of history of the nation." Decision about such vital matters ultimately cannot be taken on a critical moment by holding debates after summoning Parliament and therefore Justice Khanna quoted learned Hand: "I often wonder whether we do not rest our hopes too much upon Constitution, upon laws and upon Courts. Believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no courts can even do much to help it." The greatest safeguard as his Lordship pointed out against abuse of power is public opinion. Therefore, it follows that where the executive is responsible to the legislature, the existence of large powers may be necessary to be placed in the hands of the executives [*sic*]<sup>22</sup> to ensure safety of democracy itself.

16. Unlike other constitutions, the Indian Constitution is very much detailed providing all aspects of importance defining the extent of powers and the limitations. As early as 1878 the Privy Council in the case of *Queen versus Burah*, 3 AC 889 on 904-5, laid down as follows:

"The established courts of justice, when a question arises, whether the prescribed limits have been exceeded, must of necessity decide the question and the only way they can properly do so, is by looking at the terms of the instrument, by which affirmatively the powers were created, and by which negatively they were restricted. If what has been done is legislation within the general scope of the affirmative words, which give the power and violates no express condition or restriction by which the power is limited, it is not for any court of

<sup>20</sup> states, corrected by the author

<sup>21</sup> executive is, corrected by the author

<sup>22</sup> executive, corrected by the author

justice to inquire further or to enlarge constructively those conditions or restrictions.”

This case has been universally followed here and was also quoted and applied by Justice Khanna. There are no provisions in the Constitution, nor there is any provision which by necessary implication militates against the enduring nature of the achievements of an Ordinance after its expiry and it is not permissible to add to the restrictions upon legislative power whether vested in the legislatures [*sic*]<sup>23</sup> or the same power is vested in the President or the Governor.

## Part II

The jurisdictions of the High Court and the Supreme Court under Article 226 and 32 respectively though overlapping to some extent are not co-extensive. The common feature of both the jurisdictions is that the petitioner must have a constitutional right or a legal right which has been violated by the State or by a statutory body. That while in this respect the jurisdiction of the High Court under Article 226 is wide enough to cover any illegality which interfere [*sic*]<sup>24</sup> with any right of the petitioner for the purpose of Article 32 the remedy is not available if the interference is in respect of a right which is not the creation of one or other of the provisions of Part III [*sic*]<sup>25</sup>. If the right arises out of a contract or even under a statute, the jurisdiction under Article 32 will not be attracted unless it also involves the violation of a right guaranteed under Part III [*sic*]<sup>26</sup>. The decisions under this head are clear and many. The test of Article 32 itself is explicit.

2. A separate brief resume of some of the cases is furnished hereafter separately.

3. In the facts of the present writ application the allegations do not make out a case of violation of any right whatsoever and certainly they do not make the case of a right guaranteed by any Article of Part III [*sic*]<sup>27</sup> — (1977 (2) SCR. 361; AIR. 1977 SC. 1717) [*sic*]<sup>28</sup>.

4. Two of the petitioners claimed respectively to engage either in the manufacture of bricks or dealing in forest produce.

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<sup>23</sup> legislature, corrected by the author

<sup>24</sup> interferes, corrected by the author

<sup>25</sup> of the Constitution of India, added by the author

<sup>26</sup> of the Constitution of India, added by the author

<sup>27</sup> of the Constitution of India, added by the author

<sup>28</sup> Sentence not clear

5. In 1793 by Bengal Regulation of States [*sic*]<sup>29</sup> in the whole of Bihar with a few exceptions which are irrelevant were permanently settled [*sic*]<sup>30</sup> under what is called the Permanent Settlement Regulation. The revenue was fixed for all times and the entire right in, under and over the land was settled with zamindars and they were included in several registers prepared by the Collector.

6. All further interest [*sic*]<sup>31</sup> created in respect of land were created by the zamindars themselves. These ranged from tenure and under tenures and ultimately raiyats or they were kept in *khas* possession, that means their own personal possession by the proprietors of the tenure holders which included the under tenure-holders. The Bihar Land Reforms Act, 1950 by section 2(i) defines 'State' [*sic*]<sup>32</sup>, by clause (o) defines 'Proprietor', by clause (q) defines 'tenure', by clause (r) defines 'tenure-holder' and for the rest which are not defined in the Act by reference [*sic*]<sup>33</sup> their definitions in the Tenancy Acts are incorporated. The preamble of the Act reads: "Whereas it is expedient to provide for the transference to the State of the interests of proprietors and tenure-holders in land and of the mortgagee and lessees of such interests including interests in trees, forests, fisheries, julkas [*sic*]<sup>34</sup>, forest [*sic*]<sup>35</sup> or hats, bazars, mines and minerals etc." The vesting takes place under the provisions of sections 3 and 3A. Section 4 provides for the consequences of the vesting. They are detailed in clause (a). The vesting is "absolutely in the State free from all encumbrances" and of the lands which constitutes [*sic*]<sup>36</sup> the State [*sic*]<sup>37</sup> and everything else including the forest vest in the State.

7. The effect of the vesting has been settled by a series of decisions and I will refer only to one of them that of *Bhola Mian versus the State of Bihar*, A.I.R. 1958 Patna, page 48. A lessee who had obtained his right from the proprietor before the date of the vesting claimed that he was entitled to exercise the rights under his lease. The lease was for non-agricultural purposes. The Court negated the claim and pointed out that every interest created by the proprietor on the State [*sic*]<sup>38</sup> was an encumbrance on the State [*sic*]<sup>39</sup> as that expression meant for the purposes of the Tenancy Acts. The Patna Bench had relied and followed the full bench decision of the Calcutta High Court. Therefore to the land on the forest [*sic*]<sup>40</sup> there can be

<sup>29</sup> Title not clear

<sup>31</sup> interests, corrected by the author

<sup>33</sup> to, added by the author

<sup>35</sup> ferries, corrected by the author

<sup>37</sup> Estate, corrected by the author

<sup>39</sup> Estate, corrected by the author

<sup>30</sup> estates, added by the author

<sup>32</sup> Estate, corrected by the author

<sup>34</sup> *jalkars*, corrected by the author

<sup>36</sup> constitute, corrected by the author

<sup>38</sup> Estate, corrected by the author

<sup>40</sup> Not clear

no claim except under a grant from the State after the vesting was legally possible.

8. The State used to in the past grant a temporary *theka* or a contract with [*sic*]<sup>41</sup> persons for the purposes of cutting and appropriating dry fruits. Now that has been abolished because the result was a lot of depletion of forests by unscrupulous contractors.

9. So far as the brick manufacturer is concerned the best assumption in his favour is if he is a rayiat but a rayiat under the Tenancy Acts has the right to cultivate and raise crops or may undertake horticulture.

10. In the present case, neither of the petitioners defines the nature or the source of his right or even the details of the land which he utilizes for the purposes of taking earth and manufacturing bricks or for carrying on the trade for forest produce.

11. The result, therefore, is that neither in fact, nor in law there is enough factual allegation for the grant of a relief under any jurisdiction.

### Part III

The question of the validity of the Ordinances with regard to the business in brick manufacturing and the business of forest produce are completely displaced by the Acts No. 12 and 13 of 1984. The said Acts are antedated [*sic*]<sup>42</sup> to the whole period covered by the impugned Ordinance of 1983. There is no pleading at all by the petitioners claiming the right of carrying on business in the manufacture of bricks or the trade in forest produce or any such business having been undertaken earlier than the commencement of the impugned Ordinance of 1983, nor is there any prayer for the declaration of the invalidity of the earlier Ordinances which had expired. The writs must fail therefore so far as the claim for declaration of the invalidity of the two of the Ordinances dealing with the trade in bricks and the trade in forest produce [*sic*]<sup>43</sup>.

2. So far as the student petitioner is concerned as to what grievance he has is not clear. There was an institution in existence in 1984. Regular classes were held there. Competent teachers had been appointed. Examinations were being duly held and all students had every opportunity of availing of the benefits of the education in the institutions under the Bihar Intermediate

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<sup>41</sup> to some, corrected by the author

<sup>42</sup> antedated, spelling corrected by the author

<sup>43</sup> Sentence incomplete

Education Council. The student petitioner along with numerous others sought their admission to the institutions managed by the Council. The petitioner like many others availed of the benefit of the training there and if it were to be held that after the lapse of the Ordinance the institutions, the training all had become illegal, then the only result of that can be that the assumed petitioner will lose the entire advantage of his training in that institution. A person must have a grievance and should be in a position to ask for some relief and not for a declaration against his own interest. Article 32 is to enforce a fundamental right and not to declare that his qualifications are invalid.

3. There are a large number of American decisions which have taken the view that no person who takes the benefit under a statute can turn down and plead that the statute is unconstitutional (194 US 553 at 565; 4 L. ed. 900 at 904) [*sic*]<sup>44</sup>.

4. Here some times the question has arisen as to whether one can waive a fundamental right and two constitution benches have held that having taken advantage of a statute or action it was not open to the petitioner to challenge the constitutionality of the same (1953 SCR 1184; 1975 Suppl. SCR 361, 364) [*sic*]<sup>45</sup>. It is humbly submitted that the correct position is that all fundamental rights are not of the same character. Now right in property has ceased to be part of Part III [*sic*]<sup>46</sup> but let us take for an illustration of a case when property rights were guaranteed by Article 19 (1) (f) and Article 31 [*sic*]<sup>47</sup>. If a person's property were taken under a statute which may be unconstitutional but if he has obtained the compensation provided for the taking of his property without protest as provided in that Act, manifestly he must be disabled to seek relief under Article 32 or under any procedure to challenge the constitutionality of that Act.

5. Article 13 indeed provides that a statute which contravenes a provisions of Part III [*sic*]<sup>48</sup> is void but that stage can be reached only when there is a challenge and which the Court would entertain and the challenge is accepted. Let us take an illustration. An appointment under the State is made in violation of the better claim of some candidate. It does violate Article 16. But the appointment will not be nullity if the aggrieved person does not challenge it and the appointed person goes on performing the duties of his office. A judicial officer for instance is appointed and the claim of another has been

<sup>44</sup> Names of the parties not given

<sup>45</sup> Names of the parties not given

<sup>46</sup> of the Constitution of India, added by the author

<sup>47</sup> of the Constitution of India, added by the author

<sup>48</sup> of the Constitution of India, added by the author

ignored, but the appointment remains unchallenged. It is impossible to maintain that the appointment is void and that judgments rendered by him are all nullities.

6. It is, therefore, humbly submitted that such appointments are voidable and not void and therefore a person who has the right to challenge it if he sleeps over his right and much more than that if by a positive act he has approved the State action or for that matter a statute under which the State action has been done will not be permitted to challenge the same later.

7. The only cases in which this principle will be inapplicable will be cases concerning the life and liberty of a person because he cannot be permitted by the law to bind himself by any estoppel against his precious right of life and liberty.

8. From 1979 when the first Ordinance was made which admittedly was a valid one and the last Ordinance of 1983 which is under challenge was a gap period covered by other Ordinances which are not on the challenge except for the general challenge really by the Petitioner No. 1 during this period, thousands of students were admitted in the institutions which throughout continued to function and after passing out from these institutions they pursued higher studies. Many have been absorbed in public services. Many must be practising different professions including some before this very Court and the Court will not entertain in regard to the validity of those Ordinances where such an issue does not directly arise for giving relief to the petitioner.

9. Actually, there is no prayer which survives in respect of even the last Ordinance of 1983 but there is none at all in respect of the intervening Ordinances.

#### **Part IV**

The prayer to restrain the President from issuing further Ordinances in terms similar to previous ones after their expiry cannot be entertained by the Court at all and particularly not under Article 32. Firstly, it is a hypothetical assumption that such an Ordinance will be promulgated and that there will be some person whose rights will be actually interfered in the future or that such person will feel interested in not adopting the prescribed course rather than to challenge them. But what is more it is settled law that the Legislature will not be restrained in the performance of what it considers its duty and if

that be so neither can the President be restrained any more than the Legislature. If he does make any Ordinance in future, the Court if approached by an interested party can consider the question of its validity. No such general question in abstract can be entertained. Moreover, Article 361 gives immunity to President and the Governor and for the discharge of their purported duty whether valid or invalid, they cannot be answerable in any Court.

### Part V

If any of my earlier submissions, which justify the dismissal of the writ petitions, is accepted then the question of the power of what is called and what has been characterized as re-promulgation of Ordinances will be merely academic and any observations in that regard will be in the nature of purely of a tentative nature. Such a question will normally be not entertained by the Court. In truth and reality such questions will fall outside the scope of judicial power. Therefore, it is humbly submitted that no opinion should be expressed in regard to this issue. The petitioner, however, will briefly make his submissions on the merits of this issue because the petitioners cannot anticipate that [sic]<sup>49</sup> view the court may entertain in regard to the submissions already made. The contention may be put under several heads. At one stage as I understood the arguments had proceeded on an interpretation of Article 213 and the interpretation canvassed was that there is an absolute time limit for an Ordinance during which it must either be replaced by an Act of the Legislature or must lapse and that it would be a violation of the limit of duration if another Ordinance similar in terms were permissible to be promulgated. That would amount to giving a longer duration to the expiring Ordinance contrary to the limit set by Article 213.

2. This contention, it is humbly submitted, proceeds on a misconception. Article 213 empowers the Governor to apply his mind to circumstances which exist on the date when he is considering as to whether those circumstances are such which render it necessary for him to take immediate action. If on that date the Legislature is not in session and the problem before him calls for the exercise of his power he can promulgate an Ordinance. The Ordinance is related to the emergent circumstances existing at the time of the making of the Ordinance. After the Ordinance has lapsed, if the Governor were not [sic]<sup>50</sup> direct his mind to the circumstances as they existed on the date when

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<sup>49</sup> the, corrected by the author

<sup>50</sup> to, added by the author



he had earlier promulgated the Ordinance which has lapsed and with reference to those circumstances on that date if he thought that six months were rather inadequate and therefore he promulgated another Ordinance [*sic*]<sup>51</sup>, the contention in those circumstances of Mr. Sorabjee [*sic*]<sup>52</sup> would be valid because with reference to the circumstances which led to the promulgation of the expiring Ordinance the duration could be only that fixed by Article 213.

3. But if the Ordinance has expired and when it has expired circumstances in fact do exist and the Legislature is not in session and in the absence of a law the public interest would receive serious injury, then the power under Article 213 is available and this is a fresh exercise of power on the application of mind to circumstances as they do exist when this other Ordinance is being promulgated. To hold that this power once exercised has been exhausted and cannot be exercised in circumstances which call for the exercise of such power because such a problem had occurred earlier and had been met by the exercise of that power would merely mean that the public interest must be permitted to suffer and the Constitution provides no remedies for such a situation.

4. Great pains have been taken to collect the number of times the Legislature sat after the promulgation of the first Ordinance and the last one under challenge and the Legislature did not find it convenient to pass a Bill in terms of the Ordinances. It is argued that in those circumstances it would not be permissible for the Governor to exercise the power. It is humbly submitted that this contention is not well founded either. The fact that the Legislature has failed to pass the necessary enactment is itself the circumstance which may leave a problem insolved [*sic*]<sup>53</sup>. If the emergent circumstances do still exist, then the failure on the part of the Legislature may itself compel the Governor to exercise his power. The very case relied on by Mr. Sorabjee, namely, the case of *State of Punjab versus Satpal Dang* already referred to in connection with the powers of the President shows that his power is co-extensive with that of the Legislature under the other conditions prescribed in Article 213. It is a clear authority that the action or inaction in the Legislature itself may bring about a situation where the Governor finds it necessary to exercise his power under Article 213.

5. Take this very case of the educational institutions Ordinance. The purpose of the original Ordinance was set out in the preamble and that purpose is stated as for the establishment of Intermediate Education Council for

<sup>51</sup> Sentence not clear

<sup>52</sup> In oral arguments

<sup>53</sup> unsolved, corrected by the author

bringing uniformity in intermediate education to [sic]<sup>54</sup> the State of Bihar, for establishing co-ordination between different institutions imparting intermediate education, for separating intermediate education from the universities and for proper conduct, management and control of institutions of intermediate standards. Immediate action may be necessary in respect of a need which is of long duration or permanent duration or the character of the need may be temporary. The power in respect of both permanent acts of the Legislature and temporary acts of the Legislature have been discussed earlier in these submissions. Even in which [sic]<sup>55</sup> case if the circumstances are emergent and the House is not in session the Ordinance can be made and the first Ordinance is not under challenge. It is conceded that it was valid. As submitted earlier the institution with its powers continued even after the lapse of the first Ordinance. But as in the present case as [sic]<sup>56</sup> serious controversy has arisen and is still to be decided by this Court as to what was the effect of the lapse of the first Ordinance. In such circumstances the Governor was justified [sic]<sup>57</sup>. The possibility of a challenge which would produce a chaos if numerous students were to be interrupted on the expiry of the Ordinance [sic]<sup>58</sup>. Indeed one would have before the Legislature [sic]<sup>59</sup>. But the Legislature is autonomous and its proceedings in that respect are to and the apprehension of a challenge is present then that itself is clearly the manifest in justifications [sic]<sup>60</sup> for the power of the Governor under Article 213 [sic]<sup>61</sup>. Assuming that it were to be held that on the expiry of the first Ordinance the validity of all the action [sic]<sup>62</sup> taken in establishing the educational institutions would perish with the lapse of the Ordinance, then manifestly it would create an emergent situation calling for remedy and there would be no other remedy than the passing of an Ordinance. Granting without admitting that the question as to whether the satisfaction of the Governor as well as the existence of the circumstances are open to judicial scrutiny it could never have been possible to hold that this was a case of either colourable exercise of power under Article 213 or the exercise of a power prohibited by Article 213.

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<sup>54</sup> in, corrected by the author

<sup>55</sup> that, corrected by the author

<sup>56</sup> a, added by the author

<sup>57</sup> Sentence incomplete

<sup>58</sup> Sentence incomplete

<sup>59</sup> Sentence incomplete

<sup>60</sup> justification, spelling corrected by the author

<sup>61</sup> sentence is incomplete and unintelligible

<sup>62</sup> actions, corrected by the author

**Note:** The date of the filing of this document is not available but its copy was received by the Advocates of the petitioners on November 26, 1986, that is, after the oral arguments. The copy did not indicate as to who drafted and submitted these additional written submissions on behalf of the State of Bihar, Respondent No. 1.

# DOCUMENT 16

## Additional Written Submissions of the Petitioners, Dr. D.C. Wadhwa and Others

(After the Hearing)

In the Supreme Court of India  
Extraordinary Original Jurisdiction  
Civil Writ Petition No. 412-415 of 1984

*In the Matter of*

<b>Petitioners</b>		<b>Respondents</b>
Dr. D.C. Wadhwa and others	v.	State of Bihar and others

### Additional Written Submissions of the Petitioners in Reply to the Additional Written Submissions of the State of Bihar

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### Acts Used

1.	The Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950), sections 3, 3A and 4 (a)	5-7
2.	The Chota Nagpur Tenancy Act, 1908 (Bengal Act 6 of 1908), section 21A	8-10

**I. The Impugned Ordinances Violate the Fundamental Rights of the Petitioner Nos. 2, 3 and 4**

1. It is submitted that the three Ordinances specifically challenged in the Writ Petition violate the fundamental rights of the Petitioner Nos. 2, 3 and 4.

**A. The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983, Violates the Fundamental Rights of the Petitioner No. 2**

2. Section 2 (4) of the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983, defines forest produce as “any forest produce as specified in the Schedule (hereinafter called the specified produce).” The Schedule includes fruits and seeds of various trees, flowers of *mahua*, gums and resins, various types of grasses, lac, tusser cocoon, various types of medicinal plants, fibreyielding plants, leaves of different trees, bamboos and *kath*.

3. Section 5 imposes restrictions on the purchase of specified forest produce and creates a State monopoly in the trade. Section 7 confers powers on the State Government to fix the “price at which specified forest produce shall be purchased by it or by any authorised officer or agent from growers of specified forest produce.” Section 10 requires the growers of specified forest produce to get themselves registered in a prescribed manner. Section 13 prohibits the growers of specified forest produce from engaging themselves “in retail sale of a specified forest produce except under a licence granted under this section.” Section 16 gives the State officers “powers to entry, search, seizure, etc.” of specified forest produce. Section 21 creates a criminal offence for contravention of any of the provisions of this Ordinance.

4. The Petitioner No. 2 is an occupancy *raiya* in the Anigara village of the Khunti Police Station in the district of Ranchi. As he grows specified forest produce in his *raiya* lands, the above provisions of the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983, violate his fundamental rights under Article 19 (1) (g) of the Constitution to carry on his business.

5. Sections 3 and 3A of the Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950) provided for the vesting of intermediary interests of all intermediaries (proprietors, tenure-holders and subtenure-holders) in the State.

6. Section 4 (a) which provided for the consequences of such vesting is as under:

“4 (a). Such estate or tenure including the interests of the proprietor or tenure-holder in any building or part of a building comprised in such estate or tenure and used primarily as office or *cutchery* for the collection of rent of such estate or tenure, and his interests in trees, forests, fisheries, *jalkars*, hats, bazars (*mela*) and ferries and all other *sairati* interests as also his interest in all sub-soil including any rights in mines and minerals, whether discovered or undiscovered, or whether being worked or not, inclusive of such rights of a lessee of mines and minerals comprised in such estate or tenure (*other than the interests of raiyats or under-raiyats*) [emphasis added] shall, with effect from the date of vesting, vest absolutely in the State free from all encumbrances and such proprietor or tenure-holder shall cease to have any interests in such estate or tenure, other than the interests expressly saved by or under the provisions of this Act.”

7. Thus, the vesting in the State was of lands which constituted the estates, tenures and subtenures and not of *raiya*ti lands [emphasis added]. The Petitioner No. 2 is an occupancy-*raiya*ti and therefore his *raiya*ti lands were not within the purview of section 4 of the Bihar Land Reforms Act, 1950.

8. The rights of occupancy-*raiya*ti in their lands in Chota Nagpur are governed by the Chota Nagpur Tenancy Act, 1908 (Bengal Act 6 of 1908).

9. Section 21A of the abovementioned Chota Nagpur Tenancy Act, 1908, deals with the rights of occupancy-*raiya*ti in trees. It reads as under:

“21A. *Rights of occupancy-raiya*ti in trees — Notwithstanding anything contained in section 24, when a *raiya*ti has a right of occupancy in respect of any land —

(a) if the rent of such land is paid in cash, or if such land is a rent-free holding or a part of such holding, the *raiya*ti may —

(i) plant trees and bamboos on such land and cut, cut down and appropriate the same,

(ii) cut, cut down and appropriate any trees or bamboos standing on such land,

(iii) appropriate the flowers, fruits and other products of any trees or bamboos standing on such land,



(iv) rear lac and cocoons on trees standing on such land and appropriate the same.”

10. The above provisions show that the Petitioner No. 2 has every right to grow the specified forest produce in his *raiya* land.

***B. The Bihar Intermediate Education Council Third Ordinance, 1983, Violates the Fundamental Rights of the Petitioner No. 3***

11. As regards the Bihar Intermediate Education Council Third Ordinance, 1983, section 14 (7) of this Ordinance empowers the Council “to make regulations for prescribing conditions to be fulfilled by the students for appearing at the examinations prescribed by the Council.” Section 14 (9) empowers it “to prescribe by regulation examination fees. ... for the examination prescribed by the Council.” Section 14 (10) empowers it “to grant or refuse permission to candidates, ... or to withdraw the permission already given for appearing at the examinations conducted by the Council under the regulations made in this behalf.” Section 14 (16) empowers the Council “to lay down conditions of admission of students in the Institutions.” Section 14 (17) empowers the Council “to prescribe the number for admission of students in any class of any Institution” and section 14 (18) empowers it “to lay down conditions for removal of students from the Institutions.”

12. Thus, the abovementioned provisions of the Bihar Intermediate Education Council Third Ordinance, 1983, regulates every important aspect relating to the intermediate education received by the Petitioner No. 3 as a student.

13. It is a well established principle of law that there can be no estoppel against a Statute. The Constitution is the *suprema lex* of the land and no argument of estoppel can be validly raised to prevent the Petitioner No. 3 from ascertaining his fundamental rights and getting the violation of those rights remedied.

14. In *Anand Vardhen Chandel v. University of Delhi* (A.I.R. 1978 Delhi 308), it has been held that the right to receive education is a fundamental right.

***C. The Bihar Bricks Supplies (Control) Third Ordinance, 1983,  
Violates the Fundamental Rights of the Petitioner No. 4***

15. Coming to the Bihar Bricks Supplies (Control) Third Ordinance, 1983, section 3 of this Ordinance empowers the State Government “to control supply, distribution and consumption of bricks” by

- (a) regulating by licences, permits or otherwise the manufacture, distribution, transport, equitable disposal and consumption of bricks;
- (b) controlling the prices at which bricks may be bought or sold;
- (c) requiring manufacturers, dealers or kiln-owners to maintain and produce for inspection such accounts and records regarding bricks and furnishing such information relating thereto, as may be specified in the order;
- (d) controlling the size and type of bricks to be manufactured, and
- (e) entering and searching of premises and vehicles, seizure by a person authorised to make such search of bricks.

16. Section 6 creates a criminal offence for contravention of the provisions of section 3. Section 8 says that “offences under this Ordinance shall be cognizable.”

17. The Petitioner No. 4 is the proprietor of South Bihar Agency, Patna, a bricks manufacturing concern operating under licences obtained from the Mining and Industry Departments of the Government of Bihar. It is clear that the abovementioned provisions of the Bihar Bricks Supplies (Control) Third Ordinance, 1983, violate his fundamental rights under Article 19 (1) (g) of the Constitution to carry on his business.

18. The Petitioner No. 1 is a Professor of Economics at the Gokhale Institute of Politics and Economics, Pune. He has spent a number of years and a lot of money in collecting the statistical and other material given in the book and writing the book, Annexure ‘A’<sup>1</sup> to the Writ Petition. He is deeply interested in the constitutional functioning of our polity and therefore has filed this Writ Petition for the preservation and promotion of constitutionalism in the country.

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<sup>1</sup> Not printed in this volume

19. In *S.P. Gupta v. Union of India* (1982, 2 S.C.R. 365 at 530), Bhagwati, J. (as the learned Chief Justice then was) has held that

“any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.”

20. In *Sunil Batra v. Delhi Administration* (1980, 2 S.C.R. 557 at 596), this Hon’ble Court has held:

“In a democracy, a wrong to some is a wrong to every one.”

21. Thus, the Petitioner No. 1 has challenged the constitutional validity of the practice of the re-promulgation of Ordinances for the protection of the rights of the citizens generally.

## **II. An Invalid Law is *per se* an Unreasonable Restriction on the Fundamental Rights**

22. The petitioners submit that an Ordinance which does not comply with the provisions of Article 213 is not a valid law. An invalid law is *per se* an unreasonable restriction on the fundamental rights, *inter alia*, guaranteed by Articles 14 and 19 of the Constitution of India.

23. In *Mohammad Yasin v. The Town Area Committee, Jabalpur and another* (1952, 1 S.C.R. 572 at 578), a Constitution Bench of five judges of this Hon’ble Court has held as under:

“Under article 19 (1) (g) the citizen has the right to carry on any occupation, trade or business which right under that clause is apparently to be unfettered. The only restriction to this unfettered right is the authority of the State to make a law relating to the carrying on of such occupation, trade or business as mentioned in clause (6) of that Article as amended by the Constitution (First Amendment) Act, 1951. If, therefore, the licence fee cannot be justified on the basis of any valid law, no question of its reasonableness can arise, for an illegal impost must at all times be an unreasonable restriction and will necessarily infringe the right of the citizen to carry on his occupation, trade or business under article 19 (1) (g) and such infringement can properly be made the subject-matter of a challenge

under article 32 of the Constitution.”

24. The same Bench further held in the abovementioned case at p. 581 as under:

“In our opinion, the bye-laws which impose a charge on the wholesale dealer in the shape of the prescribed fee, irrespective of any use or occupation by him of immovable property vested in or entrusted to the management of the Town Area Committee including any public street, are obviously *ultra vires* the powers of the respondent Committee and, therefore, the bye-laws cannot be said to constitute a valid law which alone may, under Article 19 (1) (g) of the Constitution, impose a restriction on the right conferred by Article 19 (1) (g). In the absence of any valid law authorising it, such illegal imposition must undoubtedly operate as an illegal restraint and must infringe the unfettered right of the wholesale dealer to carry on his occupation, trade or business which is guaranteed to him by Article 19 (1) (g) of our Constitution.”

25. In *State of Madhya Pradesh and another v. Thakur Bharat Singh* (1967, 2 S.C.R. 454 at 459 and 460), a Constitution Bench of five judges of this Hon’ble Court has held as under:

“All executive actions which operate to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. ... We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every act done by the Government or by its officers must, if it is to operate to the prejudice of any person, be supported by some legislative authority.”

26. Similarly, another Constitution Bench of five judges of this Hon’ble Court has held in *Satwant Singh Sawhney v. D. Ramarathnam, Assistant Passport Officer* (1967, 3 S.C.R. 525) that an invalid law violates the petitioner’s right under Article 14 of the Constitution. It was held at p. 542 as under:

“The next question is whether the act of the respondents in refusing to issue the passport infringes the Petitioner’s fundamental right under Art. 14 of the Constitution. Article 14 says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This doctrine of equality before

the law is a necessary corollary to the high concept of the rule of law accepted by our Constitution. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported by some legislative authority: see *The State of Madhya Pradesh v. Thakur Bharat Singh.*"

27. It is clear from the above decisions, each of them rendered by a Bench of five judges of this Hon'ble Court, that an invalid law is violative of the fundamental rights enshrined in Articles 14 and 19 of the Constitution. The petitioners submit that the Bihar Ordinances which do not comply with the requirements of Article 213 are invalid laws. Being invalid laws, they are *per se* violative of the petitioners' fundamental rights under Articles 14 and 19 (g) of the Constitution.

### **III. The Writ Petition Does Not Raise an Academic or Hypothetical Question**

28. As regards the contention of the State of Bihar that the question raised in the Writ Petition has become academic, it is submitted that merely because two of the three Ordinances specifically challenged in the Writ Petition have been replaced by the Acts of the Legislature, it does not render the Writ Petition academic for the following reasons:

- (i) All the three Ordinances were in force on the date when the Writ Petition was filed.
- (ii) Even after filing the Writ Petition, the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983, was re-promulgated on January 23, 1984, by Ordinance No. 5 before it was replaced by Bihar Act No. 12 on May 17, 1984. It had a life of 6 years, 11 months and 16 days before it was replaced by an Act.
- (iii) Similarly, after filing of the Writ Petition, the Bihar Bricks Supplies (Control) Third Ordinance, 1983, was re-promulgated on January 23, 1984, by Ordinance No. 6 before it was replaced by Bihar Act No. 13 on May 17, 1984. It had a life of 1 year, 5 months and 15 days before it was replaced by an Act of the Legislature.
- (iv) The Bihar Intermediate Education Council Third Ordinance, 1983, was re-promulgated four times (on January 11, 1984, by

Ordinance No. 3, on April 23, 1984, by Ordinance No. 8, on October 11, 1984, by Ordinance No. 11, and on March 1, 1985, by Ordinance No. 8) after filing of the Writ Petition before it was allowed to lapse. Thus, it continued to be in force for more than five years before it was allowed to lapse. As mentioned above, it was last re-promulgated on March 1, 1985 (Ordinance No. 8 of 1985).

- (v) Though Ordinance 8 of 1985 was allowed to lapse, its provisions were substantially continued by another Ordinance, namely, the Bihar Intermediate Education Ordinance, 1985 (Bihar Ordinance No. 23 of 1985), which was promulgated on June 6, 1985. Section 3 of this Ordinance provided that the Education Secretary, Government of Bihar, shall be deemed to have been authorized to conduct, direct, supervise and control education of intermediate standard and for carrying out all functions relating to the purposes and powers as provided in the Bihar Intermediate Education Council Ordinance, 1985 (Bihar Ordinance No. 8 of 1985). This new Ordinance, that is, Ordinance No. 23 of 1985, is being re-promulgated again and again. It was re-promulgated as Ordinance No. 28 of 1985 (on August 8, 1985), as Ordinance No. 40 of 1985 (date not known), as Ordinance No. 9 of 1986 (on April 8, 1986) and is still in force.
- (vi) The matter is likely to arise again and in fact the practice of the re-promulgation of Ordinances is continuing even today in the State of Bihar.
- (vii) By the time the courts are called upon to decide the constitutionality of this practice in another case, the State of Bihar can render the Writ Petition "academic" by getting an Act enacted in terms of the Ordinance or allowing the Ordinance to lapse. Therefore, serious consequences will result if this Hon'ble Court were to hold that the present Writ Petition is academic. The State of Bihar can go on continuing with its unlawful activity of re-promulgating Ordinances for years and then when a Writ Petition for challenging such Ordinances is filed, getting those Ordinances converted into Acts or by allowing them to lapse.

29. The question as to whether the constitutional requirements set out in Article 213 have been complied with is of utmost public importance. The essence of the parliamentary system of government lies in the making of laws by the elected representatives of the people after due deliberation and discussion. The extraordinary, temporary and limited legislative power conferred on the Executive by the Constitution has been abused in the State of Bihar to by-pass the normal method of law-making by the State Legislature. Even by their own admission, this practice is against the parliamentary system (*vide* Appendix 1). Such a question of utmost public importance cannot be considered academic.

30. A Constitution Bench of five judges of this Hon'ble Court considered a similar situation in the *City of Nagpur Corporation v. John Servage Phillip and another* (1963, Suppl. 2 S.C.R. 600). The Court dismissed the contention that the dispute before it had become academic. It was held at p. 606 as under:

“It was said that the question raised in this appeal had become academic since the Congress was long over. It may be stated that the Congress was held from April 27 to May 1, 1959, and the writ was issued by the High Court on April 23, 1959. It was suggested that it is not, therefore, a fit case for decision in an appeal under Art. 136 of the Constitution. We are not at all impressed by this contention. It seems to us that it is a matter of the utmost importance for the appellant Corporation to know its rights under its incorporating statute. It will have to guide itself according to our decision in future when a similar point arises again. If we do not decide the point raised now, then on every subsequent occasion the Corporation would be bound by the judgment of the High Court under appeal and by the time the matter is brought up here the same argument that the question has become academic can always be raised to defeat the point. We think that the point raised by the appellant Corporation as to its powers under the statute and how far courts can review the exercise of its power by the appellant Corporation is of great importance and must be decided in this appeal.”

31. In *United States of America v. W.T. Grant Company* (97 L ed 1303 at 1309), the Supreme Court of the United States of America also expressed a similar view. It held there as under:

“... voluntary cessation of allegedly illegal conduct does not deprive

the tribunal of power to hear and determine the case, i.e., does not make the case moot. *United States v. Trans-Missouri Freight Assn.*, 166 US 290, 41 L ed 1007, 17 S Ct 540 (1897); *Walling v. Helmerich & Payne, Inc.*, 323 US 37, 89 L ed 29, 65 S Ct (1944); *Hecht Co. v. Bowles*, 321 US 321, 88 L ed 754, 64 S Ct 587 (1944).

32. In *United States v. Aluminium Co. of America*, 148 F2d 416, 448 (1945, CA2d NY), it was held as under:

“A controversy may remain to be settled in such circumstances, e.g., a dispute over the legality of the challenged practices. *Walling v. Helmerich & Payne, Inc.* (US) *supra*; *United Brotherhood C. & J. v. N.L.R.B.*, 341 US 707, 715, 95 L ed 1309, 1316, 71 S Ct 966 (1951). The defendant is free to return to his old ways (Cf. *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gasellschaft*, 239 US 466, 60 L ed 387, 36 S Ct 212, 1916).”

33. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion.

34. In *United States v. Trans-Missouri Freight Assn.*, *supra* (166 US 290 at 309, 310), it was held as under:

“For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right, *N.L.R.B. v. General Motors Corpn.*, 179 F2d 221 (1950), CA2d.”

35. In *United States v. Oregon State Medical Soc.* 343 US 326, 333, 396 L ed 978, 984, 72 S Ct 690 (1952), it was held as under:

“The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement. When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of anti-trust laws, courts will not assume that it has been abandoned without clear proof. ... It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.”

36. In *United States v. Aluminium Co. of America*, *supra*, 148 F2d 416 at p. 448, it was held as under:

“The case may nevertheless be moot if the defendant can demonstrate that ‘there is no reasonable expectation that the wrong will be repeated.



The burden is a heavy one. Here the defendants told the court that the interlocks no longer existed and disclaimed any intention to revive them. Such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now discontinued acts.”

37. In *Hecht Co. v. Bowles*, 321 US 321, 84 L ed 754, 64 S Ct 587, *supra*; it was held as under:

“Alongwith its power to hear the case, the court’s power to grant injunctive relief survives discontinuance of the illegal conduct. The purpose of an injunction is to prevent future violations.” *Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co.*, 242 US 202, 61 L ed 248; 37 S Ct 105 (1916).

38. In *Swift & Co. v. United States*, 276 US 311, 325, 72 L ed 587, 597, 48 S Ct 311 (1928), it was held as under:

“ ... and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.”

39. A similar view was taken by the Supreme Court of the United States of America in *Jane Roe v. Henry Wade*, 35 L ed 2d 147 at 161, also. It was held there as under:

“The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, 340 US 36, 95 L ed 36, 71 S Ct 104 (1950); *Golden v. Zwickler, supra*; *SEC v. Medical Committee for Human Rights*, 404 US 403, 30 L ed 2d 560, 92 S Ct 577 (1972).”

“But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be affectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy

provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review'. *Southern Pacific Terminal Co. v. ICC*, 219 US 498, 515, 55 L ed 310, 31 S Ct 279 (1911). See *Moore v. Ogilvie*, 394 US 814, 816, 23 L ed 2d 1, 89 S Ct 1493 (1969); *Carroll v. Princess Anne*, 393 US 175, 178-179, 21 L ed 2d 325, 89 S Ct 347 (1968); *United States v. W.T. Grant Co.*, 345 US 629, 632-633, 97 L ed 1303, 73 S Ct 894 (1953)."

"We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot."

40. It is clear from the above authorities both of a five judges Bench of this Hon'ble Court and of the Supreme Court of the United States of America that the present Writ Petition raises an issue which is live and not academic.

#### **IV. The Ordinance-making Power Cannot be Used by the Executive to Usurp the Law-making Function of the Legislature**

41. It is contended by the respondent that failure on the part of the Legislature to make laws is itself the circumstance which compels the Governor to re-promulgate Ordinances. It is submitted that the non-making of an Act by the Legislature for a number of years, even though its regular sessions were held in all those years, cannot be considered a valid emergent circumstance necessitating the promulgation of an Ordinance. Moreover, the truth of the matter is that, even on their own admission, necessary efforts were not made by the Government of Bihar for getting the Ordinances converted into Acts (*vide* Appendix 1) by bringing Bills on those subjects before the Legislature for which it had ample opportunities as the Legislature continued to meet regularly in all those years. If there had been any sense of emergency on the part of the Government, it could have approached the Legislature with Bills on the subjects and got laws made by it on the various occasions when it met first after the promulgation of the first of the Ordinances. Instead of bringing Bills before the Legislature for getting the Ordinances replaced by the Acts of the Legislature, the Government went on re-promulgating those Ordinances again and again for years together. It is also submitted that retrospectivity given to the successive Ordinances was objectionable and was indicative of want of urgency, when in fact the

Legislature had actually been in session during the periods in question. It was only for the purpose of re-promulgating Ordinances that every time, artificially and deliberately, a situation was being created by getting the 'legislature prorogued' so that it could be said that it was not in session.

42. It is well settled that if the law requires a thing to be done in the manner provided in the statute, it has got to be done in that manner itself otherwise not at all, and any action which is taken contrary to that manner will be illegal and void. It is also well settled that in a mandatory provision there is implied prohibition to do an act in any other manner while in a directory provision substantial compliance is considered sufficient. In those cases where strict compliance is indicated to be a condition precedent to the validity of the law, neglect to perform it will be fatal.

43. However, failure on the part of the Legislature to make laws for years on end as alleged by the respondent does not empower the Executive to usurp the law-making power of the Legislature and act as a parallel Legislature and make permanent laws. The Governor of a state is basically an Executive head. It was not the intention of the framers of the Constitution that he should go on functioning as a Legislature of a state. In determination of the issue this consideration is of paramount importance.

44. The primary or essential duty of law-making has got to be discharged by the Legislature itself. The Legislature must declare the policy of the law and the legal principles which are to control any given cases, and must provide a standard to guide the Executive to execute the law. It is evident, without a shadow of doubt, from the provisions of Articles 168 to 212 read with the provisions of Article 145 (1) that the Constitution intends the law-making functions of the states to be discharged by the state legislatures only. The Executive cannot convert its extraordinary limited emergency legislative power into an ordinary legislative power under any circumstances.

45. It is submitted that if after the promulgation of an Ordinance a session of the Legislature is held and if the emergent situation necessitating the promulgation of that Ordinance continues and if it is deemed desirable that the provisions of that Ordinance should continue to be in force for some more time or permanently then a Bill in terms of that Ordinance must be brought before the Legislature within six weeks after it first reassembles after the promulgation of that Ordinance and the Ordinance must be got replaced by an Act of the Legislature. Once the emergent circumstances having been utilised by promulgating an Ordinance and there having been a

session of the State Legislature after its promulgation, the power to deal with the situation by an Ordinance exhausts itself.

### **V. Subject-matter of the Bihar Ordinances**

46. The respondent argues that the Ordinance-making power is not inconsistent with democracy. It is further argued that decisions about such vital matters as war cannot be taken on a critical moment by holding debates after summoning the Parliament.

47. It is submitted that the petitioners have not challenged the Ordinance-making power of the Executive during emergencies. The petition of the petitioners is against the practice of the re-promulgation of these Ordinances instead of getting them converted into Acts of the Legislature within the time specified in the Constitution.

48. As pointed out in Annexure 'A'<sup>2</sup> to the Writ Petition, the Book, and in the earlier Written Submissions of the petitioners, the Ordinance-making power has been with the Central Government since 1861. As a matter of fact not a single Ordinance has been re-promulgated by the Central Government from 1861 till today. Moreover, Appendices 2 to 12 which give the number and names of Ordinances re-promulgated and promulgated on certain dates by the Governor of Bihar reveal the nature of the subject-matter of those Ordinances and the times when they were promulgated. They are self-explanatory and need no further comments.

### **VI. Ordinances Do Not Have Perpetual Duration**

49. One of the submissions of the respondent is that what is done by the first Ordinance has perpetual effect notwithstanding the fact that the Ordinance has lapsed. It is submitted that the above contention is misconceived in law. The petitioners submit that no Ordinance can, under the scheme of the Constitution, have a perpetual effect and all Ordinances necessarily must be got converted into Acts of the Legislature. This is the very basis of the democratic functioning of the Indian Constitution. Any view to the contrary would enable the Executive to completely by-pass the Legislature. This argument is also inconsistent with the provisions of Article 213 which make it mandatory for the Ordinances to be converted into Acts of the Legislature

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<sup>2</sup> Not printed in this volume

failing which the Ordinances lapse. Every law, including an amending law, is regulatory in nature and empowers the Executive to do or not to do an act and therefore must have the approval of the Legislature. In such a case it is erroneous to contend that an Ordinance has a perpetual effect.

### **VII. The Bihar Practice of Re-promulgating Ordinances is a Fraud on Power**

50. The petitioners submit that the practice adopted by the State of Bihar of re-promulgating Ordinances for years on end instead of getting them converted into Acts of the Legislature is a fraud on power. This Hon'ble Court has interpreted this expression in the following cases:

51. In *K.C. Gajapati Narayan Deo and others v. The State of Orissa* (1954, 1 S.C.R. 1 at 11), a Constitution Bench of five judges of this Hon'ble Court has held as under:

“Whether a statute is constitutional or not is thus always a question of power. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a state distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression ‘colourable legislation’ has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise.”

52. In *Gullapalli Nageswara Rao and others v. Andhra Pradesh State*

*Road Transport Corporation and another* (1959, Suppl. 1 S.C.R. 319 at 329), another Constitution Bench of five judges of this Hon'ble Court has held as under:

“The legal position may be briefly stated thus: The legislature can only make laws within its legislative competence. Its legislative field may be circumscribed by specific legislative entries or limited by fundamental rights created by the Constitution. The legislature cannot over-step the field of its competency, directly or indirectly. The court will scrutinize the law to ascertain whether the legislature by device purports to make a law which, though in form appears to be within its sphere, in effect and substance, reaches beyond it.”

53. In *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and another* (1965, 1 S.C.R. 614 at 629), another Constitution Bench of five judges of this Hon'ble Court has held as under:

“When a Court says that a particular legislation is a colourable one, it means that the Legislature has transgressed its legislative powers in a covert or indirect manner; it adopts a device to outstep the limits of its power. Applying the doctrine to the instant case, the Legislature cannot make a law in derogation of Art. 31(2) of the Constitution. It can, therefore, only make a law of acquisition or requisition by providing for ‘compensation’ in the manner prescribed in Art. 31(2) of the Constitution. If the Legislature, though *ex facie* purports to provide for compensation or indicates the principles for ascertaining the same, but in effect and substance takes away a property without paying compensation for it, it will be exercising power which it does not possess. If the Legislature makes a law for acquiring a property by providing for an illusory compensation or by indicating the principles for ascertaining the compensation, which do not relate to the property acquired or to the value of such property at or within a reasonable proximity of the date of acquisition or the principles are so designed and so arbitrary that they do not provide for compensation at all, one can easily hold that the Legislature made the law in fraud of its power. Briefly stated the legal position is as follows:

If the question pertains to the adequacy of compensation, it is not justiciable; if the compensation fixed or the principles evolved for fixing it disclose that the Legislature made the law in fraud of powers

in the sense we have explained, the question is within the jurisdiction of the Court.”

54. In *Acharya Jagdishwaranand Avadhuta v. Commissioner of Police, Calcutta and another* (1984, 1 S.C.R. 447), this Hon’ble Court has held that repeated extensions of the prohibitory orders made under section 144 of the Criminal Procedure Code is an abuse of power. It was held at pp. 460-463 as under:

“It is the petitioner’s definite case that the prohibitory orders under S. 144 of the code are being repeated at regular intervals from August 1979. Copies of several prohibitory orders made from time to time have been produced before us and it is not the case of the respondents that such repetitive prohibitory orders have not been made. The order under S. 144 of the Code made in March 1982 has also been challenged on the ground that the material facts of the case have not been stated. Section 144 of the Code, as far as relevant, provides: “(1) In cases where in the opinion of a District Magistrate, a Sub-Divisional Magistrate, or any other Executive Magistrate specially empowered by the State Government in this behalf, there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in the manner provided by section 134, direct ...”. It has been the contention of Mr. Tarkunde that the right to make the order is conditioned upon it being a written one and the material facts of the case being stated. Some High Courts have taken the view that this is a positive requirement and the validity of the order depends upon compliance of this provision. In our opinion it is not necessary to go into this question as counsel for the respondents conceded that this is one of the requirements of the provisions and if the power has to be exercised it should be exercised in the manner provided on pain of invalidating for non-compliance. There is currently in force a prohibitory order in the same terms and hence the question cannot be said to be academic. The other aspect, viz., the propriety of repetitive prohibitory orders is, however, to our mind a serious matter and since long arguments have been advanced, we propose to deal with it. In this case as fact from October 1979 till 1982 at the interval of almost two months orders under S. 144 (1) of the Code have been made from time to time. It is not disputed before us that the power conferred under this

section is intended for immediate prevention of breach of peace or speedy remedy. An order made under this section is to remain valid for two months from the date of its making as provided in sub-section (4) of S. 144. The proviso to sub-section (4) authorises the State Government in case it considers it necessary so to do for preventing danger to human life, health or safety, or for preventing a riot or any affray, to direct by notification that an order made by a Magistrate may remain in force for a further period not exceeding six months from the date on which the order made by the Magistrate would have, but for such order, expired. The effect of the proviso, therefore, is that the State Government would be entitled to give the prohibitory order an additional term of life but that would be limited to six months beyond the two months' period in terms of sub-section (4) of S. 144 of the Code. Several decisions of different High Courts have rightly taken the view that it is not legitimate to go on making successive orders after earlier orders have lapsed by efflux of time. A Full Bench consisting of the entire Court of 12 Judges in *Gopi Mohun Mullick v. Taramani Chowdhraani*<sup>1</sup> examining the provisions of S. 518 of the Code of 1861 (corresponding to present S. 144) took the view that such an action was beyond the Magistrate's powers. Making of successive orders was disapproved by the Division Bench of the Calcutta High Court in *Bishessur Chuckerbutty & another v. Emperor*<sup>2</sup>. Similar view was taken in *Swaminatha Mudaliar v. Gopalakrishna Naidu*<sup>3</sup>; *Taturam Sahu v. The State of Orissa*<sup>4</sup>; *Ram Das Gaur v. The City Magistrate, Varanasi*<sup>5</sup>; and *Ram Narain Sah & another v. Parmeshwar Prasad Sah & others*<sup>6</sup>. We have no doubt that the ratio of these decisions represents a correct statement of the legal position. The proviso to sub-section (4) of S. 144 which gives the State Government jurisdiction to extend the prohibitory order for a maximum period of six months beyond the life of the order made by the Magistrate is clearly indicative of the position that Parliament never intended the life of an order under S. 144 of the Code to remain in force beyond two months when made by a Magistrate. The scheme of that section does not contemplate repetitive orders and in case the situation so warrants steps have to be taken under other provisions of the law such as S. 107 or S. 145 of the Code when individual

<sup>1</sup>ILR 5 Cal. 7<sup>2</sup>AIR 1916 Cal. 47<sup>3</sup>AIR 1916 Mad. 1106<sup>4</sup>AIR 1953 Orissa 96<sup>5</sup>AIR 1960 All. 397<sup>6</sup>AIR 1942 Pat. 414



disputes are raised and to meet a situation such as here, there are provisions to be found in the Police Act. If repetitive orders are made it would clearly amount to abuse of the power conferred by S. 144 of the Code. It is relevant to advert to the decision of the Court in *Babulal Parate v. State of Maharashtra & others*<sup>7</sup>, where the vires of S. 144 of the Code was challenged. Upholding the provision, this Court observed:

“Public order has to be maintained in advance in order to ensure it and, therefore, it is competent for a legislature to pass a law permitting an appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts in an emergency for the purpose of maintaining public order...”.

It was again emphasized:

“But it is difficult to say that an anticipatory action taken by such an authority in an emergency where danger to public order is genuinely apprehended is anything other than an action done in the discharge of the duty to maintain order...”.

This court had, therefore, appropriately stressed upon the feature that the provisions of S. 144 of the Code was intended to meet an emergency. This postulates a situation temporary in character and, therefore, the duration of an order under S.144 of the Code could never have been intended to be semipermanent in character.

Similar view was expressed by this Court in *Gulam Abbas & others v. State of U.P. & others*<sup>8</sup> where it was said that “the entire basis of action under S. 144 is provided by the urgency of the situation and the power thereunder is intended to be availed of for preventing disorders, obstructions and annoyances with a view to secure the public weal by maintaining public peace and tranquillity...”. Certain observations in *Gulam Abbas’s* decision regarding the nature of the order under S. 144 of the Code — judicial or executive — to the extent they run counter to the decision of the Constitution Bench in *Babulal Parate’s* case, may require reconsideration but we agree that the nature of the order under S. 144 of the Code is intended to meet emergent situation. Thus the clear and definite view of this Court is that an

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<sup>7</sup>[1961] 3 S.C.R. 423 at 437

<sup>8</sup>[1981] 2 Cr. L.J. 1835 at 1862

order under S. 144 of the Code is not intended to be either permanent or semi-permanent in character. The concensus of judicial opinion in the High Courts of the country is thus in accord with the view expressed by this Court.”

### VIII. Relief

Lastly, it is submitted that this Hon'ble Court is fully competent to grant declaratory relief under Article 32. In *Kavalappara Kottarathil Kochunni Moopil Nayar v. The State of Madras & others* (1959 Suppl. 2 S.C.R. 316 at 333), it was held by a Constitution Bench of this Hon'ble Court as under:

“But on a consideration of the authorities it appears to be well established that this Court's powers under Art. 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party.”

*Drawn By*

D. C. Wadhwa  
Petitioner

*Filed on*

December 3, 1986

*Filed By*

J.B. Dadachanji & Co.,  
Advocates, Supreme Court,  
New Delhi

## APPENDIX 1

Chief Secretary's Letter No. 1210 dated November 13, 1981, addressed to all the Commissioners and Secretaries/all Special Secretaries/all Additional Secretaries/all Heads of Departments

**Subject: Regarding obtaining of consent of the  
Parliamentary Affairs Department before the  
promulgation of Ordinances**

I am directed to say that in the past years new Ordinances were being promulgated by different departments but *necessary efforts were not made to get them converted into Acts* [emphasis added]. Its result was that not only old Ordinances have been re-promulgated for years, even new Ordinances were promulgated every year. As a result, the number of Ordinances in the State has become very high. *This is against the Parliamentary system* [emphasis added] and for this the government is bitterly criticised. Under the above circumstances, it has become necessary that in future only under extreme, unavoidable and special circumstances new Ordinances should be promulgated.

2. It is, therefore, requested that normally no new Ordinance should be promulgated and if under special circumstances there is a proposal to promulgate a new Ordinance then the advice of the Parliamentary Affairs Department must be obtained before such promulgation.

3. Kindly acknowledge the receipt of the letter.

## APPENDIX 2

List of 54 Ordinances re-promulgated and one Ordinance promulgated by the Governor of Bihar on August 26, 1973

Serial No.	Ordinance No.	Title of the Ordinance
1	65	The Bihar Hindu Religious Trusts (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
2	66	The Rajendra Agricultural University (Third Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
3	67	The Bihar Agricultural Produce Markets (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
4	68	The Bihar Panchayat Raj (Validating) Third Ordinance, 1973 (last promulgated on April 7, 1973)
5	69	The Bihar Panchayat Raj (Amendment and Validation) Second Ordinance, 1973 (last promulgated on April 7, 1973)
6	70	The Bihar Panchayat Samitis and Zila Parishads (Second Amending and Validating) Ordinance, 1973 (last promulgated on May 10, 1973)
7	71	The Bihar Panchayat Samitis and Zila Parishads (Third Amendment) Ordinance, 1973 (last promulgated on June 21, 1973)
8	72	The Bihar Panchayat Samitis and Zila Parishads (Fourth Amendment) Ordinance, 1973 (last promulgated on June 9, 1973)
9	73	The Bihar District Boards and Local Boards (Control and Management) (Third Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)

Serial No.	Ordinance No.	Title of the Ordinance
10	74	The Bihar Taxation on Passengers and Goods (Carried by Public Service Motor Vehicles) (Second Amendment) Ordinance, 1973 (last promulgated on May 8, 1973)
11	75	The Bihar Shops and Establishments (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
12	76	The Bihar Sales Tax (Second Amendment) Ordinance, 1973 (New)
13	77	The Bihar State Aid to Industries (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
14	78	The Bihar Industrial Area Development Authority Second Ordinance, 1973 (last promulgated on April 8, 1973)
15	79	The Bihar Khadi and Village Industries (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
16	80	The Bihar Buildings (Lease, Rent and Eviction Control) (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
17	81	The Bihar Premises and Vehicles (Requisition) Second Ordinance, 1973 (last promulgated on June 18, 1973)
18	82	The Bihar State Housing Board Second Ordinance, 1973 (last promulgated on April 7, 1973)
19	83	The Motor Vehicles (Bihar Second Amendment) Ordinance, 1973 (last promulgated on April 9, 1973)
20	84	The Mithila University Second Ordinance, 1973 (last promulgated on April 7, 1973)
21	85	The Bihar Primary Education (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
22	86	The Anugrah Narain Sinha Institute of Social Studies (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
23	87	The Bihar State Universities (Bihar, Bhagalpur and Ranchi) (Third Amendment) Ordinance, 1973 (last promulgated on May 24, 1973)
24	88	The Bihar State Universities (Patna, Bhagalpur, Ranchi and Magadh) (Control and Management) Second Ordinance, 1973 (last promulgated on April 7, 1973)
25	89	The Patna University (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
26	90	The Bihar State Universities Laws and Schools Laws (Second Amendment and Repeal) Ordinance, 1973 (last promulgated on April 7, 1973)
27	91	The Bihar School Examination Board (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
28	92	The Bihar Ancient Monuments and Archaeological Sites and Remains Second Ordinance, 1973 (last promulgated on April 8, 1973)
29	93	The Patliputra Medical College (Taking Over of Management) Second Ordinance, 1973 (last promulgated on April 7, 1973)
30	94	The Bihar Medical Educational Institutions (Regulation and Control) Second Ordinance, 1973 (last promulgated on April 7, 1973)
31	95	The Bihar Health Cess Second Ordinance, 1973 (last promulgated on April 7, 1973)
32	96	The Bihar Children Second Ordinance, 1973 (last promulgated on April 8, 1973)

Serial No.	Ordinance No.	Title of the Ordinance
33	97	The Bihar Motor Vehicles Taxation (Second Amendment) Ordinance, 1973 (last promulgated on May 23, 1973)
34	98	The Patna Municipal Corporation (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
35	99	The Bihar Municipal (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
36	100	The Bihar Public Demand Recovery (Fourth Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
37	101	The Bihar Ceiling on Urban Property (Temporary Restrictions on Transfer) Second Ordinance, 1973 (last promulgated on April 10, 1973)
38	102	The Chota Nagpur Tenancy (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
39	103	The Bihar Ministers' Salaries and Allowances (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
40	104	The Bihar Deputy Ministers' Salaries and Allowances (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
41	105	The Bihar Legislature (Officers' Salaries and Allowances) (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
42	106	The Bihar Tenancy (Second Amendment) Ordinance, 1973 (last promulgated on April 7, 1973)
43	107	The Bihar Gramdan (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
44	108	The Bihar Privileged Persons Homestead Tenancy (Second Amendment) Ordinance, 1973 (last promulgated on April 26, 1973)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
45	109	The Bihar Excise (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
46	110	The Bihar Public Demand Recovery (Third Amendment) Ordinance, 1973 (last promulgated on June 14, 1973)
47	111	The Bihar Soil and Water Conservation and Land Development Second Ordinance, 1973 (last promulgated on April 7, 1973)
48	112	The Bihar Money-lenders (Regulation of Transactions) (Second Amendment) Ordinance, 1973 (last promulgated on June 18, 1973)
49	113	The Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance, 1973 (last promulgated on April 9, 1973)
50	114	The Bihar Co-operative Societies (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
51	115	The Bihar Irrigation and Lift Irrigation (Second Amendment) Ordinance, 1973 (last promulgated on April 9, 1973)
52	116	The Bihar Land Reforms (Second Amendment) Ordinance, 1973 (last promulgated on June 28, 1973)
53	117	The Bihar Land Reforms (Second Amending and Validating) Ordinance, 1973 (last promulgated on April 8, 1973)
54	118	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Second Amendment) Ordinance, 1973 (last promulgated on April 8, 1973)
55	119	The Bihar Kendu Leaves (Control on Trade) Second Ordinance, 1973 (last promulgated on April 8, 1973)



APPENDIX 3

List of 49 Ordinances re-promulgated by the Governor of Bihar on January 17, 1974

Serial No.	Ordinance No.	Title of the Ordinance
1	1	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1974 (last promulgated on October 1, 1973)
2	2	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
3	3	The Bihar State Aid to Industries (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
4	4	The Bihar Hindu Religious Trusts (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
5	5	The Bihar Taxation on Trade, Occupation, Calling and Employment Ordinance, 1974 (last promulgated on September 21, 1973)
6	6	The Bihar Municipal (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
7	7	The Bihar Panchayat Raj (Validating) Ordinance, 1974 (last promulgated on August 26, 1973)
8	8	The Bihar Irrigation and Lift Irrigation (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
9	9	The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Ordinance, 1974 (last promulgated on August 26, 1973)
10	10	The Bihar Panchayat Raj (Amendment and Validation) Ordinance, 1974 (last promulgated on August 26, 1973)
11	11	The Bihar Local Self-government (Amendment) Ordinance, 1974 (last promulgated on October 30, 1973)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
12	12	The Bihar State Laws (Authoritative Text in Hindi) Publication Ordinance, 1974 (last promulgated on November 8, 1973)
13	13	The Bihar District Boards and Local Boards (Control and Management) Ordinance, 1974 (last promulgated on August 26, 1973)
14	14	The Bihar Co-operative Societies (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
15	15	The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1974 (last promulgated on August 26, 1973)
16	16	The Bihar Ministers' Salaries and Allowances (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
17	17	The Bihar Deputy Ministers' Salaries and Allowances (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
18	18	The Bihar Legislature (Officers' Salaries and Allowances) (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
19	19	The Motor Vehicles (Bihar Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
20	20	The Bihar Health Cess Ordinance, 1974 (last promulgated on August 26, 1973)
21	21	The Bihar Motor Vehicles Taxation (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
22	22	The Bihar Land Reforms (Amending and Validating) Ordinance, 1974 (last promulgated on August 26, 1973)
23	23	The Bihar Land Reforms (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)

Serial No.	Ordinance No.	Title of the Ordinance
24	24	The Bihar Industrial Area Development Authority Ordinance, 1974 (last promulgated on August 26, 1973)
25	25	The Bihar Medical Educational Institutions (Regulation and Control) Ordinance, 1974 (last promulgated on August 26, 1973)
26	26	The Anugrah Narain Sinha Institute of Social Studies (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
27	27	The Bihar School Examination Board (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
28	28	The Bihar Primary Education (Amendment) Ordinance, 1974 (last promulgated on November 5, 1973)
29	29	The Bihar Ancient Monuments and Archaeological Sites and Remains Ordinance, 1974 (last promulgated on August 26, 1973)
30	30	The Patliputra Medical College (Taking Over of Management) Ordinance, 1974 (last promulgated on August 26, 1973)
31	31	The Bihar State Housing Board Ordinance, 1974 (last promulgated on August 26, 1973)
32	32	The Bihar Soil and Water Conservation and Land Development Ordinance, 1974 (last promulgated on August 26, 1973)
33	33	The Bihar Sales Tax (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
34	34	The Bihar State Universities (Patna, Bihar, Bhagalpur, Ranchi and Magadh Universities) (Control and Management) Ordinance, 1974 (last promulgated on August 26, 1973)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
35	35	The Patna University (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
36	36	The Mithila University Ordinance, 1973 (last promulgated on August 26, 1973)
37	37	The Bihar State Universities Laws and Schools Laws (Amendment and Repeal) Ordinance, 1974 (last promulgated on August 26, 1973)
38	38	The Bihar Shops and Establishments (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
39	39	The Bihar Children Ordinance, 1973 (last promulgated on August 26, 1973)
40	40	The Bihar Bricks Supply (Control) Ordinance, 1974 (last promulgated on December 6, 1973)
41	41	The Bihar Agricultural Produce Markets (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
42	42	The Rajendra Agricultural University (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
43	43	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
44	44	The Patna Municipal Corporation (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
45	45	The Bihar Tenancy (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
46	46	The Bihar Ceiling on Urban Property (Temporary Restrictions on Transfer) Ordinance, 1974 (last promulgated on August 26, 1973)
47	47	The Bihar Gramdan (Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)

Serial No.	Ordinance No.	Title of the Ordinance
48	48	The Chota Nagpur (Tenancy Amendment) Ordinance, 1974 (last promulgated on August 26, 1973)
49	49	The Bihar Premises and Vehicles (Requisition) Ordinance, 1974 (last promulgated on August 26, 1973)

#### APPENDIX 4

List of 50 Ordinances re-promulgated (7 on April 27, 34 on April 28, and 9 on April 29, 1974) and 4 Ordinances promulgated (2 on April 27, 1 on April 28 and 1 on April 29, 1974) by the Governor of Bihar

##### *A. April 27, 1974*

Serial No.	Ordinance No.	Title of the Ordinance
1	55	The Bihar Sales Tax (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
2	56	The Bihar State Aid to Industries (Second Amendment) Ordinance, 1974 (New)
3	57	The Bihar Ministers' Salaries and Allowances (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
4	58	The Bihar Deputy Ministers' Salaries and Allowances (Second Amendment) Ordinance, 1974 (last promulgated on January 1, 1974)
5	59	The Bihar Legislature (Officers' Salaries and Allowances) (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
6	60	The Motor Vehicles (Bihar Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)

Serial No.	Ordinance No.	Title of the Ordinance
7	61	The Bihar Motor Vehicles Taxation (Third Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
8	62	The Bihar Motor Vehicles Taxation (Fourth Amendment) Ordinance, 1974 (last promulgated on March 16, 1974)
9	67	The Bihar Motor Vehicles Taxation (Fifth Amendment) Ordinance, 1974 (New)

*B. April 28, 1974*

Serial No.	Ordinance No.	Title of the Ordinance
1	63	The Anugrah Narain Sinha Institute of Social Studies (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
2	64	The Bihar Primary Education (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
3	65	The Bihar School Examination Board (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
4	66	The Patna University (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
5	68	The Bihar State Universities Laws and Schools Laws (Second Amendment and Repeal) Ordinance, 1974 (last promulgated on January 17, 1974)
6	69	The Mithila University Second Ordinance, 1974 (last promulgated on January 17, 1974)
7	70	The Bihar State Universities Laws (Second Amendment) Ordinance, 1974 (last promulgated on March 16, 1974)

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Serial No.	Ordinance No.	Title of the Ordinance
8	71	The Bihar State Universities (Patna, Bihar, Bhagalpur, Ranchi and Magadh) (Control and Management) Second Ordinance, 1974 (last promulgated on January 17, 1974)
9	72	The Bihar Weights and Measures (Enforcement) (Second Amendment) Ordinance, 1974 (last promulgated on February 15, 1974)
10	73	The Patliputra Medical College (Taking Over of Management) Second Ordinance, 1974 (last promulgated on January 17, 1974)
11	74	The Bihar Medical Educational Institutions (Regulation and Control) Second Ordinance, 1974 (last promulgated on January 17, 1974)
12	75	The Bihar Health Cess Second Ordinance, 1974 (last promulgated on January 17, 1974)
13	76	The Patna Municipal Corporation (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
14	77	The Bihar Municipal (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
15	78	The Bihar Hindu Religious Trusts (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
16	79	The Bihar State Laws (Authoritative Text in Hindi) Publication Second Ordinance, 1974 (last promulgated on January 17, 1974)
17	80	The Bihar Industrial Area Development Authority Second Ordinance, 1974 (last promulgated on January 17, 1974)
18	81	The Bihar Soil and Water Conservation and Land Development Second Ordinance, 1974 (last promulgated on January 17, 1974)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
19	82	The Bihar Tenancy (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
20	83	The Indian Electricity (Bihar Second Amendment) Ordinance, 1974 (last promulgated on February 2, 1974)
21	84	The Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance, 1974 (last promulgated on January 17, 1974)
22	85	The Bihar Panchayat Samitis and Zila Parishads (Second Amending and Validating) Ordinance, 1974 (last promulgated on January 17, 1974)
23	86	The Bihar Local Self-government (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
24	87	The Bihar District Boards and Local Boards (Control and Management) (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
25	88	The Bihar Agricultural Produce Markets (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
26	89	The Bihar State Aid to Industries (Third Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
27	90	The Bihar Khadi and Village Industries (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
28	91	The Bihar Shops and Establishments (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
29	92	The Chota Nagpur Tenancy (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
30	93	The Bihar Gramdan (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)



Serial No.	Ordinance No.	Title of the Ordinance
31	94	The Bihar Panchayat Raj Validating Second Ordinance, 1974 (last promulgated on January 17, 1974)
32	95	The Bihar Panchayat Raj (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
33	96	The Bihar Land Reforms (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
34	97	The Bihar Land Reforms (Second Amending and Validating) Ordinance, 1974 (last promulgated on January 17, 1974)
35	98	The Indian Registration (Bihar Amendment) Ordinance, 1974 (New)

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Serial No.	Ordinance No.	Title of the Ordinance
1	99	The Bihar Co-operative Societies (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
2	100	The Bihar Flying Club (Taking Over of Management and Control) Second Ordinance, 1974 (last promulgated on February 6, 1974)
3	101	The Bihar Ancient Monuments and Archaeological Sites and Remains Second Ordinance, 1974 (last promulgated on January 17, 1974)
4	102	The Bihar Irrigation and Lift Irrigation (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
5	103	The Bihar Bricks Supply (Control) (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
6	104	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)
7	105	The Bihar Premises and Vehicles (Requisition) Second Ordinance, 1974 (last promulgated on January 17, 1974)
8	106	The Bihar State Housing Board Second Ordinance, 1974 (last promulgated on January 17, 1974)
9	107	The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Amendment) Ordinance, 1974 (New)
10	108	The Rajendra Agricultural University (Second Amendment) Ordinance, 1974 (last promulgated on January 17, 1974)

### APPENDIX 5

List of 51 Ordinances re-promulgated by the Governor of Bihar on July 23, 1974

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
1	115	The Bihar Sugarcane (Regulation of Supply and Purchase) Third Ordinance, 1974 (last promulgated on April 28, 1974)
2	116	The Bihar State Housing Board Third Ordinance, 1974 (last promulgated on April 29, 1974)
3	117	The Bihar Co-operative Societies (Fifth Amendment) Ordinance, 1974 (last promulgated on April 29, 1974)
4	118	The Bihar Flying Club (Taking Over of Management and Control) Third Ordinance, 1974 (last promulgated on April 29, 1974)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
5	119	The Motor Vehicles (Bihar Third Amendment) Ordinance, 1974 (last promulgated on April 27, 1974)
6	120	The Bihar Motor Vehicles Taxation (Sixth Amendment) Ordinance, 1974 (last promulgated on April 27, 1974)
7	121	The Bihar Motor Vehicles Taxation (Seventh Amendment) Ordinance, 1974 (last promulgated on April 27, 1974)
8	122	The Bihar Motor Vehicles Taxation (Eighth Amendment) Ordinance, 1974 (last promulgated on April 27, 1974)
9	123	The Indian Electricity (Bihar Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
10	124	The Bihar Agricultural Produce Markets (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
11	125	The Rajendra Agricultural University (Third Amendment) Ordinance, 1974 (last promulgated on April 29, 1974)
12	126	The Bihar Weights and Measures (Enforcement) (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
13	127	The Bihar Soil and Water Conservation and Land Development (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
14	128	The Bihar Gramdan (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
15	129	The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Second Amendment) Ordinance, 1974 (last promulgated on April 29, 1974)
16	130	The Chota Nagpur Tenancy (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
17	131	The Bihar Tenancy (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
18	132	The Bihar Ceiling on Urban Property (Temporary Restrictions on Transfer) Third Ordinance, 1974 (last promulgated on May 10, 1974)
19	133	The Bihar Municipal (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
20	134	The Patna Municipal Corporation (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
21	135	The Bihar Medical Educational Institutions (Regulation and Control) Fourth Ordinance, 1974 (last promulgated on June 4, 1974)
22	136	The Bihar Health Cess Third Ordinance, 1974 (last promulgated on April 28, 1974)
23	137	The Bihar Irrigation and Lift Irrigation (Third Amendment) Ordinance, 1974 (last promulgated on April 29, 1974)
24	138	The Patliputra Medical College (Taking Over of Management) Third Ordinance, 1974 (last promulgated on April 28, 1974)
25	139	The Bihar Hindu Religious Trusts (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
26	140	The Bihar State Aid to Industries (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
27	141	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Third Amendment) Ordinance, 1974 (last promulgated on April 29, 1974)
28	142	The Bihar Premises and Vehicles (Requisition) Third Ordinance, 1974 (last promulgated on April 29, 1974)

Serial No.	Ordinance No.	Title of the Ordinance
29	143	The Bihar State Laws (Authoritative Text in Hindi) Publication Third Ordinance, 1974 (last promulgated on April 28, 1974)
30	144	The Bihar Panchayat Raj (Amendment and Validation) Third Ordinance, 1974 (last promulgated on April 28, 1974)
31	145	The Bihar Local Self-government (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
32	146	The Bihar District Boards and Local Boards (Control and Management) (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
33	147	The Bihar Panchayat Raj (Validating) Third Ordinance, 1974 (last promulgated on April 28, 1974)
34	148	The Bihar Ministers' Salaries and Allowances (Third Amendment) Ordinance, 1974 (last promulgated on April 27, 1974)
35	149	The Bihar Deputy Ministers' Salaries and Allowances (Third Amendment) Ordinance, 1974 (last promulgated on April 27, 1974)
36	150	The Bihar Legislature (Officers' Salaries and Allowances) (Third Amendment) Ordinance, 1974 (last promulgated on April 27, 1974)
37	151	The Bihar Legislature (Removal of Disqualification) (Second Amendment) Ordinance, 1974 (last promulgated on May 7, 1974)
38	152	The Bihar Panchayat Samitis and Zila Parishads (Third Amending and Validating) Ordinance, 1974 (last promulgated on April 28, 1974)
39	153	The Bihar Secondary Education Board Second Ordinance, 1974 (last promulgated on May 21, 1974)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
40	155	The Bihar School Examination Board (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
41	156	The Bihar State Universities (Patna, Bihar, Bhagalpur, Ranchi and Magadh Universities) (Control and Management) Ordinance, 1974 (last promulgated on April 28, 1974)
42	157	The Bihar State Universities Laws and Schools Laws (Third Amendment and Repeal) Ordinance, 1974 (last promulgated on April 28, 1974)
43	158	The Mithila University Third Ordinance, 1974 (last promulgated on April 28, 1974)
44	159	The Bihar State Universities Laws (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
45	160	The Patna University (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
46	161	The Bihar Primary Education (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
47	162	The Anugrah Narain Sinha Institute of Social Studies (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
48	163	The Bihar Ancient Monuments and Archaeological Sites and Remains Third Ordinance, 1974 (last promulgated on April 29, 1974)
49	164	The Bihar Bricks Supply (Control) Third Ordinance, 1974 (last promulgated on April 29, 1974)
50	165	The Bihar Shops and Establishments (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)
51	166	The Bihar Khadi and Gramodyog (Third Amendment) Ordinance, 1974 (last promulgated on April 28, 1974)

APPENDIX 6

List of 49 Ordinances re-promulgated by the Governor of Bihar on April 28, 1979

Serial No.	Ordinance No.	Title of the Ordinance
1	60	The Minimum Wages (Bihar Second Amendment) Ordinance, 1979 (last promulgated on January 31, 1979)
2	61	The Bihar Agricultural Produce Markets Second Ordinance, 1979 (last promulgated on February 5, 1979)
3	62	The Bihar Motor Vehicles Taxation (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
4	63	The Bihar State Aid to Industries (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
5	64	The Bihar Khadi and Village Industries (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
6	65	The Bihar Hindu Religious Trusts (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
7	66	The Bihar Soil and Water Conservation and Land Development Second Ordinance, 1979 (last promulgated on February 5, 1979)
8	67	The Rajendra Agricultural University (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
9	68	The Bihar State Water and Sewage Board Ordinance, 1979 (last promulgated on March 17, 1979)
10	69	The Bihar State Housing Board Second Ordinance, 1979 (last promulgated on February 5, 1979)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
11	70	The Bihar Legislature (Members' Salaries, Allowances and Pension) (Second Amendment) Ordinance, 1979 (last promulgated on March 1, 1979)
12	71	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Third Amendment) Ordinance, 1979 (last promulgated on March 12, 1979)
13	72	The Bihar Agricultural Credit Operations and Miscellaneous Provisions (Bank) Second Ordinance, 1979 (last promulgated on February 5, 1979)
14	73	The Bihar Sugar Undertakings (Acquisition) (Second Amendment) Ordinance, 1979 (last promulgated on March 17, 1979)
15	74	The Bihar Forest Produce (Regulation of Trade) Second Ordinance, 1979 (last promulgated on February 5, 1979)
16	75	The Bihar Children Second Ordinance, 1979 (last promulgated on March 17, 1979)
17	76	The Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance, 1979 (last promulgated on February 5, 1979)
18	77	The Bihar Maintenance of Essential Services (Second Amendment) Ordinance, 1979 (last promulgated on February 6, 1979)
19	78	The Bihar Medical Educational Institutions (Regulation and Control) Second Ordinance, 1979 (last promulgated on February 5, 1979)
20	79	The Bihar Agricultural Income-tax (Repeal) Second Ordinance, 1979 (last promulgated on February 22, 1979)
21	80	The Bihar Municipal (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)



Serial No.	Ordinance No.	Title of the Ordinance
22	81	The Patna Municipal Corporation (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
23	82	The Bihar Municipal (Third Amendment and Validation) Ordinance, 1979 (last promulgated on February 22, 1979)
24	83	The Bihar Municipal and Patna Municipal Corporation (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
25	84	The Bihar Cinema (Regulation) (Second Amendment) Ordinance, 1979 (last promulgated on February 22, 1979)
26	85	The Bihar Sales Tax Second Ordinance, 1979 (last promulgated on February 5, 1979)
27	86	The Bihar Regional Development Authority Second Ordinance, 1979 (last promulgated on February 5, 1979)
28	87	The Bihar Co-operative Societies (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
29	88	The Bihar State Universities (Fourth Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
30	89	The Patna University (Fourth Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
31	90	The Bihar Non-Government Physical Training Colleges and Non-Government Teachers' Training Colleges and Non-Government Primary Teachers' Education Colleges (Control and Regulation) Second Ordinance, 1979 (last promulgated on February 5, 1979)
32	91	The Bihar Madarsa Education Board Second Ordinance, 1979 (last promulgated on March 1, 1979)
33	92	The Bihar University Service Commission (Third Amendment) Ordinance, 1979 (last promulgated on March 17, 1979)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
34	93	The Bihar Inter-Universities Board Second Ordinance, 1979 (last promulgated on February 5, 1979)
35	94	The Bihar Secondary Education Board (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
36	95	The Bihar Panchayat Election Rules and Supplementary Electoral Rolls Validating Second Ordinance, 1979 (last promulgated on February 5, 1979)
37	96	The Bihar Panchayat Raj (Amendment and Validation) Second Ordinance, 1979 (last promulgated on February 5, 1979)
38	97	The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Second Ordinance, 1979 (last promulgated on February 5, 1979)
39	98	The Bihar District Boards and Local Boards (Control and Management) Second Amendment Ordinance, 1979 (last promulgated on February 5, 1979)
40	99	The Bihar Control of Crimes Second Ordinance, 1979 (last promulgated on February 5, 1979)
41	100	The Bihar Bhoodan Yagna (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
42	101	The Land Acquisition (Bihar Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
43	102	The Bihar Cess (Second Amendment) Ordinance, 1979 (last promulgated on March 16, 1979)
44	103	The Bihar Land Rent (Exemption from Payment) Second Ordinance, 1979 (last promulgated on February 5, 1979)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
45	104	The Bihar Public Land Encroachment (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
46	105	The Santhal Parganas Civil Courts (Order Validation and Protection) Ordinance, 1979 (last promulgated on March 16, 1979)
47	106	The Bihar Irrigation Field Channel (Second Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
48	107	The Bihar Irrigation Laws (Third Amendment) Ordinance, 1979 (last promulgated on February 5, 1979)
49	108	The Bihar Excise (Second Amendment and Validation) Ordinance, 1979 (last promulgated on February 5, 1979)

### APPENDIX 7

List of 51 Ordinances re-promulgated by the Governor of Bihar on August 18, 1979

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
1	112	The Bihar Sales Tax Third Ordinance, 1979 (last promulgated on April 28, 1979)
2	113	The Bihar Regional Development Authority Third Ordinance, 1979 (last promulgated on April 28, 1979)
3	114	The Bihar Co-operative Societies (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
4	115	The Bihar Legislature (Members' Salaries, Allowances and Pension) (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)

Serial No.	Ordinance No.	Title of the Ordinance
5	116	The Bihar Medical Educational Institutions (Regulation and Control) Third Ordinance, 1979 (last promulgated on April 28, 1979)
6	117	The Bihar Maintenance of Essential Services (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
7	118	The Bihar Municipal (Fourth Amendment and Validation) Ordinance, 1979 (last promulgated on April 28, 1979)
8	119	The Patna Municipal Corporation (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
9	120	The Bihar Cinema (Regulation) (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
10	121	The Bihar Municipal and Patna Municipal Corporation (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
11	122	The Bihar Agricultural Income-tax (Repeal) Third Ordinance, 1979 (last promulgated on April 28, 1979)
12	123	The Bihar Municipal (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
13	124	The Bihar Children Third Ordinance, 1979 (last promulgated on April 28, 1979)
14	125	The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1979 (last promulgated on April 28, 1979)
15	126	The Bihar Sugar Undertakings (Acquisition) (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
16	127	The Bihar Sugarcane (Regulation of Supply and Purchase) Third Ordinance, 1979 (last promulgated on April 28, 1979)

Serial No.	Ordinance No.	Title of the Ordinance
17	128	The Bihar Irrigation Laws (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
18	129	The Bihar Irrigation Field Channel (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
19	130	The Bihar Prohibition of Intoxicants Second Ordinance, 1979 (last promulgated on June 9, 1979)
20	131	The Bihar Excise (Third Amendment and Validation) Ordinance, 1979 (last promulgated on April 28, 1979)
21	132	The Bihar Control of Crimes Third Ordinance, 1979 (last promulgated on April 28, 1979)
22	133	The Bihar Bhoodan Yagna (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
23	134	The Land Acquisition (Bihar Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
24	135	The Tana Bhagat Raiyats' Agricultural Lands Restoration (Third Amendment) Ordinance, 1979 (last promulgated on June 19, 1979)
25	136	The Bihar Cess (Fourth Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
26	137	The Bihar Land Rent (Exemption from Payment) Third Ordinance, 1979 (last promulgated on April 28, 1979)
27	138	The Bihar Public Land Encroachment (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
28	139	The Santhal Parganas Civil Courts (Order Validation and Protection) Third Ordinance, 1979 (last promulgated on April 28, 1979)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
29	140	The Bihar Agricultural Credit Operations and Miscellaneous Provisions (Bank) Third Ordinance, 1979 (last promulgated on April 28, 1979)
30	141	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Fourth Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
31	142	The Bihar State Housing Board Third Ordinance, 1979 (last promulgated on April 28, 1979)
32	143	The Minimum Wages (Bihar Amendment) Third Ordinance, 1979 (last promulgated on April 28, 1979)
33	144	The Bihar Agricultural Produce Markets (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
34	145	The Bihar State Water and Sewage Board Third Ordinance, 1979 (last promulgated on April 28, 1979)
35	146	The Bihar Soil and Water Conservation and Land Development Third Ordinance, 1979 (last promulgated on April 28, 1979)
36	147	The Bihar Motor Vehicles Taxation (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
37	148	The Bihar Khadi and Village Industries (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
38	149	The Bihar Hindu Religious Trusts (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
39	150	The Bihar State Aid to Industries (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
40	151	The Rajendra Agricultural University (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)

Serial No.	Ordinance No.	Title of the Ordinance
41	152	The Patna University (Fifth Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
42	153	The Bihar Inter-Universities Board Third Ordinance, 1979 (last promulgated on April 28, 1979)
43	154	The Bihar Non-Government Physical Training Colleges and Non-Government Teachers' Training Colleges and Non-Government Primary Teachers' Education Colleges (Control and Regulation) Third Ordinance, 1979 (last promulgated on April 28, 1979)
44	155	The Bihar Madarsa Board Education Third Ordinance, 1979 (last promulgated on April 28, 1979)
45	156	The Bihar Secondary Education Board (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
46	157	The Bihar University Service Commission (Fourth Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
47	158	The Bihar State Universities (Fifth Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
48	159	The Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Third Ordinance, 1979 (last promulgated on April 28, 1979)
49	160	The Bihar District Boards and Local Boards Control and Management (Third Amendment) Ordinance, 1979 (last promulgated on April 28, 1979)
50	161	The Bihar Panchayat Raj (Amendment and Validation) Third Ordinance, 1979 (last promulgated on April 28, 1979)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
51	162	The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Third Ordinance, 1979 (last promulgated on April 28, 1979)

### APPENDIX 8

List of 52 Ordinances re-promulgated by the Governor of Bihar on March 5, 1980

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
1	1	The Bihar Sales Tax Ordinance, 1980 (last promulgated on August 18, 1979)
2	2	The Bihar Regional Development Authority Ordinance, 1980 (last promulgated on August 18, 1979)
3	3	The Bihar Co-operative Societies (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
4	4	The Bihar Legislature (Members' Salaries, Allowances and Pension) (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
5	5	The Bihar Medical Educational Institutions (Regulation and Control) Ordinance, 1980 (last promulgated on August 18, 1979)
6	6	The Bihar Maintenance of Essential Services (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
7	7	The Bihar Municipal (Amendment and Validation) Ordinance, 1980 (last promulgated on August 18, 1979)



Serial No.	Ordinance No.	Title of the Ordinance
8	8	The Patna Municipal Corporation (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
9	9	The Bihar Cinema (Regulation) (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
10	10	The Bihar Municipal and Patna Municipal Corporation (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
11	11	The Bihar Agricultural Income-tax (Repeal) Ordinance, 1980 (last promulgated on August 18, 1979)
12	12	The Bihar Municipal (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
13	13	The Bihar Agricultural Credit Operations and Miscellaneous Provisions (Bank) Ordinance, 1980 (last promulgated on August 18, 1979)
14	14	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
15	15	The Bihar State Water and Sewage Board Ordinance, 1980 (last promulgated on August 18, 1979)
16	16	The Bihar State Housing Board Ordinance, 1980 (last promulgated on August 18, 1979)
17	17	The Bihar Agricultural Produce Markets (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
18	18	The Minimum Wages (Bihar Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
19	19	The Bihar Motor Vehicles Taxation (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
20	20	The Bihar State Aid to Industries (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
21	21	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
22	22	The Bihar Soil and Water Conservation and Land Development Ordinance, 1980 (last promulgated on August 18, 1979)
23	23	The Rajendra Agricultural University (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
24	24	The Bihar Hindu Religious Trusts (Amendment) Ordinance, 1980 (last promulgated on September 24, 1979)
25	25	The Santhal Parganas Civil Courts (Order Validation and Protection) Ordinance, 1980 (last promulgated on August 18, 1979)
26	26	The Bihar Control of Crimes Ordinance, 1980 (last promulgated on August 18, 1979)
27	27	The Bihar Bhoodan Yagna (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
28	28	The Bihar Cess (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
29	29	The Chota Nagpur Tenancy (Amendment) Ordinance, 1980 (last promulgated on November 14, 1979)
30	30	The Bihar Public Land Encroachment (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)

Serial No.	Ordinance No.	Title of the Ordinance
31	31	The Bihar Land Rent (Exemption from Payment) Ordinance, 1980 (last promulgated on August 18, 1979)
32	32	The Tana Bhagat Raiyats' Agricultural Lands Restoration (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
33	33	The Bihar Sanskrit Education Board Ordinance, 1980 (last promulgated on December 31, 1979)
34	34	The Bihar Madarsa Education Board (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
35	35	The Bihar Secondary Education Board (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
36	36	The Bihar State Universities (Amendment) Ordinance, 1980 (last promulgated on December 31, 1979)
37	37	The Patna University (Amending and Validation) Ordinance, 1980 (last promulgated on December 31, 1979)
38	38	The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Ordinance, 1980 (last promulgated on August 18, 1979)
39	39	The Bihar University Service Commission (Amendment) Ordinance, 1980 (last promulgated on December 31, 1979)
40	40	The Bihar Non-Government Physical Training Colleges and Non-Government Teachers' Training Colleges and Non-Government Primary Teachers' Education Colleges (Control and Regulation) Ordinance, 1980 (last promulgated on August 18, 1979)

Serial No.	Ordinance No.	Title of the Ordinance
41	41	The Bihar Intermediate Education Board Ordinance, 1980 (last promulgated on December 31, 1979)
42	42	The Bihar Panchayat Raj (Amendment and Validation) Ordinance, 1980 (last promulgated on August 18, 1979)
43	43	The Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Ordinance, 1980 (last promulgated on August 18, 1979)
44	44	The Bihar Forest Produce (Regulation of Trade) Ordinance, 1980 (last promulgated on August 18, 1979)
45	45	The Bihar Children Ordinance, 1980 (last promulgated on August 18, 1979)
46	46	The Bihar Sugar Undertakings (Acquisition) (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
47	47	The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1980 (last promulgated on August 18, 1979)
48	48	The Bihar Prohibition of Intoxicants Ordinance, 1980 (last promulgated on August 18, 1979)
49	49	The Bihar Excise (Amendment and Validation) Ordinance, 1980 (last promulgated on August 18, 1979)
50	50	The Bihar Irrigation Field Channel (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
51	51	The Bihar Irrigation Laws (Amendment) Ordinance, 1980 (last promulgated on August 18, 1979)
52	52	The Bihar Inter-Universities Board Ordinance, 1980 (last promulgated on December 31, 1979)

APPENDIX 9

List of 49 Ordinances re-promulgated and one Ordinance promulgated by the Governor of Bihar on August 11, 1980

Serial No.	Ordinance No.	Title of the Ordinance
1	107	The Bihar Municipal (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
2	108	The Bihar Ministers', Deputy Ministers' and Officers of Legislature's Salaries and Allowances Laws (Second Amendment) Ordinance, 1980 (last promulgated on June 14, 1980)
3	109	The Bihar Agricultural Income-tax (Repeal) Third Ordinance, 1980 (last promulgated on April 21, 1980)
4	110	The Bihar Maintenance of Essential Services (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
5	111	The Bihar Cinema (Regulation) (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
6	112	The Patna Municipal Corporation (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
7	113	The Bihar Medical Educational Institutions (Regulation and Control) Third Ordinance, 1980 (last promulgated on April 21, 1980)
8	114	The Bihar Municipal and Patna Municipal Corporation (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
9	115	The Bihar Sales Tax Third Ordinance, 1980 (last promulgated on April 21, 1980)
10	116	The Bihar Regional Development Authority Third Ordinance, 1980 (last promulgated on April 21, 1980)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
11	117	The Bihar Co-operative Societies (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
12	118	The Bihar Control of Crimes Third Ordinance, 1980 (last promulgated on April 21, 1980)
13	119	The Bihar Bhoodan Yagna (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
14	120	The Bihar Cess (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
15	121	The Bihar Land Rent (Exemption from Payment) Third Ordinance, 1980 (last promulgated on April 21, 1980)
16	122	The Bihar Public Land Encroachment (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
17	123	The Chota Nagpur Tenancy (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
18	124	The Santhal Parganas Civil Courts (Order Validation and Protection) Third Ordinance, 1980 (last promulgated on April 21, 1980)
19	125	The Bihar Agricultural Credit Operations and Miscellaneous Provisions (Bank) Third Ordinance, 1980 (last promulgated on April 21, 1980)
20	126	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
21	127	The Bihar Sugarcane (Regulation of Supply and Purchase) Third Ordinance, 1980 (last promulgated on April 21, 1980)
22	128	The Bihar Children Third Ordinance, 1980 (last promulgated on April 21, 1980)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
23	129	The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1980 (last promulgated on April 21, 1980)
24	130	The Bihar Sugar Undertakings (Acquisition) (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
25	131	The Bihar Irrigation Laws (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
26	132	The Bihar Irrigation Field Channel (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
27	133	The Bihar Excise (Third Amendment and Validation) Ordinance, 1980 (last promulgated on April 21, 1980)
28	134	The Bihar State Water and Sewage Board Third Ordinance, 1980 (last promulgated on April 21, 1980)
29	135	The Bihar State Housing Board Third Ordinance, 1980 (last promulgated on April 21, 1980)
30	136	The Bihar Soil and Water Conservation and Land Development Third Ordinance, 1980 (last promulgated on April 21, 1980)
31	137	The Minimum Wages (Bihar Amendment) Third Ordinance, 1980 (last promulgated on April 21, 1980)
32	138	The Bihar Agricultural Produce Markets (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
33	139	The Bihar Motor Vehicles Taxation (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
34	140	The Bihar Hindu Religious Trusts (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
35	141	The Bihar Khadi and Village Industries (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
36	142	The Bihar State Aid to Industries (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
37	143	The Rajendra Agricultural University (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
38	144	The Bihar Sanskrit Education Board Third Ordinance, 1980 (last promulgated on April 21, 1980)
39	145	The Bihar Madarsa Education Board Third Ordinance, 1980 (last promulgated on April 21, 1980)
40	146	The Bihar Private Secondary Schools (Management and Control) Ordinance, 1980 (New)
41	147	The Bihar Non-Government Physical Training Colleges and Non-Government Teachers' Training Colleges and Non-Government Primary Teachers' Education Colleges (Control and Regulation) Third Ordinance, 1980 (last promulgated on April 21, 1980)
42	148	The Bihar University Service Commission (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
43	149	The Bihar Intermediate Education Board Third Ordinance, 1980 (last promulgated on April 21, 1980)
44	150	The Bihar Inter-Universities Board Third Ordinance, 1980 (last promulgated on April 21, 1980)
45	151	The Bihar Panchayat Samitis and Zila Parishads (Third Amending and Validating) Ordinance, 1980 (last promulgated on April 21, 1980)



Serial No.	Ordinance No.	Title of the Ordinance
46	152	The Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Third Ordinance, 1980 (last promulgated on April 21, 1980)
47	153	The Bihar District Boards and Local Boards (Control and Management) (Second Amendment) Ordinance, 1980 (last promulgated on June 14, 1980)
48	154	The Bihar Panchayat Raj (Amendment and Validation) Third Ordinance, 1980 (last promulgated on April 21, 1980)
49	155	The Patna University (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)
50	156	The Bihar State Universities (Third Amendment) Ordinance, 1980 (last promulgated on April 21, 1980)

### APPENDIX 10

List of 52 Ordinances re-promulgated by the Governor of Bihar on January 19, 1981

Serial No.	Ordinance No.	Title of the Ordinance
1	2	The Bihar Municipal (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
2	3	The Bihar Ministers', Deputy Ministers' and Officers of Legislature's Salaries and Allowances Laws (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
3	4	The Bihar Agricultural Income-tax (Repeal) Ordinance, 1981 (last promulgated on August 11, 1980)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
4	5	The Bihar Maintenance of Essential Services (Amendment) Ordinance, 1981 (last promulgated on August 27, 1980)
5	6	The Bihar Cinema (Regulation) (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
6	7	The Patna Municipal Corporation (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
7	8	The Bihar Municipal and Patna Municipal Corporation (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
8	9	The Bihar Sales Tax Ordinance, 1981 (last promulgated on August 11, 1980)
9	10	The Bihar Regional Development Authority Ordinance, 1981 (last promulgated on August 11, 1980)
10	11	The Bihar Co-operative Societies (Fourth Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
11	12	The Bihar Control of Crimes Ordinance, 1981 (last promulgated on August 11, 1980)
12	13	The Bihar Bhoodan Yagna (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
13	14	The Bihar Cess (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
14	15	The Bihar Land Rent (Exemption from Payment) Ordinance, 1981 (last promulgated on August 11, 1980)
15	16	The Bihar Public Land Encroachment (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
16	17	The Chota Nagpur Tenancy (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)

Serial No.	Ordinance No.	Title of the Ordinance
17	18	The Santhal Parganas Civil Courts (Order Validation and Protection) Ordinance, 1981 (last promulgated on August 11, 1980)
18	19	The Bihar Conduct of Examinations Ordinance, 1981 (last promulgated on October 8, 1980)
19	20	The Bihar Agricultural Credit Operations and Miscellaneous Provisions (Bank) Ordinance, 1981 (last promulgated on August 11, 1980)
20	21	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
21	22	The Bihar State Housing Board Ordinance, 1981 (last promulgated on August 11, 1980)
22	23	The Bihar State Water and Sewage Board Ordinance, 1981 (last promulgated on August 11, 1980)
23	24	The Bihar District Boards and Local Boards (Control and Management) (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
24	25	The Bihar Government Premises (Rent Recovery and Eviction) (Amendment) Ordinance, 1981 (last promulgated on August 30, 1980)
25	26	The Rajendra Agricultural University (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
26	27	The Bihar Hindu Religious Trusts (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
27	28	The Bihar Motor Vehicles Taxation (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
28	29	The Bihar State Aid to Industries (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
29	30	The Bihar Soil and Water Conservation and Land Development Ordinance, 1981 (last promulgated on August 11, 1980)
30	31	The Bihar Panchayat Raj (Amendment and Validation) Ordinance, 1981 (last promulgated on August 11, 1980)
31	32	The Bihar Forest Produce (Regulation of Trade) Ordinance, 1981 (last promulgated on August 11, 1980)
32	33	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
33	34	The Bihar Intermediate Education Board Ordinance, 1981 (last promulgated on August 11, 1980)
34	35	The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1981 (last promulgated on August 11, 1980)
35	36	The Bihar Irrigation Laws (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
36	37	The Bihar Irrigation Field Channel (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
37	38	The Minimum Wages (Bihar Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
38	39	The Bihar Agricultural Produce Markets (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
39	40	The Bihar Medical Educational Institutions (Regulation and Control) Ordinance, 1981 (last promulgated on August 11, 1980)
40	41	The Bihar Private Secondary Schools (Management and Control) Ordinance, 1981 (last promulgated on August 11, 1980)

Serial No.	Ordinance No.	Title of the Ordinance
41	42	The Anugrah Narain Sinha Institute of Social Studies (Amendment) Ordinance, 1981 (last promulgated on September 18, 1980)
42	43	The Bihar Sanskrit Education Board Ordinance, 1981 (last promulgated on August 11, 1980)
43	44	The Bihar Inter-Universities Board Ordinance, 1981 (last promulgated on August 11, 1980)
44	45	The Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Ordinance, 1981 (last promulgated on August 11, 1980)
45	46	The Bihar Excise (Amendment and Validation) Ordinance, 1981 (last promulgated on August 11, 1980)
46	47	The Bihar Sugar Undertakings (Acquisition) (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
47	48	The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Ordinance, 1981 (last promulgated on September 18, 1980)
48	49	The Bihar University Service Commission (Amendment) Ordinance, 1981 (last promulgated on August 11, 1980)
49	50	The Bihar Non-Government Physical Training Colleges and Non-Government Teachers' Training Colleges and Non-Government Primary Teachers' Education Colleges (Control and Regulation) Ordinance, 1981 (last promulgated on August 11, 1980)
50	51	The Birsa Agricultural University Ordinance, 1981 (last promulgated on November 29, 1980) [ <i>sic</i> ] <sup>3</sup>

<sup>3</sup> Though this Ordinance is supposed to have been promulgated on 29.11.1980, it was not only not promulgated on that date, it was never promulgated and therefore is being wrongly shown in the Government records as having been promulgated and was also wrongly laid before the Legislature of the State on 10.12.1980.

Serial No.	Ordinance No.	Title of the Ordinance
51	52	The Bihar Children Ordinance, 1981 (last promulgated on August 11, 1980)
52	53	The Bihar Madarsa Education Board Ordinance, 1981 (last promulgated on August 11, 1980)
53	54	The Bihar Sales Tax (Amendment) Ordinance, 1981 (last promulgated on November 27, 1980)

### APPENDIX 11

List of 59 Ordinances re-promulgated (30 on April 22 and 29 on April 23, 1981) by the Governor of Bihar

#### *A. April 22, 1981*

Serial No.	Ordinance No.	Title of the Ordinance
1	68	The Bihar District Boards and Local Boards (Control and Management) (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
2	69	The Bihar Government Premises (Rent Recovery and Eviction) (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
3	70	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Third Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
4	71	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Fourth Amendment) Ordinance, 1981 (last promulgated on March 10, 1981)
5	72	The Bihar Inter-Universities Board Second Ordinance, 1981 (last promulgated on January 19, 1981)

Serial No.	Ordinance No.	Title of the Ordinance
6	73	The Bihar Sanskrit Education Board Second Ordinance, 1981 (last promulgated on January 19, 1981)
7	74	The Bihar Private Secondary Schools (Management and Control) Second Ordinance, 1981 (last promulgated on January 19, 1981)
8	75	The Bihar Intermediate Education Board Second Ordinance, 1981 (last promulgated on January 19, 1981)
9	76	The Bihar Sugarcane (Regulation of Supply and Purchase) (Second Amendment) Ordinance, 1981 (last promulgated on March 5, 1981)
10	77	The Bihar Irrigation Laws (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
11	78	The Bihar Irrigation Field Channel (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
12	79	The Bihar Excise (Second Amendment and Validation) Ordinance, 1981 (last promulgated on January 19, 1981)
13	81	The Bihar Soil and Water Conservation and Land Development Second Ordinance, 1981 (last promulgated on January 19, 1981)
14	82	The Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Second Ordinance, 1981 (last promulgated on January 19, 1981)
15	83	The Bihar Medical Educational Institutions (Regulation and Control) Second Ordinance, 1981 (last promulgated on January 19, 1981)
16	84	The Bihar Panchayat Raj (Amendment and Validation) Second Ordinance, 1981 (last promulgated on January 19, 1981)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
17	85	The Bihar Hindu Religious Trusts (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
18	86	The Bihar Motor Vehicles Taxation (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
19	87	The Bihar Khadi and Village Industries (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
20	88	The Bihar Ministers', Deputy Ministers' and Officers of Legislature's Salaries and Allowances Laws (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
21	89	The Patna Municipal Corporation (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
22	90	The Bihar Agricultural Income-tax (Repeal) Second Ordinance, 1981 (last promulgated on January 19, 1981)
23	91	The Bihar Cinema (Regulation) (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
24	92	The Bihar Municipal and Patna Municipal Corporation (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
25	93	The Bihar State Universities (Second Amendment) Ordinance, 1981 (last promulgated on January 20, 1981)
26	94	The Patna University (Second Amendment) Ordinance, 1981 (last promulgated on January 20, 1981)
27	95	The Bihar Maintenance of Essential Services (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
28	96	The Bihar Municipal (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)



Serial No.	Ordinance No.	Title of the Ordinance
29	97	The Birsa Agricultural University Second Ordinance, 1981 (last promulgated on January 19, 1981)
30	98	The Rajendra Agricultural University (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)

*B. April 23, 1981*

Serial No.	Ordinance No.	Title of the Ordinance
1	80	The Bihar State Aid to Industries (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
2	99	The Bihar University Service Commission (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
3	100	The Bihar Madarsa Education Board Second Ordinance, 1981 (last promulgated on January 19, 1981)
4	101	The Anugrah Narain Sinha Institute of Social Studies (Third Amendment) Ordinance, 1981 (last promulgated on January 31, 1981)
5	102	The Bihar Non-Government Physical Training Colleges and Non-Government Teachers' Training Colleges and Non-Government Primary Teachers' Education Colleges (Control and Regulation) Second Ordinance, 1981 (last promulgated on January 19, 1981)
6	103	The Bihar State Engineering and Pharmaceutical Training Institute (Validating and Control) Second Ordinance, 1981 (last promulgated on January 28, 1981)
7	104	The Bihar Panchayat Samitis and Zila Parishads (Second Amending and Validating) Ordinance, 1981 (last promulgated on January 19, 1981)

Serial No.	Ordinance No.	Title of the Ordinance
8	105	The Bihar Cess (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
9	106	The Bihar Conduct of Examinations Second Ordinance, 1981 (last promulgated on January 19, 1981)
10	107	The Santhal Parganas Civil Courts (Order Validation and Protection) Second Ordinance, 1981 (last promulgated on January 19, 1981)
11	108	The Chota Nagpur Tenancy (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
12	109	The Bihar Land Rent (Exemption from Payment) Second Ordinance, 1981 (last promulgated on January 19, 1981)
13	110	The Bihar Public Land Encroachment (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
14	111	The Bihar Agricultural Development (Cess) Second Ordinance, 1981 (last promulgated on February 28, 1981)
15	112	The Bihar State Housing Board Second Ordinance, 1981 (last promulgated on January 19, 1981)
16	113	The Bihar State Water and Sewage Board Second Ordinance, 1981 (last promulgated on January 19, 1981)
17	114	The Bihar Agricultural Credit Operations and Miscellaneous Provisions (Bank) Second Ordinance, 1981 (last promulgated on January 19, 1981)
18	115	The Bihar Control of Crimes Second Ordinance, 1981 (last promulgated on January 19, 1981)
19	116	The Bihar Bhoodan Yagna (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)

Serial No.	Ordinance No.	Title of the Ordinance
20	117	The Bihar Consolidation of Holdings and Prevention of Fragmentation (Second Amendment) Ordinance, 1981 (last promulgated on February 27, 1981)
21	118	The Minimum Wages (Bihar Amendment) Second Ordinance, 1981 (last promulgated on January 19, 1981)
22	119	The Bihar Co-operative Societies (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
23	120	The Bihar Regional Development Authority Second Ordinance, 1981 (last promulgated on January 19, 1981)
24	121	The Bihar Sales Tax (Validation) Second Ordinance, 1981 (last promulgated on January 8, 1981)
25	122	The Bihar Children Second Ordinance, 1981 (last promulgated on January 19, 1981)
26	123	The Bihar Forest Produce (Regulation of Trade) Second Ordinance, 1981 (last promulgated on January 19, 1981)
27	124	The Bihar Sugar Undertakings (Acquisition) (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)
28	125	The Bihar Sugarcane (Regulation of Supply and Purchase) Second Ordinance, 1981 (last promulgated on January 19, 1981)
29	126	The Bihar Agricultural Produce Markets (Second Amendment) Ordinance, 1981 (last promulgated on January 19, 1981)

## APPENDIX 12

List of 60 Ordinances re-promulgated (35 on August 11 and 25 on August 12, 1981) and 2 Ordinances promulgated (1 on August 11 and 1 on August 12, 1981) by the Governor of Bihar

*A. August 11, 1981*

Serial No.	Ordinance No.	Title of the Ordinance
1	131	The Santhal Parganas Civil Courts (Order Validation and Protection) Third Ordinance, 1981 (last promulgated on April 23, 1981)
2	132	The Bihar Land Rent (Exemption from Payment) Third Ordinance, 1981 (last promulgated on April 23, 1981)
3	133	The Chota Nagpur Tenancy (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
4	134	The Bihar Public Land Encroachment (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
5	135	The Bihar Agricultural Development (Cess) Third Ordinance, 1981 (last promulgated on April 23, 1981)
6	136	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Fifth Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
7	137	The Bihar District Boards and Local Boards (Control and Management) (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
8	138	The Bihar Government Premises (Rent Recovery and Eviction) (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
9	139	The Bihar Irrigation Field Channel (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)

Serial No.	Ordinance No.	Title of the Ordinance
10	140	The Bihar Irrigation Laws (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
11	141	The Bihar Excise (Third Amendment and Validation) Ordinance, 1981 (last promulgated on April 22, 1981)
12	142	The Bihar Medical Educational Institutions (Regulation and Control) Third Ordinance, 1981 (last promulgated on April 22, 1981)
13	143	The Bihar Cinema (Regulation) (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
14	144	The Bihar Collective Fines (Imposition) Second Ordinance, 1981 (last promulgated on May 7, 1981)
15	145	The Patna Municipal Corporation (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
16	146	The Bihar Municipal and Patna Municipal Corporation (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
17	147	The Bihar Ministers', Deputy Ministers' and Officers of Legislature's Salaries and Allowances Laws (Third Amendment) Ordinance, 1981 (last promulgated on August 11, 1981)
18	148	The Bihar Agricultural Income-tax (Repeal) Third Ordinance, 1981 (last promulgated on April 22, 1981)
19	149	The Bihar Municipal (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
20	150	The Bihar Maintenance of Essential Services (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
21	151	The Bihar Motor Vehicles Taxation (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
22	152	The Bihar Soil and Water Conservation and Land Development Third Ordinance, 1981 (last promulgated on April 22, 1981)
23	153	The Bihar Panchayat Raj (Amendment and Validation) Third Ordinance, 1981 (last promulgated on April 22, 1981)
24	154	The Bihar State Engineering and Pharmaceutical Training Institute (Validating and Control) Third Ordinance, 1981 (last promulgated on April 23, 1981)
25	155	The Anugrah Narain Sinha Institute of Social Studies (Fourth Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
26	156	The Bihar State Aid to Industries (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
27	157	The Wakf (Bihar Amendment) Ordinance, 1981 (New)
28	158	The Bihar Khadi and Village Industries (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
29	159	The Bihar Hindu Religious Trusts (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
30	160	The Bihar Non-Government Physical Training Colleges and Non-Government Teachers' Training Colleges and Non-Government Primary Teachers' Education Colleges (Control and Regulation) Ordinance, 1981 (last promulgated on April 23, 1981)
31	161	The Rajendra Agricultural University (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
32	162	The Birsa Agricultural University (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
33	163	The Bihar Primary Education (Second Amendment) Ordinance, 1981 (last promulgated on April 9, 1981)
34	164	The Bihar University Service Commission (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
35	165	The Bihar Panchayat Samitis and Zila Parishads (Third Amending and Validating) Ordinance, 1981 (last promulgated on April 23, 1981)
36	166	The Bihar Inter-Universities Board Third Ordinance, 1981 (last promulgated on April 22, 1981)

*B. August 12, 1981*

<b>Serial No.</b>	<b>Ordinance No.</b>	<b>Title of the Ordinance</b>
1	167	The Minimum Wages (Bihar Amendment) Third Ordinance, 1981 (last promulgated on April 23, 1981)
2	168	The Bihar Agricultural Produce Markets (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
3	169	The Bihar Panchayat Election Rules and Supplementary Electoral Rolls (Validating) Third Ordinance, 1981 (last promulgated on April 22, 1981)
4	170	The Bihar Private Secondary Schools (Management and Control) Third Ordinance, 1981 (last promulgated on April 22, 1981)
5	171	The Bihar Intermediate Education Board Third Ordinance, 1981 (last promulgated on April 22, 1981)
6	172	The Bihar State Madarsa Education Board Third Ordinance, 1981 (last promulgated on April 23, 1981)

Serial No.	Ordinance No.	Title of the Ordinance
7	173	The Bihar Sanskrit Education Board Third Ordinance, 1981 (last promulgated on April 22, 1981)
8	174	The Patna University (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
9	175	The Bihar State Universities (Third Amendment) Ordinance, 1981 (last promulgated on April 22, 1981)
10	176	The Bihar Conduct of Examinations Third Ordinance, 1981 (last promulgated on April 22, 1981)
11	177	The Bihar Cess (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
12	178	The Bihar Agricultural Credit Operations and Miscellaneous Provisions (Bank) Third Ordinance, 1981 (last promulgated on April 23, 1981)
13	179	The Bihar Contingency Fund (Third Amendment) Ordinance, 1981 (New)
14	180	The Bihar Municipal Corporations (Second Amendment) Ordinance, 1981 (last promulgated on May 7, 1981)
15	181	The Bihar Consolidation of Holdings and Prevention of Fragmentation (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
16	182	The Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) (Second Amendment) Ordinance, 1981 (last promulgated on April 9, 1981)
17	183	The Bihar Sugar Undertakings (Acquisition) (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
18	184	The Bihar Sugarcane (Regulation of Supply and Purchase) Third Ordinance, 1981 (last promulgated on April 23, 1981)



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Serial No.	Ordinance No.	Title of the Ordinance
19	185	The Bihar Children Third Ordinance, 1981 (last promulgated on April 23, 1981)
20	186	The Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1981 (last promulgated on April 23, 1981)
21	187	The Bihar State Housing Board Third Ordinance, 1981 (last promulgated on April 23, 1981)
22	188	The Bihar State Water and Sewage Board Third Ordinance, 1981 (last promulgated on April 23, 1981)
23	189	The Bihar Legislature (Members' Salaries, Allowances and Pension) (Second Amendment) Ordinance, 1981 (last promulgated on June 27, 1981)
24	190	The Bihar Co-operative Societies (Third Amendment) Ordinance, 1981 (last promulgated on April 23, 1981)
25	191	The Bihar Regional Development Authority Third Ordinance, 1981 (last promulgated on April 23, 1981)
26	192	The Bihar Administrative Tribunal Second Ordinance, 1981 (last promulgated on April 30, 1981)

# DOCUMENT 17

## Judgment of the Supreme Court on the Writ Petition

In the Supreme Court of India  
Original Jurisdiction  
Writ Petition No. 412-415 of 1984

*In the Matter of*

### **Petitioners**

Dr. D.C. Wadhwa and others

v.

### **Respondents**

State of Bihar and others

## **J U D G M E N T\***

*BHAGWATI, C.J.*

These petitions under Article 32 of the Constitution raise a short question of great constitutional importance relating to the power of the Governor under Article 213 of the Constitution to re-promulgate Ordinances from time to time without getting them replaced by Acts of the Legislature. The question is: can the Governor go on re-promulgating Ordinances for an indefinite period of time and thus take over to himself the power of the Legislature to legislate though that power is conferred on him under Article 213 only for the purpose of enabling him to take immediate action at a time when the Legislative Assembly of the State is not in session or when in a case where there is a Legislative Council in the State, both Houses of Legislature are not in session. The facts giving rise to these writ petitions are disturbing and we may briefly state them as follows.

These writ petitions have been filed by four petitioners challenging the validity of the practice of the State of Bihar in promulgating and re-promulgating Ordinances on a massive scale and in particular they have challenged the constitutional validity of three different Ordinances issued by the Governor of Bihar, namely, the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983; the Bihar Intermediate Education Council Third Ordinance, 1983; and the Bihar Bricks Supply (Control) Third

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\* (1987) 1 S.C.C. 378

Ordinance, 1983.

Petitioner No. 1 is a Professor of Economics in the Gokhale Institute of Politics and Economics, Pune and he has spent a number of years in studying the constitutional functioning of Indian politics. He is deeply interested in the preservation and promotion of constitutional functioning of the administration in the country. He has made a deep and profound study of the practice which is being followed in the State of Bihar of promulgating and re-promulgating Ordinances from time to time without enacting them into Acts of the Legislature. Petitioner No. 2 is an occupancy raiyat of village Anigara, Kunti Police Station in the district of Ranchi. He grows forest produce in his *raiya* land. Clause (5) of the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 imposes restriction on the sale of specified forest produce and it further created State monopoly for sale and purchase of such forest produce. Clause (7) of this Ordinance conferred power on the State Government to fix the price at which the specified forest produce may be purchased by it or by any authorized forest officer or agent from the growers of such forest produce. The effect of these provisions in the Bihar Forest Produce (Regulation of Trade) Third Ordinance was that the Petitioner No. 2 was prevented from selling his forest produce to any purchaser other than those mentioned in the Ordinance and his right to dispose of the forest produce was adversely affected by these provisions and he was therefore interested in challenging the constitutional validity of this Ordinance. Petitioner No. 3 is a student studying in Intermediate (Science) Class in A.N. College, Patna. He was affected by the Bihar Intermediate Education Council Third Ordinance. It is not necessary to refer to the provisions of this Ordinance since it could not be seriously disputed on behalf of the respondents that the provisions of this Ordinance affected, curtailed and/or regulated the rights of Petitioner No. 3 or at least had the potential of doing so and Petitioner No. 3 therefore challenged the constitutional validity of this Ordinance. Similarly Petitioner No. 4 was aggrieved by the Bihar Bricks Supply (Control) Third Ordinance because he is the proprietor of South Bihar Agency, Patna, a brick-manufacturing concern operating under a licence issued by the Mining and the Industry Department of the Government of Bihar and the provisions of this Ordinance empowering the State Government to control and regulate the manufacture, distribution, transport, disposal and consumption of bricks, as also the price at which the bricks may be bought or sold affected Petitioner No. 4 and he accordingly joined the writ petition and challenged the constitutional validity of this Ordinance.

It was contended on behalf of the respondents that the petitioners had no *locus standi* to maintain this writ petition since out of the three Ordinances challenged on behalf of the petitioners, two of them, namely, the Bihar Forest Produce (Regulation of Trade) Third Ordinance, 1983 and the Bihar Bricks Supply (Control) Third Ordinance, 1983 had already lapsed and their provisions were enacted in Acts of the Legislature and so far as the third Ordinance, namely, the Bihar Intermediate Education Council Third Ordinance was concerned, a legislative proposal was already introduced for enacting its provisions into an Act. The respondents also contended that the petitioners are not entitled to challenge the practice prevalent in the State of Bihar of re-promulgating Ordinances from time to time since they were merely outsiders who had no legal interest to challenge the validity of this practice. We do not think this preliminary objection raised on behalf of the respondents is well founded. It is undoubtedly true that the provisions of two out of the three Ordinances challenged in this writ petition were enacted into Acts of the Legislature but that happened only during the pendency of these writ petitions and at the date when these writ petitions were filed, these two ordinances were very much in operation and affected the interest of Petitioners Nos. 2 and 4 respectively. Moreover, the third Ordinance, namely, the Bihar Intermediate Education Council Third Ordinance is still in operation though a Bill incorporating the provisions of this Ordinance is pending consideration before the State Legislature and it has been referred to a Select Committee and the right of Petitioner No. 3 to pursue a particular course of study is vitally affected by the provisions contained in that Ordinance.

Besides, Petitioner No. 1 is a Professor of Political Science and is deeply interested in ensuring proper implementation of the constitutional provisions. He has sufficient interest to maintain a petition under Article 32 even as a member of the public because it is a right of every citizen to insist that he should be governed by laws made in accordance with the Constitution and not laws made by the Executive in violation of the constitutional provisions. Of course, if any particular Ordinance was being challenged by Petitioner No. 1 he may not have the *locus standi* to challenge it simply as a member of the public unless some legal right or interest of his is violated or threatened by such Ordinance, but here what Petitioner No. 1 as a member of the public is complaining of is a practice which is being followed by the State of Bihar of re-promulgating the Ordinances from time to time without their provisions being enacted into Acts of the Legislature. It is clearly for vindication of public interest that Petitioner No. 1 has filed these writ petitions and he must

therefore be held to be entitled to maintain his writ petitions. In *S.P. Gupta and others v. Union of India and others*, one of us (Bhagwati, J. as he then was) observed:

“Any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision.”<sup>1</sup>

The rule of law constitutes the core of our Constitution and it is the essence of the rule of law that the exercise of the power by the State whether it be the Legislature or the Executive or any other authority should be within the constitutional limitations and if any practice is adopted by the Executive which is in flagrant and systematic violation of its constitutional limitations, Petitioner No. 1 as a member of the public would have sufficient interest to challenge such practice by filing a writ petition and it would be the constitutional duty of this Court to entertain the writ petition and adjudicate upon the validity of such practice. We must, therefore, reject the preliminary contention raised on behalf of the respondents challenging the *locus standi* of the petitioners to maintain these writ petitions.

The respondents then contended that in any event the question raised before the Court in these writ petitions was academic in nature and should not be adjudicated upon by the Court. But this contention urged on behalf of the respondents is also without force since the Bihar Intermediate Education Council Third Ordinance is still in force and it cannot therefore be said to be academic to examine the challenge to its constitutional validity. Moreover the question raised in these writ petitions is of highest constitutional importance as it does [*sic*]<sup>2</sup> the power of the Governor to re-promulgate Ordinances and it is in public interest that the Executive should know what are the limitations on the power of the Governor in the matter of re-promulgation of Ordinances. If this question is not decided on merits, the correct position in regard to the constitutional limitations on the power of the Governor to re-promulgate Ordinances will remain undetermined. We are of the view that this question has great public importance and it must be decided by us on merits in order to afford guidance to the Governor in the exercise of his power to re-promulgate Ordinances from time to time.

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<sup>1</sup> (1982) 2 S.C.R. 365

<sup>2</sup> deals with, corrected by the author

We shall now proceed to state how the Governor in the State of Bihar has been indulging in the practice of re-promulgating the Ordinances from time to time so as to keep them alive for an indefinite period of time. Petitioner No. 1 carried out thorough and detailed research in the matter of re-promulgation of Ordinances by the Governor of Bihar from time to time and the result of this research was compiled by him and published in a book entitled *Re-promulgation of Ordinances: A Fraud on the Constitution of India*. Some of the relevant extracts from this book have been annexed to the writ petition indicating the number of Ordinances repromulgated repeatedly by the Governor of Bihar. It is clear on a perusal of these extracts that the Governor of Bihar promulgated 256 Ordinances between 1967 and 1981 and all these Ordinances were kept alive for periods ranging between one to 14 years by re-promulgation from time to time. Out of these 256 Ordinances 69 were re-promulgated several times and kept alive with the prior permission of the President of India.

The following table would indicate the categorization of these 256 Ordinances by reference to their life-groups:

Life-groups (Years)	Number of Ordinances
00-01	59
01-02	51
02-03	45
03-04	21
04-05	21
05-06	21
06-07	11
07-08	08
08-09	04
09-10	04
10-11	06
11-12	04
12-13	00
13-14	01
Total	256

The enormity of the situation would appear to be startling if we have a look at some of the Ordinances which were allowed to continue in force by the methodology of re-promulgation. The following table indicates in the case of each Ordinance, the title of the Ordinance, the date of first promulgation and the total period for which the Ordinance was continued in force by adopting the stratagem of re-promulgation:

S.No.	Name of the Ordinance	Date on Which First Promulgated	Life of the Ordinance		
			Years	Months	Days
(1)	(2)	(3)	(4)		
(i)	The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1968 (Ordinance No. 3 of 1968)	13.11.1968	13	11	19
(ii)	The Bihar Panchayati Raj (Amending and Validating) Ordinance, 1970 (Ordinance No. 3 of 1970)	14.08.1970	11	4	18
(iii)	The Bihar Hindu Religious Trusts (Amendment) Ordinance, 1970 (Ordinance No. 5 of 1970)	05.09.1970	11	3	26
(iv)	The State Aid to Industries (Amendment) Ordinance, 1970 (Ordinance No. 8 of 1970)	10.09.1970	11	3	21
(v)	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1970 (Ordinance No. 9 of 1970)	17.09.1970	11	3	14

S.No.	Name of the Ordinance	Date on Which First Promulgated	Life of the Ordinance		
			(1)	(2)	(3)
			Years	Months	Days
(vi)	The Bihar Soil and Water Conservation and Land Development Ordinance, 1971 (Ordinance No. 16 of 1971)	10.02.1971	10	10	19
(vii)	The Bihar Panchayati Raj (Amendment) Ordinance, 1971 (Ordinance No. 54 of 1971)	15.05.1971	10	7	17
(viii)	The Bihar Municipal (Third Amendment) Ordinance, 1971 (Ordinance No. 57 of 1971)	20.05.1971	10	7	12
(ix)	The Patna Municipal Corporation (Amendment) Ordinance, 1971 (Ordinance No. 58 of 1971)	22.05.1971	10	7	10
(x)	The Bihar State Housing Board Ordinance, 1971 (Ordinance No. 101 of 1971)	14.09.1971	10	3	17
(xi)	The Bihar Co-operative Societies (Second Amendment) Ordinance, 1971 (Ordinance No. 103 of 1971)	07.10.1971	10	2	25



S.No.	Name of the Ordinance	Date on Which First Promulgated	Life of the Ordinance		
			Years	Months	Days
(1)	(2)	(3)	(4)	(5)	(6)
(xii)	The Bihar Agricultural Produce Markets (Amendment) Ordinance, 1972 (Ordinance No. 6 of 1972)	14.12.1972	9	10	16
(xiii)	The Bihar Medical Educational Institutions (Regulation and Control) Ordinance, 1972 (Ordinance No. 69 of 1972)	14.05.1972	9	7	18
(xiv)	The Rajendra Agricultural University (Amendment) Ordinance, 1973 (Ordinance No. 2 of 1973)	15.01.1973	8	11	17
(xv)	The Bihar Panchayati Raj (Validating) Ordinance, 1973 (Ordinance No. 5 of 1973)	22.02.1973	8	10	7
(xvi)	The Bihar Panchayat Samitis and Zila Parishads (Amending and Validating) Ordinance, 1973 (Ordinance No. 6 of 1973)	22.02.1973	8	10	7
(xvii)	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1973 (Ordinance No. 122 of 1973)	01.10.1973	8	3	0

S.No.	Name of the Ordinance	Date on Which First Promulgated	Life of the Ordinance		
			(1)	(2)	(3)
			Years	Months	Days
(xviii)	The Motor Vehicles (Bihar) Amendment Ordinance, 1971 (Ordinance No. 56 of 1971)	20.05.1971	7	8	17
(xix)	The Bihar State Aid to Industries (Second Amendment) Ordinance, 1974 (Ordinance No. 56 of 1974)	27.04.1974	7	8	4
(xx)	The Bihar Irrigation Laws (Amendment) Ordinance, 1974 (Ordinance No. 169 of 1974)	27.08.1974	7	4	3
(xxi)	The Bihar Irrigation Field Channel (Amendment) Ordinance, 1974 (Ordinance No. 170 of 1974)	29.08.1974	7	4	3
(xxii)	The Bihar Soil and Water Conservation and Land Development (Amendment) Ordinance, 1974 (Ordinance No. 174 of 1974)	16.09.1974	7	3	15
(xxiii)	The Bihar Gramdan (Amendment) Ordinance, 1972 (Ordinance No. 12 of 1972)	26.02.1972	6	5	27

S.No. (1)	Name of the Ordinance (2)	Date on Which First Promulgated (3)	Life of the Ordinance (4)		
			Years	Months	Days
(xxiv)	The Bihar Primary Education (Amendment) Ordinance, 1970 (Ordinance No. 6 of 1970)	05.09.1970	6	3	26
(xxv)	The Bihar Regional Development Authority Ordinance, 1974 (Ordinance No. 175 of 1974)	19.09.1974	6	3	12
(xxvi)	The Chota Nagpur and Santhal Parganas Autonomous Development Authority (Fifth Amendment) Ordinance, 1975 (Ordinance No. 197 of 1975)	29.10.1975	6	2	3
(xxvii)	The Bihar Motor Vehicles Taxation (Fifth Amendment) Ordinance, 1975 (Ordinance No. 207 of 1975)	29.11.1975	6	1	2
(xxviii)	The Bihar Cess (Amendment) Ordinance, 1975 (Ordinance No. 209 of 1975)	02.12.1975	6	1	0
(xxix)	The Bihar Public Land Encroachment (Amendment) Ordinance, 1975 (Ordinance No. 210 of 1975)	05.12.1975	6	0	27

S.No.	Name of the Ordinance	Date on Which First Promulgated	Life of the Ordinance		
			(1)	(2)	(3)
			Years	Months	Days
(xxx)	The Bihar Motor Vehicles Taxation (Sixth Amendment) Ordinance, 1975 (Ordinance No. 212 of 1975)	05.12.1975	6	0	27
(xxxi)	The Bihar Motor Vehicles Taxation (Seventh Amendment) Ordinance, 1975 (Ordinance No. 214 of 1975)	05.12.1975	6	0	27

It will thus be seen that the power to promulgate Ordinances was used by the Government of Bihar on a large scale and after the session of the State Legislature was prorogued, the same Ordinances which had ceased to operate were re-promulgated containing substantially the same provisions almost in a routine manner. This would be clear from the fact that on 26th August, 1973, the Governor of Bihar re-promulgated 54 Ordinances with the same provisions and on 17th January, 1973, 49 Ordinances were re-promulgated by the Governor of Bihar containing substantially the same provisions and again on 27th April, 1974, seven Ordinances were re-promulgated and [sic]<sup>3</sup> on 29th April, 1974, nine Ordinances were re-promulgated with substantially the same provisions. Then again on 23rd July, 1974, 51 Ordinances were re-promulgated which included the self-same Ordinances which had been re-promulgated on 27th, [sic]<sup>4</sup> and 29th April, 1974. On 18th March, 1979, 52 Ordinances were re-promulgated while on 18th August, 1979, 51 Ordinances were re-promulgated containing substantially the same provisions. Forty-nine Ordinances were re-promulgated on 28th April, 1979, and on 18th August, 1979, 51 Ordinances were re-promulgated. This exercise of making mass re-promulgation of Ordinances on the prorogation of the session of the State Legislature continued unabated and on 11th August, 1980, 49 Ordinances were re-promulgated while on 19th January, 1981, the number

<sup>3</sup> on April 28, 1974, 34 Ordinances were re-promulgated, please see pp. 196-199

<sup>4</sup> 28th, added by the author, please see pp. 195-200

of Ordinances re-promulgated was as high as 53. The following table shows how many times the same Ordinance was re-promulgated in order to keep its provisions in force:

S. No.	Name of the Ordinance	Date of First Promul-gation	Last Date of Re-promul-gation	How Many Times Re-promu- lgated	Total Period of the Life of the Ordi- nance
(1)	(2)	(3)	(4)	(5)	(6)
1	The Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance, 1968	13.01.1968	12.08.1981	39	About 14 years
2	The Bihar Panchayati Raj (Amending and Validating) Ordinance, 1970	14.08.1970	19.01.1981	35	About 12 years
3	The Bihar Hindu Religious Trusts (Amendment) Ordinance, 1970	05.09.1970	22.04.1981	37	About 12 years
4	The Bihar State Aid to Industries (Amendment) Ordinance, 1970	10.09.1970	23.04.1981	34	About 12 years
5	The Bihar Khadi and Village Industries (Amendment) Ordinance, 1970	17.09.1970	19.01.1981	35	About 12 years

It may be pointed out that the three Ordinances challenged in these writ petitions also suffered the same process of re-promulgation from time to time. The Bihar Forest Produce (Regulation of Trade) Third Ordinance was

first promulgated in 1977 and after its expiry, it was re-promulgated several times without it being converted into an Act of the State Legislature and it continued to be in force until it was replaced by Bihar Act No. 12 of 1984 on 17th May, 1984. So far as the Bihar Intermediate Education Council Third Ordinance is concerned it was initially promulgated in 1982 and after its expiry, it was again re-promulgated by the Governor of Bihar four times with the same provisions and it was ultimately allowed to lapse on 6th June, 1985, but then the Bihar Intermediate Education Council Ordinance, 1985 was promulgated which contained almost the same provisions as those contained in the Bihar Intermediate Education Council Third Ordinance. Similarly the Bihar Bricks Supply (Control) Third Ordinance was initially promulgated in 1979 and after its expiry it was re-promulgated by the Governor of Bihar from time to time and continued to be in force until 17th May, 1984 when it was replaced by Bihar Act No. 13 of 1984. Thus the Bihar Forest Produce (Regulation of Trade) Third Ordinance continued to be in force for a period of more than six years, the Bihar Intermediate Education Council Third Ordinance remained in force for a period of more than one year, while the Bihar Bricks Supply (Control) Third Ordinance was continued in force for a period of more than five years.

The Government of Bihar, it seems, made it a settled practice to go on re-promulgating the ordinances from time to time and this was done methodologically and with a sense of deliberateness. Immediately at the conclusion of each session of the State Legislature, a circular letter used to be sent by the Special Secretary in the Department of Parliamentary Affairs to all the Commissioners, Secretaries, Special Secretaries, Additional Secretaries and all Heads of Departments intimating to them that the session of the Legislature had been 'got prorogued' and that under Article 213 Clause (2) (a) of the Constitution all the Ordinances would cease to be in force after six weeks of the date of reassembly of the Legislature and that they should therefore get in touch with the Law Department and that immediate action should be initiated to get "all the concerned Ordinances re-promulgated" so that all those Ordinances are positively re-promulgated before the date of their expiry. This circular letter also used to advise the officers that if the old Ordinances were re-promulgated in their original form without any amendment, the approval of the Council of Ministers would not be necessary. The petitioners placed before the Court a copy of one such circular letter dated 29th July, 1981 and it described the subject of the communication as "Regarding Re-promulgation of Ordinances". It would be profitable to

reproduce this circular letter dated 29th July, 1981 as it indicates the routine manner in which the Ordinances were re-promulgated by the Governor of Bihar:

“Letter No. P.A./Misc. 1040/80-872

**GOVERNMENT OF BIHAR, DEPARTMENT OF PARLIAMENTARY  
AFFAIRS**

From: Basant Kumar Dubey,  
Special Secretary to the Govt.  
To: All Commissioners and Secretaries,  
All Special Secretaries,  
All Additional Secretaries,  
All Heads of Departments

Patna 15 — dated 29th July, 1981

Subject: Regarding Re-promulgation of Ordinances

Sir,

I am directed to say that the budget Session of the Legislature (June-July 1981) has been got prorogued after the completion of the business of both the houses on July 28, 1981.

Under the provisions of Art. 213 (2) (a) of the Constitution all the Ordinances cease to be in force after six weeks of the date of the reassembly of the Legislature. This time the session of the Legislative Assembly has begun on June 29, 1981 and that of the Legislative Council on July 1, 1981. Therefore from 1.7.1981, six weeks, that is, 42 days would be completed on 11.8.1981 and if they are not re-promulgated before the aforesaid date, then all the Ordinances will cease to be in force after 11.8.1981.

It is, therefore, requested that the Law Department may be contacted and immediate action be initiated to get all the concerned Ordinances re-promulgated so that they are definitely re-promulgated before 11.8.1981.

If the old ordinances are re-promulgated in their original form without any amendment, then the approval of the Council of Ministers is not necessary.

This should be given the top-most priority and necessary action should be taken immediately.

Yours faithfully,

Sd/- Basant Kumar Dubey  
Special Secretary to Bihar Government”

This circular letter clearly shows beyond doubt that the re-promulgation of the Ordinances was done on a massive scale in a routine manner without even caring to get the Ordinances replaced by Acts of the Legislature or considering whether the circumstances existed which rendered it necessary for the Governor to take immediate action by way of re-promulgation of the Ordinances. The Government seemed to proceed on the basis that it was not necessary to introduce any legislation in the Legislature but that the law could be continued to be made by the Government by having the Ordinances re-promulgated by the Governor from time to time. The question is whether this practice followed by the Government of Bihar could be justified as representing legitimate exercise of power of promulgating Ordinances conferred on the Governor under Article 213 of the Constitution.

The determination of this question depends on the true interpretation of Article 213 which confers power on the Governor of a State to promulgate Ordinances. This Article in so far as material, reads as follows:

“213. (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require:

(2) An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance —

(a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the reassembly of the Legislature, or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council; and

(b) may be withdrawn at any time by the Governor.

*Explanation* — Where the Houses of the Legislature of a State having a Legislative Council are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.”



The power conferred on the Governor to issue Ordinances is in the nature of an emergency power which is vested in the Governor for taking immediate action where such action may become necessary at a time when the Legislature is not in session. The primary law-making authority under the Constitution is the Legislature and not the Executive but it is possible that when the Legislature is not in session circumstances may arise which render it necessary to take immediate action and in such a case in order that public interest may not suffer by reason of the inability of the Legislature to make law to deal with the emergent situation, the Governor is vested with the power to promulgate Ordinances. But every Ordinance promulgated by the Governor must be placed before the Legislature and it would cease to operate at the expiration of six weeks from the reassembly of the Legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any. The object of this provision is that since the power conferred on the Governor to issue Ordinances is an emergent power exercisable when the Legislature is not in session, an Ordinance promulgated by the Governor to deal with a situation which requires immediate action and which cannot wait until the Legislature reassembles, must necessarily have a limited life. Since Article 174 enjoins that the Legislature shall meet at least twice in a year but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session and an Ordinance made by the Governor must cease to operate at the expiration of six weeks from the reassembly of the Legislature, it is obvious that the maximum life of an Ordinance cannot exceed seven and a half months unless it is replaced by an Act of the Legislature or disapproved by the resolution of the Legislature before the expiry of that period. The power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be "perverted to serve political ends." It is contrary to all democratic norms that the Executive should have the power to make a law, but in order to meet an emergent situation, this power is conferred on the Governor and an Ordinance issued by the Governor in exercise of this power must, therefore, of necessity be limited in point of time. That is why it is provided that the Ordinance shall cease to operate on the expiration of six weeks from the date of assembling of the Legislature. 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 time 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 re-promulgation 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. The Executive cannot by taking resort to an emergency power exercisable by it only when the Legislature is not in session, take over the law-making function of the Legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the Legislature as provided in the Constitution but by laws made by the Executive. The Government cannot by-pass the Legislature and without enacting the provisions of the Ordinance into an Act of the Legislature, re-promulgate the Ordinance as soon as the Legislature is prorogued. Of course, there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance because the Legislature may have too much legislative business in a particular session or the time at the disposal of the Legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the Ordinance. Where such is the case, re-promulgation of the Ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of re-promulgation. It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision. This is precisely what was pointed out by Mukharji, J. speaking for the Court in *K.C. Gajapati Narayan Deo and others vs. State of Orissa* (1954, 1 S.C.R.):

“In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method.”

So also in *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and another* (1965, 1 S.C.R. 614), a Constitution Bench of this Court observed that when it is said that Legislation is a colourable one, what it means is that the Legislature has transgressed its legislative power in a covert or indirect manner, if it adopts a device to outstep the limits of its power. When the constitutional provision stipulates that an Ordinance promulgated by the Governor to meet an emergent situation shall cease to be in operation at the expiration of six weeks from the reassembly of the Legislature and the Government if it wishes the provisions of the Ordinance to be continued in force beyond the period of six weeks has to go before the Legislature which is the constitutional authority entrusted with the law-making function, it would most certainly be a colourable exercise of power for the Government to ignore the Legislature and to re-promulgate the Ordinance and thus to continue to regulate the life and liberty of the citizens through Ordinance made by the Executive. Such a strategem would be repugnant to the constitutional scheme, as it would enable the Executive to transgress its constitutional limitation in the matter of law-making in an emergent situation and to covertly and indirectly arrogate to itself the law-making function of the Legislature.

Shri Lal Narain Sinha, appearing on behalf of the State of Bihar urged that the Court is not entitled to examine whether the conditions precedent for the exercise of the power of the Governor under Article 213 existed or not, for the purpose of determining the validity of an Ordinance and in support of this proposition, he strongly relied upon the decisions reported in *Bhagat Singh & Ors. v. Empire*<sup>4</sup>, *Rajaram Bahadur Kamlesh Narain Singh v. Commissioner of Income Tax*<sup>5</sup>, *Laxmidhar Misra v. Rangalal & Ors.*<sup>6</sup> and *R.C. Cooper v. Union of India*<sup>7</sup>. We do not see how these decisions could possibly help in the present case. They do not at all deal with the question which we are called upon to decide here. It is true that, according to the decisions of the Privy Council and this Court, the Court cannot examine the question of satisfaction of the Governor in issuing an Ordinance, but the question in the present case does not raise any controversy in regard to the satisfaction of the Governor. The only question is whether the Governor has power to re-promulgate the same Ordinance successively without bringing it before the Legislature. That clearly the Governor cannot do. He cannot assume

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<sup>4</sup> AIR 1931 PC 111

<sup>5</sup> AIR 1943 PC 153

<sup>6</sup> AIR 1950 PC 59

<sup>7</sup> (1970) 3 SCR 530

legislative function in excess of the strictly defined limits set out in the Constitution because otherwise he would be usurping a function which does not belong to him. It is significant to note that so far as the President of India is concerned, though he has the same power of issuing an Ordinance under Article 123 as the Governor has under Article 213, there is not a single instance in which the President has since 1950 till today, re-promulgated any Ordinance after its expiry. The startling facts which we have narrated above clearly show that the Executive in Bihar has almost taken over the role of the Legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations. This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid. We hope and trust that such practice shall not be continued in the future and that whenever an Ordinance is made and the Government wishes to continue the provisions of the Ordinance in force after the assembling of the Legislature, a Bill will be brought before the Legislature for enacting those provisions into an Act. There must not be Ordinance Raj in the country.

We must accordingly strike down the Bihar Intermediate Education Council Ordinance, 1985 which is still in operation as unconstitutional and void. Petitioner No.1 has done enormous research and brought this reprehensible practice of the Government of Bihar to the notice of the Court and we would therefore direct that the State of Bihar shall pay to Petitioner No. 1 a sum of Rs. 10,000/- (Rupees ten thousand only) as and by way of cost of the writ petitions.

	sd/-	CJ.
	sd/- Ranganath Misra	J.
	sd/- G.L. Oza	J.
New Delhi,	sd/- M.M. Dutt	J.
20th December, 1986	sd/- K.N. Singh	J.

# EPILOGUE

## I Supreme Court

### On Judgment

While declaring the practice of re-promulgation of Ordinances as illegal, unconstitutional and a fraud on the Constitution of India, the five-judge Constitution Bench of the Supreme Court, presided over by the Chief Justice, that heard the case, observed that

“there may be a situation where it may not be possible for the Government to introduce and push through in the legislature a Bill containing the same provisions as in the Ordinance because the legislature may have too much legislative business in a particular session or the time at the disposal of the legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the Ordinance. Where such is the case, re-promulgation of the Ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an Ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of re-promulgation. It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision.”

2. With utmost respect to the learned judges, it is humbly submitted that in my opinion their Lordships have erred in interpreting Article 213 of the Constitution by carving out the abovementioned exception. Article 213 of the Constitution does not provide for an exception.

3. Under the provisions of Article 213 of the Constitution, there is an absolute time limit for an Ordinance during which it must be replaced by an Act of the legislature. Otherwise, it must lapse.

### Courts Cannot Add Words to a Statute

4. In *Renula Bose v. Manmatha Nath*<sup>1</sup> (per Lord Goddard), the Privy Council observed as under:

“It is contrary to all rules of construction to read words into an Act ... .”

5. In *Sri Ram Ram Narain v. State of Bombay*<sup>2</sup>, the Supreme Court of India refused to add words in construing Article 31A (1) (a) of the Constitution of India saying:

“If the language of the enactment is clear and unambiguous it would not be legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out the supposed intention of the legislature. The intention of the Legislature is to be gathered *only* (emphasis added) from the words used by it and no such liberties can be taken by the Courts for effectuating a supposed intention of the Legislature. There is no warrant at all, in our opinion, for adding these words to the plain terms of Art. 31A (1) (a) and the words “extinguishment or modification of any such rights” must be understood in their plain grammatical sense, without any limitation of the type suggested by the petitioners.”

6. In *Ramnarain v. State of Uttar Pradesh*<sup>3</sup>, while interpreting section 14 (f) of the United Provinces Town Areas Act, 1914, the Supreme Court did not accept the contention of the petitioners that residence within the Town Area must be read as a necessary part of clause (f).

“To do so”, said the Supreme Court, “will be to read in cl. (f) words which do not occur there.”

7. In *Vickers, Sons & Maxim Limited v. Evans*<sup>4</sup>, Lord Loreburn, Lord Chancellor, House of Lords, in the above appeal observed as under:

“My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; ... . The appellants’ contention involves reading words into this clause. The clause does not contain them; and we are not

<sup>1</sup> A.I.R. 1945 P.C. 108, at 110

<sup>2</sup> A.I.R. 1959 S.C. 459, at 470

<sup>3</sup> A.I.R. 1957 S.C. 18, at 23

<sup>4</sup> (1910) A.C. 444, at 445 (House of Lords)

entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.”

8. In *Jumma Masjid v. Kodimaniandra Deviah*<sup>5</sup>, the question was whether, in construing section 43 of the Transfer of Property Act, 1882, the court could carve out an exception for the case where the transfer was of a mere expectation of succeeding to certain property. The Supreme Court held that that could not be done. It held there as under:

“If we accede to this contention, we will not be construing S.43, but rewriting it.” The Supreme Court cited with approval the abovementioned words of Lord Loreburn, Lord Chancellor, that “we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.”

9. In *Magor and St. Mellons Rural District Council v. Newport Corporation*<sup>6</sup>, the Law Lords (House of Lords) severely criticised the view of Lord Denning in the Court of Appeal that a Judge could fill up the gaps.

(a) Lord Simonds in his concurring judgment observed as under:<sup>7</sup>

“My Lords, I have had the advantage of reading the opinion which my noble and learned friend, Lord Morton of Henryton, is about to deliver, and I fully concur in his reasons and conclusion, as I do in those of Parker, J., and the majority of the Court of Appeal. Nor should I have thought it necessary to add any observations of my own were it not that the dissenting opinion of Denning, L.J., appears to invite some comment. ... The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited: see, for instance, *Assam Railways & Trading Co., Ltd. v. Inland Revenue Comrs.* (2), and, particularly, the observations of Lord Wright ([1935] A.C. 458). ... What the legislature has not written, the court must write. This proposition which re-states in a new form the view expressed by the lord justice in the earlier case of *Seaford Court Estates, Ltd. v. Asher* (3) (to which the lord justice himself refers), cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation, and it is

<sup>5</sup>A.I.R. 1962 S.C. 847, at 850

<sup>6</sup>(1951) 2 All ER, Vol. 2, 839-850 (House of Lords)

<sup>7</sup>ibid, p. 841

the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it in. If a gap is disclosed, the remedy lies in an amending Act. ...”

(b) Lord Morton of Henryton observed as under:<sup>8</sup>

“My Lords, my noble and learned friend Lord Goddard has asked me to say that he entirely agrees with the opinion which I am about to deliver. ... My Lords, I have already described this as a vigorous judgment, and it is certainly one which invites some comment. I feel sure that Parker J., ... set out to interpret the Act and the order, and I agree with his interpretation. In so far as the intention of Parliament or of Ministers is revealed in Acts of Parliament or orders, either by the language used or by necessary implication, the courts should, of course, carry these intentions out, but it is not the function of any judge to fill in what he conceives to be the gaps in an Act of Parliament. If he does so, he is usurping the function of the legislature.”

(c) Lord Tucker, with reference to the judgment of Lord Denning, L.J., said as under:<sup>9</sup>

“...your Lordships would be acting in a legislative rather than a judicial capacity if the view put forward by Denning, L.J., in his dissenting judgment were to prevail.”

10. Thus, it is clear from the abovementioned judgments of the Privy Council, House of Lords and the Supreme Court of India that the courts cannot add words into a Statute if the language of the Statute is clear and unambiguous. The language of Article 213 of the Constitution is very clear and unambiguous.

11. If the legislature has too much legislative business in a particular session, the conversion of an Ordinance into an Act of the legislature must get top most priority in any legislative business because the Executive has already made a temporary law (Ordinance) when the legislature was not in session and it is the duty of the legislature to look into it at the earliest, after it reassembles, whether that temporary law should be continued or not. If the legislature wants that law to continue then it must convert it into its own Act. If the legislature does not want that temporary law to continue, then it should disapprove it by its resolution. If the legislature neither converts it into an Act nor disapproves it by its resolution,

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<sup>8</sup> *ibid*, pp. 841 and 847

<sup>9</sup> *ibid*, p. 850



it must lapse within the stipulated period provided in Article 213 of the Constitution. The Governor cannot re-promulgate it. It is submitted, at the cost of repetition, that the conversion of an Ordinance into an Act of the legislature must get the highest priority in any legislative business of the legislature. Article 213 of the Constitution does not provide for the re-promulgation of an Ordinance *under any circumstances* (emphasis added). In fact, it has fixed the maximum life of an Ordinance.

12. As regards the observation of the Constitution Bench that the time at the disposal of the legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to re-promulgate the Ordinance, it is humbly submitted that this too is a faulty reasoning. If the time at the disposal of the legislature in a particular session is short, the solution does not lie in the re-promulgation of an Ordinance but it lies in extending the duration of the session of the legislature. After all, there is no upper limit fixed in the Constitution for the duration of a session of the legislature.

13. While participating in the debate in the Constituent Assembly on the appointment of the Governors and their powers, Shri H. V. Kamath said as under:<sup>10</sup>

“The ordinance-making power is distasteful to me and I moved some amendments in connection with these powers of the President a couple of days ago. But Dr. Ambedkar himself argued against the amendments of mine which tried to limit the powers of ordinance-making by the President. He said that it was nothing extraordinary and that it was only a power given to the President at times when the Parliament was not in session, and visualising the possibility of Parliament sitting continuously, *almost the whole year* (emphasis added), he assured the House that the need for ordinance-making by the President will not arise. I hope the same argument will apply here too. In view of the fact that the legislative business will be very heavy in the States as well as in the Centre, I am sure that the state legislatures as well as the Parliament at the Centre will be almost continually in session, and the need for ordinance promulgation by the Governor in the States just as in the case of the President at the Centre, as pointed out by Dr. Ambedkar, will not arise.”

14. Thus, it is clear that Dr. Ambedkar had visualised that the Parliament and the state legislatures will be sitting continuously for almost the whole year

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<sup>10</sup> *Constituent Assembly Debates*, Volume 8, dated May 30, 1949, pp. 429-430

and therefore the need for promulgation of Ordinances, not to speak of re-promulgation, will not arise.

15. What is happening is contrary to what Dr. Ambedkar had said. The duration of the sessions of state legislatures as well as that of the Parliament are not only continuously being curtailed but there is a drastic cut in them. For example, after the practice of re-promulgation of Ordinances was started in Bihar, the duration of the sessions of the Bihar Legislative Assembly had gone down from 145 days in 1950 to 59 days in 1981, the last year of the study. Similarly, the duration of the sessions of the Bihar Legislative Council had gone down from 152 days in 1950 to 55 days in 1981. As regards the number of days the Legislative Assembly actually met, the number of days had gone down from 80 in 1950 to 41 in 1981. The corresponding figures for the Legislative Council are 60 in 1950 and 37 in 1981.<sup>11</sup> The number of Acts made in 1950 were 42 while the number of Ordinances promulgated in 1950 were 5. The corresponding figures for the year 1981, the last year of the study, are 10 and 203.<sup>12</sup> It is not accidental that from that period, no session of the Bihar Legislature lasted for more than six weeks, the idea being to ensure that the Ordinances do not lapse automatically.

16. It is not only in Bihar but in other states also, and even at the Centre, the duration of the sittings of the state legislatures and the Parliament is on the decline. Shri K. Mohanan while participating in a Call Attention Motion in the *Rajya Sabha* on re-promulgation of Ordinances said as under:<sup>13</sup>

“Everyday, Sir, there is a tendency to curtail the duration of the House, whether it is of Parliament or of the State Legislatures. Sir, the Report of the Department of Parliamentary Affairs shows that last year only 80 sittings of the *Rajya Sabha* and 90 sittings of the *Lok Sabha* were held. It has gradually come down from 130 to 125 to 110 and it has come down now to 80. So, Sir, ... . My point is this. Sir, this is not a disease. But this is only one of the symptoms of a serious disease. That is the tendency towards authoritarianism in this country. I would like to get at least an assurance from the Home Minister that even in the case of subjects

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<sup>11</sup> Wadhwa, D.C., *Re-promulgation of Ordinances: A Fraud on the Constitution of India*, pp. 94 and 98

<sup>12</sup> *ibid*, Table I, p. 84

<sup>13</sup> *Parliamentary Debates, Rajya Sabha*, Official Report, dated December 22, 1983, column 305

in the Concurrent List, the Government is prepared not to give sanction, not to give the seal, of the President, in the case of re-promulgation of Ordinances.”

17. Even Vice-President of India Shri Hamid Ansari expressed concern at the “decreasing credibility of the legislatures and called for a review of their day-to-day functioning in order to optimise their productivity.”<sup>14</sup> Speaking at the 14<sup>th</sup> All India Whips’ Conference in Mumbai on February 4, 2008, Shri Ansari said as under:<sup>15</sup>

“Parliament must increase its sittings to 130 days a year “to restore its deliberative role” . . . . He cited data to underline the decline in the number of sittings. He said *Rajya Sabha*, which had an annual average of 90.5 in 1952-61, came down to 71.3 in the decade 1992-2001 – a decline of 20 per cent. The comparative figures for the *Lok Sabha* are 124.2 and 81.0 – a decline of 34 per cent. State assemblies are worse off, with the average now being in the range of 20 to 50 sittings every year. Calling for an increase in the number of sittings, he said comparative figures for the British and Canadian Parliaments are in excess of 140. The US Congress is in session, on an average, for over 150 days in a year.

The annual average of the number of Bills passed by Parliament has come down from 68 in 1952-61 to 49.9 in the decade 1992-2001.”

18. Thus, it is most respectfully submitted that the data given above in paragraphs 15, 16 and 17 and in my book entitled ‘*Re-promulgation of Ordinances: A Fraud on the Constitution of India*’ go to show, beyond an iota of doubt, that the exception carved out by the Constitution Bench, for the re-promulgation of Ordinances, for the reasons given by the Constitution Bench, is totally unfounded.

19. A person, who is not a member of either House of the legislature of a state can be appointed as a Minister by the Chief Minister of that state for a period of six months. If that Minister fails to get himself elected to either House of that state within that period, that is, six months, he cannot continue to remain as a Minister *under any circumstances* (emphasis added). He must resign, as provided in the Constitution. Similarly, an Ordinance, promulgated by the Governor of a state, can not remain in force after six weeks from the first day of

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<sup>14</sup> *The Indian Express* dated February 5, 2008

<sup>15</sup> *ibid*

the reassembly of the state legislature after the promulgation of that Ordinance, *under any circumstances* (emphasis added). It must lapse, as provided in the Constitution. The Governor of that state cannot re-promulgate it. Of course, it can be converted into an Act by the state legislature before the expiry of six weeks from the first day of the reassembly of the legislature as the Minister can get himself elected before the expiry of six months.

20. Commenting upon the carving out of the abovementioned exception by the Constitution Bench of the Supreme Court of India for the re-promulgation of Ordinances, Shri A.G. Noorani, Senior Advocate, Supreme Court of India, wrote as under:<sup>16</sup>

“The exemption carved out by justice Bhagwati is wholly gratuitous and robs the judgment of merit and value. It was a case of interpretation and the exception, based on pure legislative convenience, derives no sanction from Article 213. The limit for legislative ratification of an ordinance does not depend on the legislature’s convenience. It is devoid of any justification. If it be “judicial activism” it is activism in favour of the state contrary to the law after a failure to exercise judicial activism in favour of the citizen in conformity with the law.”

21. Will the Supreme Court correct its abovementioned mistake *suo moto* or will it require another writ petition or a constitutional amendment for it? It is humbly suggested that a Constitution Bench of five or seven judges be immediately constituted by the Supreme Court of India to reconsider *suo moto* the exception carved out by the Constitution Bench of five judges, for the re-promulgation of Ordinances, in the light of data presented hereinabove and in my book entitled *Re-promulgation of Ordinances: A Fraud on the Constitution of India*, annexed to the writ petition, and the arguments advanced against the reasons given by the Constitution Bench for carving out that exception.

## II Constitutional Functionaries Do Not Read Constitution

22. The main reason for the Governors to subvert the Constitution by making Ordinances masquerade as laws is that the Governors do not read the Constitution of India, which they are supposed to preserve, protect and defend and to which they swear allegiance by the oath taken by them under Article 159 of the Constitution. Is it possible for a human being – and I presume that the Governor

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<sup>16</sup>Noorani, A.G., *Economic and Political Weekly*, Vol. XXII, No. 9, dated February 28, 1987

is one – to read, analyse, discuss, debate and apply his mind to 56 Ordinances on 56 different subjects and satisfy himself that circumstances exist which render it necessary for him to take immediate action and promulgate them all on a single day? The Governors merely sign on dotted lines and reduce the Constitution to a mockery.

23. It will be enlightening to compare the docile way in which the Governors of Bihar have been signing on dotted lines and who did not read the Constitution with the Governor who read the Constitution and then made his decisions.

24. Shri Amarnath K. Menon wrote as under:<sup>17</sup>

“When the 67-years-old Dr. Shankar Dayal Sharma replaced the controversial Ram Lal as the Governor of Andhra Pradesh, on August 28 last year, he was described as a cool man on a hot seat. However, it didn’t take long for him to change. Last fortnight when Sharma declined to give a fresh lease of life to three Ordinances, it not only soured relations between him and Chief Minister N.T. Rama Rao but is beginning to precipitate a constitutional crisis over the role of a Governor. Exactly a month after Rama Rao wrote to Sharma urging that the three Ordinances be re issued, the governor sent in a terse 21-sentence reply stating that the Constitution permits only limited legislative powers to the governor and that an Ordinance has to be ratified by the legislature within a specified period; political parties, high courts and the Supreme Court had criticised the re-promulgation of ordinances as a violation of the Constitution and reissue of ordinances would be a gross constitutional impropriety... . . . . In his latest letter to Sharma, Rama Rao pointed out that there are no fetters on the legislative power of the governor under Article 213 of the Constitution. He sent notes drafted by the law secretary D.J. Jagannatha Raju and Advocate General K.C. Reddy as replies to the points raised by Sharma. ... Sharma who has impressive educational credentials including a doctoral degree in constitutional law from the Cambridge University, a stint at Harvard School of Law, and Lincoln’s Inn, however remained unconvinced, said a peeved Rama Rao:” ... The governor, however, told INDIA TODAY: “As the constitutional head of the state and as one who has sworn allegiance to the Constitution I will be guided by it in making my decisions.”

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<sup>17</sup> *India Today* dated February 15, 1985, p. 64

25. After some years when I had an opportunity to meet Dr. Sharma at *Rashtrapati Bhavan* when he was the President of India, he told me that he was greatly influenced by my arguments against the re-promulgation of Ordinances in my book and, therefore, had decided to refuse to re-promulgate Ordinances when he was the Governor of Andhra Pradesh.

26. It is not only the Governors of Bihar who did not read the Constitution of India but even the Governors of other states also do not read it. For example, the ex-Governor of Maharashtra Air Chief Marshal Om Prakash Mehra (Retd.), said: Mr. Antulay, the then Chief Minister of Maharashtra, “asked me if I had read the Constitution. I said I had not, but I had one rare commodity – common sense.”<sup>18</sup> Strange! The Governor takes oath under Article 159 of the Constitution of India to preserve, protect and defend the Constitution of India and not his common sense. I believe that the secretariat of the Governor of Maharashtra will have an excellent library. Still, the Governor says that he had not read the Constitution. Even as Air Chief Marshal, he must have been obliged to read the Constitution of India. This makes it very clear that proper persons are not appointed to the constitutional posts.

### III Appointment of the Governors

27. There was a considerable discussion in the Constituent Assembly about the appointment of the Governors and their powers. I give below extracts from a few speeches.

28. Dr. P.K. Sen said as under:<sup>19</sup>

“There is also a great advantage in having a person who is detached from the province — I do not say that necessarily the selection will be from outside the province — but supposing it were it would be an advantage because that person would come to the province with a free mind perfectly detached, perfectly unassociated with the different factions, or different sections of opinion, in the province. The function that the Governor has to fulfil, as it is now borne in upon the Members of the House, is that of a lubricator, if I may use the expression. He is not to interfere, but he has just to smooth matters. If there are factions, if the different sections of the community are at loggerheads with each other, it is for him to act more or less as a lubricator, a cementing factor. ... he is not to come and interfere

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<sup>18</sup> *The Asian Age* dated January 8, 2007, p.2

<sup>19</sup> *Constituent Assembly Debates*, Volume 8, May 31, 1949, pp. 445-446

and cause confusion or chaos; he would be the person really to lubricate the machinery and to see to it that all the wheels are going well by reason not of his interference, but his friendly intervention.”

29. Shrimati G. Durga Bai said<sup>20</sup> that

“the governing idea is to place the Governor above party politics, above factions and not to subject him to the party affairs.”

30. Shri K.M. Munshi said as under:<sup>21</sup>

“Would it not be better to have an independent person bringing a detached frame of mind on this question rather than have more or less a nominee or a follower of the Prime Minister himself, if he has to perform this function? ... It would be much better that this person is ... cut away from the party politics of the province, ... it would be better to have a Governor nominated by the Centre who is free from the passions and jealousies of local party politics. ... it is advisable that a person who is connected with this or that party should not occupy this important position for he would, in that event, be responsible for the maintenance of public tranquility in that province.”

31. Shri Jawaharlal Nehru said as under:<sup>22</sup>

“I think it would be infinitely better if he was not so intimately connected with the local politics of the province, with the factions in the province. And, as has been stated by Mr. Munshi, would it not be better to have a more detached figure, obviously a figure that is acceptable to the province, otherwise he could not function there? He must be acceptable to the province, he must be acceptable to the government of the province and yet he must not be known to be a part of the party machine of that province. ... But on the whole it probably would be desirable to have people from outside – eminent people, sometimes people who have not taken too great a part in politics. ... there may be an eminent educationist or persons eminent in other walks of life, who would naturally while co-operating fully with the Government and carrying out the policy of the Government, at any rate helping in every way so that that policy might be carried out, he would nevertheless represent before the public someone slightly above the party and thereby, in fact, help that Government more than if he was considered as part of the party machine.”

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<sup>20</sup> *ibid*, p. 449

<sup>21</sup> *ibid*, pp. 453-454

<sup>22</sup> *ibid*, p. 455

32. Shri T.T. Krishnamachari said as under:<sup>23</sup>

“We do not want either by this particular article or by any other article that will be passed by this House in future to make the Governor of a Province an agent of the Centre at all. ... the person so selected will be a person who will hold the scales impartially as between the various factors in the politics of this State. The advantages of having a non-party man, a non-provincial man have been amply made out by the Honourable Prime minister.”

33. Thus, there was a unanimous opinion in the Constituent Assembly that the person appointed as Governor should be above party politics. But what is happening today is that the party in power at the Centre appoints a person as Governor, either on political considerations or as an appeasement, who is pliable to the party. If Congress comes to power at the Centre, it appoints Congressmen as Governors. If BJP comes to power at the Centre, it appoints persons from the BJP as Governors.

34. Even the Supreme Court of India wondered if the high constitutional office has been reduced to a “party office extension.”<sup>24</sup> Justice Sabharwal said that “one day, a man is Chief Minister, next day he is Governor. Human beings are not machines who will switch over just like that ... unfortunately, there are people who claim we have to follow political agenda even after assuming office.”<sup>25</sup> The result is that every appointment has resulted in disappointment.

35. The Sarkaria Commission in its report on Center-State relations says about the appointment of Governor as under:<sup>26</sup>

“... the demands on the Governor have become much more exacting, making it all the more important that the right type of persons are selected for the office. In order to ensure proper selection of Governors, we cannot do better than re-iterate the criteria laid down in this regard by Jawaharlal Nehru. We recommend that a person to be appointed as a Governor should satisfy the following criteria:

- (i) He should be eminent in some walk of life.
- (ii) He should be a person from outside the State.

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<sup>23</sup> *ibid*, pp. 460, 462

<sup>24</sup> *The Indian Express* dated September 23, 2005

<sup>25</sup> *ibid*

<sup>26</sup> *Report of the Commission on Center-State Relations*, Part I, p. 122



- (iii) He should be detached figure and not too intimately connected with the local politics of the State.
- (iv) He should be a person who has not taken too great a part in politics generally and particularly in the recent past.”

36 But who cares for the Constituent Assembly, Jawaharlal Nehru, Supreme Court of India and the Sarkaria Commission?

#### IV Parliament

##### Out of Power

37. Now, I turn to the Parliament. As I have mentioned in the Preface of this book, there was a debate on my book entitled *Re-promulgation of Ordinances: A Fraud on the Constitution of India* in the Parliament (*Rajya Sabha*) through a Calling Attention Motion to a Matter of Urgent Public Importance moved by Shri L. K. Advani.

38. The Minister of State in the Ministry of Home Affairs, Shri P. Venkatasubbaiah, laid on the Table of the House his written statement on the subject in which after reproducing Article 213 of the Constitution, he said in paragraph 3 of his statement as under:<sup>27</sup>

“The Constitution does not lay down any limit on the number of times substantially the same Ordinance can be promulgated by the Governor. The criterion laid down is that the Governor should be satisfied that circumstances exist which make it necessary for him to take immediate action and promulgate an Ordinance. Whether such circumstances prevail as make it necessary for him to take such action is a matter for the Governor to decide.”

39. However, in paragraph 4 of his statement, he said as under:<sup>28</sup>

“When substantially the same Ordinance is sent repeatedly by the Governor of a State for instructions of the President, the State Government is advised to take action to convert it into an Act at the earliest.”

40. Thereafter, Shri Advani took the floor. He said as under:<sup>29</sup>

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<sup>27</sup> *Parliamentary Debates, Rajya Sabha*, Official Report, dated December 22, 1983, columns 205-206

<sup>28</sup> *ibid*, column 206

<sup>29</sup> *ibid*, columns 206-214

“Sir, before I deal with the issues themselves and also the statement made by the Home Minister, I would like to express my deep admiration for the person who has unearthed all these facts which are the subject-matter of the discussion today. I am referring to Dr. D.C. Wadhwa, who is a research scholar in the Gokhale Institute of Politics and Economics, at Poona, and who, in fact, does not belong to this discipline. He is basically a scholar who studies agrarian legislation and it is by chance that in the course of his own efforts in the field of agrarian legislation he discovered that there are laws relating to agrarian matters in the States [*sic*]<sup>30</sup> of Bihar which have been enforced through Ordinances, not once, not twice, not thrice but scores of times and not for a period of six months or eight months or one year or two years, ... but to the extent of 13 years without the law being referred to the Legislature at all. And it is then that he pursued this matter and came up with this treatise which is called the *‘Repromulgation of Ordinances, a Fraud on the Constitution of India’*. I have not seen any book dealing with a drab, dull, subject of this kind during the last many, many years which has received such rave [*sic*]<sup>31</sup> reviews from every important paper and journal in the country. Everyone has said that this particular work that he has done is a signal services [*sic*]<sup>32</sup> done towards the *defence of the Constitution* (emphasis added). The case of *constitutional integrity* (emphasis added) has been admirably served by this gentleman, Dr. Wadhwa, by unearthing and revealing all these facts. Before I would deal with the facts and come to the point, I would like to say that listening to the Minister I felt extremely disappointed, extremely. The first 1/2 pages of his statement add up to nothing else but a summary of the constitutional position and the provisions with which we are quite familiar. Everyone knows them. The substantial part of his statement comes in para 3 in which the Government of India has virtually justified and acquiesced in whatever has been done. I would also like to say that this is not a matter in which parties are involved. This should not be made a matter of partisan or political recrimination or fault finding. None of the parties here can exclude itself with regard to what has been happening. I came to know about this only recently. If I had known about these matters when I was in Government, all that I can today say is I would certainly have exerted ractify to [*sic*]<sup>33</sup> the situation from within the Government ... .

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<sup>30</sup> State, corrected by the author

<sup>31</sup> rare, corrected by the author

<sup>32</sup> service, corrected by the author

<sup>33</sup> to rectify, corrected by the author

Perhaps many in today's Government also, in the Government of India also, might have discovered it subsequently. ... I only wished to point out to him (the Minister) that in the State of Bihar a fraud was being perpetrated over a period of years and now that you have come to know of it, it is your duty and it is the duty of this House to stop it. As Council of States we are concerned with what goes on in the States, whether the Constitution is being properly worked or not. It is from that point of view I have to raise this matter. ... Now, let us understand what is the nature of the fraud. So far as this treatise by Shri Wadhwa is concerned, it has dealt with every aspect of it. Even the *modus operandi* how it is one has been laid bare. Every aspect has been thoroughly discussed, and it is not possible for me to go in to all that. I feel that a unanimous opinion expressed in this House is going to carry very great weight with the States where this is happening. Therefore, I want to appeal to every member who speaks, that he should view it from a non-partisan angle, from a purely constitutional angle, from the point of view of constitutional morality and propriety, ... I do not know if any other Constitution in the world gives this kind of legislative power to the Executive. This was objected to in the Constituent Assembly which said that legislation is the function of the Legislature; let not the Executive legislate. But it was argued that in exceptional circumstances in a vast country like ours, when legislation is urgently required the Executive should be empowered to legislate in certain circumstances. This power was given to the Executive to be used in extraordinary and exceptional circumstances. But then too a time constraint was imposed on it. This time constraint was that immediately after the calling of the Assembly [*sic*]<sup>34</sup> within six weeks of the reassembling of the Assembly [*sic*]<sup>35</sup>, the Ordinance will cease to operate or, if before that, it has been disapproved, then it will cease to operate on the basis of that disapproval. If it is replaced by the Act, then it will cease to be an Ordinance. Thus the total life given to an Ordinance was six weeks from the opening of the Assembly [*sic*]<sup>36</sup> session. And as everybody knows, between two sessions of the Legislature, there cannot be an interval of more than six months. Therefore, the maximum period for which an Ordinance could survive is 7 ½ months. This is the total duration for which an Ordinance can survive. Now, Sir,

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<sup>34</sup> Legislature, corrected by the author

<sup>35</sup> Legislature, corrected by the author

<sup>36</sup> Legislature, corrected by the author

in Bihar there is an Ordinance called the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance which was first promulgated in 1968. From 1968 till 1981, for thirteen years, it was promulgated and re-promulgated on 38 [sic]<sup>37</sup> occasions and every time with the prior permission of the President of India. The Hon'ble Minister, in the last paragraph of his statement, has said that so far as we are concerned, we give our advice to the State Government that it should take action to convert the Ordinance into an Act at the earliest. Is this the result of the advice, that his [sic]<sup>38</sup> particular Ordinance should have been issued 39 times, with the result the legislature becomes a farce. The legislature does not figure anywhere. I notice from the figures that between 1971 and 1981 the Bihar Assembly [sic]<sup>39</sup> has passed 163 Acts, 163 regular Acts. During the same period however, between 1971 and 1981, the Bihar Governor promulgated 1958 Ordinances – 163 Acts and 1958 Ordinances. This is something stupefying and mind-boggling. ... Sir, going through the various observations made by the Supreme Court on ordinance-making, on the implications of article 123, which deals with ordinance-making at the Centre, or article 213, which deals with ordinance-making in the States, I have little doubt that the Supreme Court will hold that repromulgation is constitutionally *ultra vires*. It is also a fraud [sic]<sup>40</sup> on the Constitution! ... I would like to quote from that particular judgment which is a very recent judgment given in 1981 ... “... That power was to be used to meet the extraordinary situation and *not perverted to serve political ends* (emphasis added). The Constituent Assembly held forth, as it were, an assurance to the people that an extraordinary power shall not be used in order to perpetuate the fraud on the Constitution which is conceived with so much faith and vision.” Against this background of the Supreme Court's view on Ordinance making I have little doubt that if this matter goes to the Supreme Court it is bound to be struck down. But today I would appeal to the Government of India that in so far as Bills [sic]<sup>41</sup> for which President's consent, assent or instructions are needed, hereafter the President should refuse to give consent to a case where an Ordinance is sought to be repromulgated. ... I am referring to the question of re-promulgation of Ordinance which I regard as constitutionally bad-dubious, at best – bad-but politically

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<sup>37</sup> 39, corrected by the author

<sup>39</sup> Legislature, corrected by the author

<sup>41</sup> Ordinances, corrected by the author

<sup>38</sup> this, corrected by the author

<sup>40</sup> fraud, corrected by the author

immoral. Sir, therefore, I seek an assurance from the Minister that in all cases hereafter the President would withhold his assent, and refuse to give permission. ... The President would be within his powers to say that *the Constitution does not envisage re-promulgation of the Ordinance* (emphasis added). Sir, before I conclude I would like to point out to the Minister the implications of what he has said. You should understand the enormity of the fraud that can be perpetrated if your view is accepted. There are several provisions in the Constitution, not merely those relating to Ordinance making, where though the Executive has been given certain authority, the authority is circumscribed by certain time constraints. Mr. Venkatasubbaiah may not be a Member of the *Lok Sabha* or the *Rajya Sabha*. Nevertheless the Prime Minister can appoint him as a Minister. But even after appointing him as Minister the Prime Minister has to heed article 75 whereunder a Minister who within a period of six months is not a member of either House of Parliament, shall at the expiration of that period cease to be a Minister. Now, with the kind of justification he has given for Ordinance making and re-promulgation of Ordinances, it may very well be that after six months he resigns for a day and then on the next day he is re-appointed as a Minister without coming to Parliament at all, and this process goes on and on. Just as Ordinances have gone on for 13 years, similarly, Mr. Venkatasubbaiah or for that matter any one can be a Minister without becoming a Member of Parliament, for an indefinite time. Is this not clear case of fraud committed on the Constitution? (Mr. Murasoli Maran interrupted to say: "Prime Minister also. Mr. Deputy Chairman said: Every one.") I think ... the minimum that Government would do was that in so far as matters coming to the President are concerned, where laws in respect of Concurrent Subjects are concerned where the permission of the President is necessary, in those cases the Government would decide not to give permission. I would like to know from him whether this matter has been considered in the Cabinet. This is a matter which, I think, must be considered in the Cabinet and the considered opinion taken on that – not merely at the level of the Law Ministry or the Home Ministry."

41. Shri Dinesh Goswami said as under:<sup>42</sup>

"... I hope the Home Minister will rise above party politics, because in this every one has become guilty. In Bihar, I found that the Congress

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<sup>42</sup> *Parliamentary Debates, Rajya Sabha*, Official Report, dated December 22, 1983, columns 214-221

was guilty, the S.V.D. was guilty and the Janata Party itself was guilty ... . . . . Therefore, every one is guilty. ... I am extremely unhappy at the statement made by the hon. Home Minister. I feel that the statement is not correct because it goes against the fundamental principles of the Constitution. ... After all, what is this power of promulgation of Ordinances? ... this [*sic*]<sup>43</sup> a power which the Legislature gives to the Executive which exclusively belongs to the Legislature, the power to make laws. It is given to the Executive subject to some restrictions. ... What is being done is that the Assemblies [*sic*]<sup>44</sup> do not meet for six weeks: As the Assemblies [*sic*]<sup>45</sup> do not meet for six weeks, the ordinance automatically does not lapse. Then the ordinance is replaced by another ordinance before the expiry of the date with the same language, repealing the earlier ordinance, and, therefore, a fresh date starts. ... But the most dangerous thing is this. There are some legislatures in this country where a party may have majority in the State Legislature [*sic*]<sup>46</sup>, but may not have a majority in the Council. The Bill is passed in both the state legislature [*sic*]<sup>47</sup> and the Council. In order to obviate this difficulty because the Bill will not be passed by the Council, they resort to this method. ... And I am indebted, and I must pay my compliments to Mr. Wadhwa because he has brought out these things to light. ... I would like the hon. Minister, Mr. Venkatasubbaiah to tell me, whether it was the assurance given. Is it not totally contradictory and violative of the assurance that was given solemnly by Dr. Ambedkar to the Constituent Assembly? And if by dubious method, the assurance given by Dr. Ambedkar is frustrated and the power of legislation is carried on by the Executive, denying the legislature of its rightful duty, then is it not necessary either to take political action or make legislative changes and correct the situation? ... in Bihar, 444 Acts were passed as against 76 Ordinances from 1950 to 1966. From 1967, this practice started. And from 444 Acts, the figure came down to 180 during 1967-1981, and the number of Ordinances rose from 76 to 2,014 between 1967-81. ... the malaise has spread to other states. ... In Uttar Pradesh what has happened is something beyond comprehension. In Uttar Pradesh, recently 12 ordinances have been re-promulgated – 6 ordinances on 14<sup>th</sup> March; 5 ordinances on 15<sup>th</sup> March;

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<sup>43</sup> is, added by the author

<sup>44</sup> Legislatures, corrected by the author

<sup>45</sup> Legislatures, corrected by the author

<sup>46</sup> Legislative Assembly, corrected by the author

<sup>47</sup> Legislative Assembly, corrected by the author

and one ordinance on 16<sup>th</sup> March. And what is more serious is that the Legislative Council was sitting. The Legislative Council was prorogued on 11<sup>th</sup> March. And then it was made to reconvene on 17<sup>th</sup> March because you can not promulgate ordinances when the Parliament or the Assembly [*sic*]<sup>48</sup> is in session. ... The Council was prorogued for six days so that 12 ordinances can be passed. And even in U.P., some of these ordinances promulgated in 1981 were re-issued five times. This was done because at that point of time when it was done, the Government did not have a majority in the Council. ... I have got *The Indian Express*, New Delhi, write up of 21<sup>st</sup> March, 1983. It is said here ... Governor Govind Narain re-issued three Ordinances which were due to lapse, and this is dated February 26, 1983. Now, do you know the significance? Now supposing under the normal procedure a Bill cannot be passed in the House, you pass it through the dubious process of promulgating an Ordinance and continue to re-promulgate it for years and years together. The result will be that the entire concept on which the whole constitutional democratic polity is based, will be frustrated if we permit this to continue. ... I would like to know whether the Government will think in terms of bringing suitable constitutional amendments, if necessary to meet this malady, because we can do it by saying that the Ordinance will lapse if it is not passed in the subsequent sessions and somehow the loopholes by which these are re-promulgated should be plugged. Will the Law Minister or the Home Minister take it up with all the Law Ministers and the Home Ministers as well as the Governors of the States that such type of re-promulgation is not permitted? After all, you have the Governors' conference annually. Once at least for this purpose the Governors' conference can be called. Call the Law Ministers also. [*sic*]<sup>49</sup> give an assurance to the House that so far as those Ordinances which require the prior consent or assent of the President or subsequent assent of the President are concerned, the President will *never* (emphasis added) give the assent because this goes against the fundamental letter and spirit of the Constitution?"

42. Shri Ladli Mohan Nigam said as under:<sup>50</sup>

He began his long speech in Hindi by saying that he wanted the entire debate on this issue above party politics. After this he said that he salutes

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<sup>48</sup> Legislature, corrected by the author

<sup>49</sup> Will the Home Minister, added by the author

<sup>50</sup> *Parliamentary Debates. Rajya Sabha*, Official Report, dated December 22, 1983, columns 285-298

the *Manishi*, Dr. D.C. Wadhwa, whose book was referred to in the morning and who has done this deep research. At the end of his speech he pointed out that in 1961 the session of the Bihar Legislative Assembly lasted for 236 days and the actual number of its sittings was 106. He said that obviously when the sessions last for so many days, the legislatures will be compelled to make laws. He regretted that the duration of the sessions of the Parliament was being continuously reduced. He was of the opinion that to tackle this disease, it was necessary to amend the Constitution to provide that the difference between the two sessions of the Parliament and the state legislatures shall not be more than four months instead of the present provision of six months and the Parliament shall sit for at least 200 days and the state legislatures shall sit for at least 150 days in a year.

43. Shri Sankar Prasad Mitra (former Judge of the Calcutta High Court) said as under:<sup>51</sup>

“Sir, I regret respectfully to submit to the hon. Minister that his statement is slightly tainted with an inconsistency. In the opening sentence of paragraph 3, he says: “The Constitution does not lay down any limit on the number of times substantially the same Ordinance can be promulgated by the Governor.”

And in the last sentence of paragraph 4, he says:

“When substantially the same Ordinance is sent repeatedly by the Governor of a State for instructions of the President, the State Government is advised to take action to convert it into an Act at the earliest.”

So, if you are giving this advice to the State Governments, why are you doing so? This is something which ought to be explained by the hon. Minister.

In my humble submission, Sir, the Constitution of India, has been framed broadly on the principle of separation of powers. One of the basic tests of parliamentary democracy is whether the Parliament or the Legislature, as the case may be, has the power to legislate.

The power to legislate is, therefore, vested in Parliament or the Legislature. Certain exceptions have been made in articles 123, 213 and 239 (b), so far as the Union Territories are concerned. ... Mr. Advani has also referred

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<sup>51</sup> *ibid*, columns 298-301



to Articles 75 and 164. In these Articles it is provided that a person can become a Minister without being a member of the Legislature or Parliament. But if he fails to become a member of Parliament or the State Legislature, as the case may be, within six months, he must cease to be a Minister. There is a concrete case. I am not divulging any secret because this episode was published in all the newspapers, almost all the newspapers. You know that there were similar provisions in the Government of India Act, 1935. In 1948 when Dr. B.C. Roy was the Chief Minister of West Bengal, one of his Ministers was not a member of the State legislature. His term of six months was about to expire. He was advised by quite an important legal person, that he could tender his resignation, the resignation would be accepted by the Governor and thereafter he would be sworn in as a Minister again without going through the process of election. The entire Cabinet met the Advocate-General of West Bengal, one of the greatest legal luminaries India has ever produced – he was Advocate General of West Bengal, Advocate General of undivided Bengal, for 23 years, and he was Advocate General of India also under the Government of India Act, 1935. What is the opinion that he gave? He categorically stated that if the Minister is sworn in again without going through the process of election, it would be a fraud upon the Constitution and it could not be done. Dr. B. C. Roy accepted the advice of the Advocate-General, the Minister concerned accepted the advice of the Advocate-General. He faced election ... . The same principle, in my opinion, applies to re-promulgation of ordinances, and, therefore if the honourable Minister or the Government thinks that there is any lacuna in the Constitution, that lacuna should immediately be plugged; otherwise, the mischief that is being committed by some state [*sic*]<sup>52</sup> cannot be prevented.”

44. Shri K. Mohanan said as under:<sup>53</sup>

“... this is a very serious and important matter, and I would like to say something which is quite different from the points of view which have already been expressed on the floor of the House. My learned and senior colleagues have already pointed out the seriousness of the problem in depth. Although I am in agreement with those arguments, I would like to approach this issue from a little different point of view. ... So, my point

<sup>52</sup> states, corrected by the author

<sup>53</sup> *Parliamentary Debates, Rajya Sabha*, Official Report, dated December 22, 1983, columns 301-305

is that the Government was fully aware of it. But they do not want to control this and they are not even prepared to control this illegal, undemocratic and unscrupulous act of many of the State Governments. That is my first point. ... in the Constituent Assembly many senior members had vehemently opposed even the heading of Chapter III, namely, "Legislative Powers of the President". All these are applicable to Governors also. In the course of discussion on this Chapter, the learned senior member, Prof. K.T. Shah had moved an amendment to delete the word 'legislative' and to substitute it with 'extraordinary'. Moving his amendment, he said and I quote:

"I particularly with [sic]<sup>54</sup> to draw attention to this aspect that any power of the Head of the State or the Chief Executive should be of an executive character. If any other powers are proposed to be put under this article, it should be clearly understood that they are extraordinary, that is to say, that they are not to be employed in normal times, in ordinary circumstances. Of course, in an [sic]<sup>55</sup> extraordinary circumstances as in the case of an emergency, use of extraordinary powers will be both necessary and justified. I think that it is important, therefore, to make it clear in the heading itself that this is avowedly an extraordinary power which may take the form of legislation without our calling it legislative power."

This was not a legislative power and that was the spirit of the Constituent Assembly discussion. This was an extraordinary power vested in the President and the Governor for meeting emergency needs. This was a valid argument. Stalwarts in the Constituent Assembly including Dr. Ambedkar conceded this argument. Replying to the point he said:

Article 102 makes it clear that this is an extraordinary power of the President.

"It is nothing but an extraordinary power, but still it is a legislative power. So any amendment to the heading was not necessary."

This was the reply and I quote this only to point out that the intention of the Constituent Assembly, when it included this particular provision in the Constitution, was crystal-clear and the intention was that it should be used only as an extraordinary power of the President and the Governors.

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<sup>54</sup> wish, corrected by the author

<sup>55</sup> an, deleted by the author

Now, in the case of the State Governors, the power to promulgate Ordinances in the same spirit was included. Our complaint is that the very same spirit of the Constitution is being violated nakedly and unscrupulously. ... this is not in accordance with the provisions of the Constitution, but is completely in violation of the letter and spirit of the Constitution. Even when the Constituent Assembly had agreed to include this article, many leading Members had expressed their apprehensions about the chances of misuse of this power and they were very particular about including some specific provision regarding the exercise of this extraordinary power. Some leading Members like Shri H.V. Kamath and Shri Hriday Nath Kunzuru had argued that the interval between two sessions about [sic]<sup>56</sup> including some specific provision must be reduced as much as possible as a measure to limit the misuse of this power. ... Sir, we know that the Governments of the present day are using this extraordinary power regarding the promulgation ... of ordinances in a callous and careless manner and through this action of theirs they are cutting at the very root of our democratic system. ... I think the duration of the House is very relevant in this context. Sir, I would like to quote Dr. Ambedkar again. He expressed the hope like this:

“I believe that owing to the exigencies of parliamentary business, there will be more frequent sessions of Parliament than the honourable Members are at present inclined to believe.”

This was the hope expressed by Dr. Ambedkar himself at the time of discussion in the Constituent Assembly. But what exactly is our experience? According to article 85, the President shall, from time to time, summon each House of Parliament to meet at such place and at such time as he thinks fit and a period of more than six months shall not intervene between the last day of sitting of one session and the day appointed for the commencement of the next session. This is the provision of the Constitution. Many Members had expressed their apprehension in the Constituent Assembly itself that this would create a tendency to overrule and bypass Parliament and many eminent members had demanded the reduction of the interval and through many amendments they had suggested that Parliament should be summoned more frequently. To this Dr. Ambedkar again replied:

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<sup>56</sup> by, corrected by the author

“In the changed circumstances in free India, the executive is not expected to show a callous attitude towards the legislatures.”

This was the reply and this was the hope and this was the expectation of the founding-fathers of the Constitution of this country. But, Sir, what is the present situation? I want to project that point. Our experience is quite different.

Everyday, Sir, there is a tendency to curtail the duration of the House, whether it is of Parliament or of the State Legislatures. Sir, the Report of the Department of Parliamentary Affairs shows that last year only 80 sittings of the *Rajya Sabha* and 90 sittings of the *Lok Sabha* were held. It has gradually come down from 130 to 125 to 110 and it has come down now to 80. So, Sir, my point is this. Sir, this is not a disease. But this is only one of the symptoms of a serious disease. That is the tendency towards authoritarianism in this country. I would like to get at least an assurance from the Home Minister that even in the case of the subjects in the Concurrent List, the Government is prepared not to give the sanction, not to give the seal, of the President, in the case of re-promulgation of Ordinances.”

45. It is noteworthy that in spite of having a majority in the House, no Congress-I member spoke on the Call Attention Motion. Shri B. Krishna Mohan from Andhra Pradesh, the only Congress-I member to speak, said as under:<sup>57</sup>

“... This is the first time that the subject like this has come before the House, which is ably supported by Mr. Goswami and some other Members. Sir, even though it is not my intention to introduce the element of politics in my approach, but still I have no other recourse. Mr. Nigam and others have listed the Ordinances issued particularly in the State of Bihar. He has also advised the Union Government to advise the Congress-I ruled States to convene the State Assemblies [*sic*]<sup>58</sup> to see that the Ordinances promulgated be placed before the House and to see that the enactments are made. ... Sir, the present Chief Minister, who was a bitter critic of the Government of India and other Governments, has resorted to the practice of issuing Ordinances, one after the others, ... Apprehending rough weather in the State Legislature, he adjourned the Legislature 15 days before schedule. He is afraid of the winter session

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<sup>57</sup> *Parliamentary Debates, Rajya Sabha*, Official Report, dated December 22, 1983, columns 305-307

<sup>58</sup> Legislatures, corrected by the author

of the State Legislature also. Such is the sorry state of affairs in Andhra Pradesh. I request Mr. Nigam and other leaders to advise Mr. Rama Rao to convene the State Legislature and see that the Ordinances are stopped and laws are enacted.”

46. Replying to the debate, Shri Venkatasubbaiah said as under:<sup>59</sup>

“... Sir, Mr. Wadhwa, in a way, has created the occasion for some of the hon. Members of this House to raise this issue of re-promulgation of Ordinances to be discussed through a Calling Attention Notice. I feel that *Rajya Sabha* is eminently suited to discuss this Calling Attention. ... So far as the Central Government is concerned, we are very proud to say that there was no occasion where the Central Government had to resort to re-promulgation of the ordinances. Whatever ordinances were promulgated were placed before the two Houses and they were converted into Acts. ... I am not here to defend any aberrations which have been committed by any State Government. I am not here to defend them. ... The Union Government is concerned only with those ordinances which are sent by the Governors of States for the instructions of the President under Article 213 (1) (a) and (b) of the Constitution. That is, those Ordinances which relate to subjects included in List III, the Concurrent List of the Seventh Schedule of the Constitution. It is mainly in the case of certain States, the substantially the same Ordinances have been promulgated again and again. So, Sir, it has happened, and these Ordinances which have been or are being promulgated are reserved for the President's consent when the Governor is satisfied that such a situation has arisen. ... And, Sir, if we take any step that encroaches upon the States' autonomy, then there will be a hue and cry. Perhaps, they will call another Conclave. So, Sir, the Centre's role is limited. And when I said that we have rendered advice, it is an advice not based on any constitutional provision. ... And I may also say that so far as the ordinances regarding prior approval of the Centre are concerned, the state Governments seeking to promulgate them again and again are advised to convert these into Acts, ... Suppose we adopt an inflexible attitude and try to amend the Constitution. But amending the Constitution is not something which we can do just unilaterally. The State Governments are also involved. ... Sir, the only thing that I can say is that the hon.

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<sup>59</sup> *Parliamentary Debates, Rajya Sabha*, Official Report, dated December 22, 1983, columns 308-311

Members who have participated in this Calling Attention have made valuable contributions and have highlighted some other aspects of the Constitution and have also drawn attention to certain infirmities and lacunae. So, Sir, his [*sic*]<sup>60</sup> debate has served well to highlight this aspect of the matter.”

47. Concluding the debate initiated by him, Shri Advani said thus:<sup>61</sup>

“Sir, so far as the States are concerned, I fully appreciate the Minister’s view that he or we can only advise them and tell them that this is proper, this is not proper. But pointedly we said that so far as the Central Government is concerned, we can certainly demand an assurance from the Central Government, that when a Bill [*sic*]<sup>62</sup> relating to a Concurrent subject comes to the President for his assent for re-promulgation, not for promulgation, at that point of time, they should say, no, this is not proper. ... Because of his (Minister’s) reluctance to assure the House, which we have a right to demand, that in case of re-promulgation the President will not grant assent, we would like to protest. We register our protest against the Government of India’s stand because we think that the Government of India’s stand in this regard is trying to defend the indefensible. Therefore, in protest, we walk out.”

48. Thus, the debate in the *Rajya Sabha* caused a furore in that House. Next day, there was a front page news item in almost all the newspapers (English and vernacular languages) that the entire Opposition walked out of the House because the Government did not give an assurance that re-promulgation of Ordinances on the subjects mentioned in the Concurrent List in the Constitution will not receive the permission of the President of India. Not only there was a news item in all the newspapers, there were editorials in almost all the major newspapers on this subject. I give below the editorials that appeared in *The Times of India* and *The Hindu*. The editorial in *The Times of India* read as under:<sup>63</sup>

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<sup>60</sup> this, corrected by the author

<sup>61</sup> *Parliamentary Debates, Rajya Sabha*, Official Report, dated December 22, 1983, columns 312-313

<sup>62</sup> Ordinance, corrected by the author

<sup>63</sup> *The Times of India* dated December 24, 1983

### “Compounding A Fraud”

“Thursday, the last day of Parliament’s winter session, must be reckoned to be a very sad day in this country’s parliamentary history. This is so because of the ruling party’s shocking stand on the outrageous fraud on the Constitution in Bihar through which an automatically renewable “Ordinance Raj” has been in force in that benighted state for well over 15 years. When this political skulduggery was first exposed to the light of day by Dr. D.C. Wadhwa of the Gokhale Institute of Politics and Economics, it sent shock waves all through the country. There was striking unanimity behind the demand that this horrendous state of affairs be ended at once. But all hopes that this anguished cry would be heeded by all political parties which would then act in concert in Parliament to undo the gross political impropriety have been dashed to the ground. In the first place, neither house of Parliament could find time for a full-dress discussion on the grave issue. Only on the last day and in the *Rajya Sabha* alone was it taken up through a call attention motion. The result was disastrous. Indeed, continued silence on the part of all concerned would have been less damaging than what the minister of State for home, Mr. Venkatasubbiah, actually said and did on behalf of the government. He not merely condoned the systematic fraud on the Constitution but virtually compounded it.

Mr. Venkatasubbiah’s bland argument that to do or even say anything about the shocking situation would be impermissible interference in the affairs of the states will take in no one. It is as dubious as his plea that the Centre’s own hands are clean. No ordinances may have been issued in New Delhi bypassing Parliament in the blatant way in which the state assembly [*sic*]<sup>64</sup> is being circumvented in Patna. But a large number of Bihar ordinances relate to the concurrent list, necessitating the Centre’s specific sanction in each case and this has never once been refused. Particularly disingenuous was Mr. Venkatasubbiah’s description as a mere “aberration” of the political chicanery that has actually taken place on a gigantic scale. The number of ordinances in Bihar, extended from time to time, without ever having been brought before the legislature, runs into hundreds. Some of them have been revalidated as often as 35 times each. On a single day as many as 56 ordinances have been promulgated!

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<sup>64</sup> legislature, corrected by the author

The earlier belief that the noxious practice is, and would remain, confined to Bihar has also been blown sky-high. The contagion has already spread to U.P. and Karnataka and is unlikely to stop there. Another and perhaps the most ominous fact of life must also be faced. Mr. L.K. Advani and other opposition leaders may have walked out from the *Rajya Sabha* in protest against the government's deplorable attitude. But when the parties they represent were in power in Bihar under the Janata umbrella, ordinances were being revalidated as recklessly and remorsefully as before and after."

The editorial entitled "Rule by Ordinances" in *The Hindu* said as under:<sup>65</sup>

### Rule by Ordinances

"The NONE TOO infrequent resort to ordinances by governments in utter disregard of democratic norms has come in for strong criticism from the Opposition benches in Parliament. ... This is only one aspect of the highhandedness of the majority in legislatures epitomised by the statement of a Deputy Minister in the *Lok Sabha* that it was the right and privilege of the Government to issue Ordinances. But what has been happening in Bihar over which the Opposition expressed both indignation and concern in the *Rajya Sabha* is quite unparalleled. A recent study by Mr. D.C. Wadhwa of the Gokhale Institute of Politics and Economics has made the revelation that during the period from 1971 to 1981 the Bihar legislature passed roughly 15 Acts a year, while the average number of Ordinances promulgated every year by the Governor in the same period was 178. ... The study underlines the failure of the legislature to call a halt to such mangling of its rights and responsibility by the Executive. Much worse was the fact that a number of ordinances in Bihar were not converted into Acts even when the legislature was in session. ... The Minister of State for Home Affairs may not think that "this is a fraud on the Constitution" but as the study has stressed, it is the duty of Parliament "to make the governing parameters of the executive's power in this regard plain to it."

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<sup>65</sup> *The Hindu* dated December 24, 1983



### In Power

49. In 1997, the National Democratic Alliance (NDA) led by the Bhartiya Janata Party (BJP) came into power at the Centre. Shri L.K. Advani of the BJP became the Home Minister and Deputy Prime Minister of this Government.

50. On October 24, 2001, the Government of India promulgated the Prevention of Terrorism Ordinance, 2001 (Central Ordinance No. 9 of 2001).<sup>66</sup> After that the Parliament commenced its winter session on November 19, 2001. The Government was obliged to get that Ordinance converted into an Act of the Parliament within six weeks from the first day of the reassembly of the Parliament, that is, November 19, 2001. But it failed to get the Ordinance converted into an Act during the abovementioned session of the Parliament. The Parliament was adjourned *sine die* on December 19, 2001. As according to the constitutional provisions, the Ordinance was to expire on December 31, 2001, the Government of India re-promulgated the said Ordinance on December 30, 2001, as the Prevention of Terrorism (Second) Ordinance, 2001 (Central Ordinance No. 12 of 2001).<sup>67</sup> By section 64 (1) of this Ordinance, the earlier Ordinance, namely, the Prevention of Terrorism Ordinance, 2001 (Central Ordinance No. 9 of 2001) was repealed. But sub-section 2 of this section, that is, section 64 of the new Ordinance, provided that notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Ordinance. Thus, the continuity of the Prevention of Terrorism Ordinance, 2001 (Central Ordinance No. 9 of 2001) promulgated on October 24, 2001, was ensured.

51. On the re-promulgation of this Ordinance, an editorial entitled "Rule by Decree" in *The Times of India* stated as under:<sup>68</sup>

#### Rule by Decree

"The repromulgation of the Prevention of Terrorism Ordinance after Parliament failed to ratify it in its last session is an abuse of democracy. ... what the BJP-led Vajpayee government has done is tantamount to stifling the spirit of the Constitution. Ordinances were conceived as temporary measures needed either to plug a legal hole or to enable a

<sup>66</sup> Published in *Gazette of India*, Extraordinary, Part II, section I, dated October 24, 2001

<sup>67</sup> Published in *Gazette of India*, Extraordinary, Part II, section I, dated December 30, 2001

<sup>68</sup> *The Times of India* dated January 7, 2002

certain activity at a time when Parliament may not be in session. Once having promulgated an Ordinance, governments are duty-bound to have them ratified on the floor of the House at the earliest opportunity. Knowing that it stood little chance of passing POTO (Prevention of Terrorism Ordinance) in the *Rajya Sabha*, the BJP deliberately did not introduce the required law at the beginning of the last session as good faith dictated it should have. Instead, it waited till the fag end of the winter session, threatened a joint sitting of the *Lok Sabha* and the *Rajya Sabha* in order to ram the law through, and then decided that such a drastic method of enactment might boomerang on the party. ... the fact remains that the draconian law should have been allowed the undignified death it deserved – and perhaps even been buried in one of those \$2500 aluminium coffins this government bought but has been unable to put to good use.”

52. A writ petition was filed in the Bombay High Court challenging the constitutionality of the re-promulgation of the abovementioned Ordinance. A Press Trust of India news item in *The Indian Express* said as under:<sup>69</sup>

“The Bombay High Court has directed the Union Government to enumerate in an affidavit the reasons for not introducing Prevention of Terrorism Ordinance (POTO) 2001 in Parliament within the stipulated time, thereby resulting in the re-promulgation of a new bill [*sic*]<sup>70</sup> The direction was issued by Chief Justice C.K. Thakker and Justice S. Radhakrishnan, who admitted on January 24 a public interest litigation (PIL) challenging re-promulgation of POTO by the President on the ground that “it is unconstitutional and illegal.” The judges ordered that notices be issued to President K.R. Narayanan and the Union Government asking them to explain within three weeks as to why POTO was re-promulgated. The PIL, filed by advocate Nitin Gangal, said the Ordinance was first promulgated on October 20 [*sic*]<sup>71</sup> last year but it was not introduced in the Parliament on the expiry of the stipulated period. POTO was re-promulgated by the President ... on December 30, 2001. Petitioner’s counsel Satish Borulkar argued that this was violative of the Constitution and against the Supreme Court judgment in the case of *D.C. Wadhwa v. State of Bihar*. The government, he argued, had not explained why POTO could not be introduced in Parliament within the stipulated

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<sup>69</sup>Dated February 4, 2002

<sup>70</sup> Ordinance, corrected by the author

<sup>71</sup> October 24, corrected by the author

period. Additional Solicitor General S.B. Jaishighani submitted that the bill could not be introduced in Parliament due to *political reasons* (emphasis added). However, the High Court has asked to [sic]<sup>72</sup> government to file an affidavit in this regard.”

53. Thus, the submission of the Additional Solicitor General that the Bill to convert the Ordinance into an Act could not be introduced in the Parliament due to *political reasons* confirmed what was stated in the editorial of *The Times of India* that the government did not have majority in the *Rajya Sabha* and knew that the *Rajya Sabha* would not pass the Bill and hence it re-promulgated the Ordinance.

54. It may be pointed out here that the Supreme Court had clearly stated in its judgment in my case that the “power to promulgate an Ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be “*perverted to serve political ends*” (emphasis added).

55. In A.K. Roy’s case<sup>73</sup> also the Supreme Court had held that “power was to be used to meet extraordinary situations and *not perverted to serve political ends*” (emphasis added).

56. This very part of the judgment of the Supreme Court was quoted approvingly by Shri Advani during his speech in the *Rajya Sabha* on the Calling Attention Motion about re-promulgation of Ordinances, initiated by him. It will not be out of place to mention here that the same Shri Advani, when he was not in power, had described the re-promulgation of Ordinances, during the debate on Call Attention Motion on the re-promulgation of Ordinances in the *Rajya Sabha*, as against the constitutional integrity, bad-dubious, politically immoral, constitutionally *ultra vires* and a fraud on the Constitution of India and had sought an assurance from the then Home Minister that in all cases hereafter the President would withhold his assent, and refuse to give permission for re-promulgation of Ordinances. He had also appealed to “every member who speaks, that he should view it from a non-partisan angle, from a purely constitutional angle, from a point of view of constitutional morality and propriety.” He had also said that the President would be within his powers to say that “*the Constitution does not envisage for the re-promulgation of Ordinance*” (emphasis added). Concluding the debate initiated by him, Shri Advani had said: “Because of his (Home Minister’s) reluctance to assure the House, which we

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<sup>72</sup> the, corrected by the author

<sup>73</sup> A.K. Roy v. Union of India, 1982, 2 S.C.R. 272, at 291

*have a right to demand* (emphasis added), that in the case of re-promulgation the President will not grant assent, we would like to protest. We register our protest against the Government of India's stand because *we think that the Government of India's stand in this regard is trying to defend the indefensible* (emphasis added). Therefore, in protest we walk out."

57. It may be pointed out here that the power to promulgate Ordinances was given to the Governor General of India for the first time in 1861.<sup>74</sup> Thereafter it was continued in all the Constitutional Acts.<sup>75</sup> I had pointed out in my book<sup>76</sup> that no Ordinance promulgated by the Governor General of India was re-promulgated from 1861 to 1950, till the coming into force of the Constitution of India. All the Ordinances promulgated during this period were either converted into Acts or allowed to lapse as stipulated in the constitutional Acts then in force. Even after coming into force of the present Constitution of India in 1950, no Central Ordinance was re-promulgated till December 30, 2001, that is, for a period of 51 years. For the first time the abovementioned Ordinance was re-promulgated at the Centre on December 30, 2001. Shri Venkatasubbaiah, the then Minister of State in the Ministry of Home Affairs, pointedly said this when replying to the debate on re-promulgation of Ordinances in the *Rajya Sabha* in 1983 that so far as the Central Government was concerned, they were very proud to say that there was no occasion where the Central Government had to resort to re-promulgation of Ordinances. Thus, a Central Ordinance was re-promulgated for the first time after 51 years of the coming into force of the present Constitution of India in 1950 and the credit for this goes to Shri L.K. Advani, the then Home Minister at the Centre, who had earlier vehemently opposed the permission given by the President of India for re-promulgation of Ordinances saying that the Constitution "*does not envisage re-promulgation of Ordinance*" (emphasis added)... . But that was when he was not in power. In 2001, he himself as Home Minister got a Central Ordinance re-promulgated by the President. It seems that Shri Advani had forgotten all what he had said about the re-promulgation of Ordinances during the debate on the re-promulgation of Ordinances in the *Rajya Sabha*, when he got the Central Ordinance re-promulgated. It appears that Shri Advani had also forgotten that he had described the then Government of India's stand in this regard as *trying to defend the indefensible* (emphasis added) because it had not given an assurance in the

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<sup>74</sup> By the Indian Councils Act, 1861, 24 & 25 Vict., c. 67

<sup>75</sup> Wadhwa, D.C., *Re-promulgation of Ordinances: A Fraud on the Constitution of India*, pp. 52-59

<sup>76</sup> *ibid*, p. 63

House that the President will not give permission for the re-promulgation of Ordinances in future and that he had led an Opposition walkout in protest against the refusal of the Government of India to give that assurance. Further, it appears that Shri Advani had also forgotten, when he got a Central Ordinance re-promulgated by the President, that he had said in the *Rajya Sabha* during the debate on re-promulgation of Ordinances, that he did not know earlier about the re-promulgation of Ordinances when he was in the Government. He had said then as under: "I came to know about this only recently. If I had known about these matters when I was in Government, all that I can today say is I would certainly have exerted to rectify the situation from within the Government." Now, not only he was in the Government, he was the Home Minister in the Government of India and as a Home Minister he got a Central Ordinance re-promulgated by the President.

58. This is a shining example of the gap between what a politician says when he is out of power and what he does when he is in power. What else to say!

### V Amendment of the Constitution

59. The Supreme Court of India as the sentinel on the *qui vive* is supposed to jealously guard and protect the constitutional destiny of the country. As the Supreme Court also has fallen into error, the only way to salvation, as I wrote in 1983,<sup>77</sup> lies in amending the Constitution. This is essential, so as to move from the region of subtlety and obliquity to brighter and more positive area. It is necessary to place expressly and unmistakably a limit upon the duration of the Ordinances, promulgated by the Governors of the states, President of India and the Administrators of the Union Territories, in language of the utmost vigour that cannot be swept away by implication. If this is not done, it can be seen, in the light of working of this provision in some states and now at the Centre, that the power may be abused to such an extent that the whole fabric of the constitutional machinery will be gone. It has happened today in some states and at the Centre, tomorrow other states may take a leaf out of the book of these states and the Centre. Having once departed from the Constitution, there is no saying to what extent it might be carried, or where the axe will fall next. It is easy at any future time to go further, it is difficult to draw back from a point already reached. It is axiomatic that in administering this power of the Governor of a state, the President of India and the Administrator of a Union Territory, one cannot trust the

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<sup>77</sup> Wadhwa, D.C., *Re-promulgation of Ordinances: A Fraud on the Constitution of India*, p. 82

Government of India and the Administrator of that Union Territory. It will be dangerous for the Parliament if it remains quiescent in the matter after what has happened in some states and at the Centre. When confronted with a region of subtlety and obliquity, as in this case, it is the duty of Parliament to make the governing parameters of the Executive's power, in this regard, plain to it. Shri Sham Lal, former Editor-in-Chief of *The Times of India* has rightly said in his review article of my book entitled '*Re-promulgation of Ordinances: A Fraud on the Constitution of India*',<sup>78</sup> published on the editorial page: "A source of rot in the body politics is like a cancer. If it is not treated at fairly early stage it is liable to spread and kill the organism." Re-promulgation of Ordinances is a case in point. The founding fathers had given this power to the Executive in a great trepidation. Worst fears have come true. The Constitution makers had not visualised such brazenfaced breach of trust by the Executive. The Minister of State in the Ministry of Home Affairs had said, while replying to the debate on re-promulgation of Ordinances in the *Rajya Sabha*, that the members who had participated in the Calling Attention had drawn attention to certain infirmities and lacunae in the Constitution and the debate had served well to highlight that aspect of the matter. I do not think that there are any infirmities and lacunae in the Constitution. However, in view of the judgment of the Supreme Court in the matter and the admission by the Minister of State in the Ministry of Home Affairs that the members who had participated in the Calling Attention had drawn attention to certain infirmities and lacunae in the Constitution, I propose the following amendments to the Constitution of India to remove those infirmities and lacunae in the Constitution:

1. In Article 85 of the Constitution,
  - (i) in clause (1), for the words "six months", the words "three months" shall be substituted, and
  - (ii) after clause (1), the following proviso shall be inserted, namely,
  - (iii) Provided that each House of Parliament shall remain in session and transact business for not less than two hundred days in a year.
2. In Article 123 of the Constitution, the following shall be inserted, namely,
  - (i) After clause (2) (a), the following clause, namely, (2 aa) shall be inserted: Notwithstanding any provision contained in this

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<sup>78</sup> When The Rot Spreads, *The Times of India* dated October 29, 1983

Constitution and notwithstanding any judgment of any court, no Ordinance promulgated by the President shall be re-promulgated by him nor any Ordinance reproducing substantially the provisions of the repealed or lapsed Ordinance shall be promulgated by him under any circumstances.

3. In Article 174 of the Constitution,
  - (i) in clause (1), for the words “six months”, the words “three months” shall be substituted, and
  - (ii) after clause (1), the following proviso shall be inserted, namely,
  - (iii) Provided that the House or each House of the Legislature of a State, as the case may be, shall remain in session and transact business for not less than two hundred days in a year.
4. In Article 213 of the Constitution, the following shall be inserted, namely,
  - (i) After clause 2 (a), the following clause, namely,
  - (ii) (2 aa) shall be inserted: Notwithstanding any provision contained in this Constitution and notwithstanding any judgment of any court, no Ordinance promulgated by the Governor of a state shall be re-promulgated by him nor any Ordinance reproducing substantially the provisions of the repealed or lapsed Ordinance shall be promulgated by him under any circumstances.
5. In Article 239 A of the Constitution
  - (i) in clause (1) (a), the following proviso shall be inserted, namely,
  - (ii) Provided that the Legislature so created shall remain in session and transact business for not less than two hundred days in a year.
6. In Article 239 (B) of the Constitution, the following shall be inserted, namely,

After clause (1), the following proviso shall be inserted: Notwithstanding any provision contained in this Constitution and notwithstanding any judgment of any court, no Ordinance promulgated by the Administrator of a Union Territory shall be re-promulgated by him nor any Ordinance reproducing substantially the provisions of the repealed or lapsed Ordinance shall be promulgated by him under any circumstances.

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"... Wadhwa's exacting research".

Rajeev Dhavan, Senior Advocate, Supreme Court of India, in *Public Law* (London, U.K.)

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