

SUPREME COURT CASES

(Reprint)

A PROFESSOR'S BRUSH WITH THE BIZARRE

Review of "Re-promulgation of Ordinances : A Fraud on the Constitution of India", Dr. D. C. Wadhwa (Gokhale Institute of Politics and Economics, Pune), Orient Longmans Ltd.

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Indian Law is not always what it seems and certainly far from what it ought to be. Professor D.C. Wadhwa of the Gokhale Institute, an expert in rural economics may have been familiar with social contradictions and dichotomies but the use or abuse of constitutional provisions in Bihar, (and presumably elsewhere) has been an eye-opener for him. "*Re-promulgation of Ordinances*" is a book which should have been written by a lawyer but such are the vagaries of life that one seldom notices something obvious. It took a professor of economics to give a jolt to the lawyer, not just by writing this book but also by virtually treating it as a petition before the Supreme Court of India. To Dr Wadhwa the constitutional infirmity of the "re-promulgation" device is patent. Whether lawyers and judges can see it too remains to be seen.

In many ways Bihar is a chaotic laboratory of political and social reality of contemporary India. For all its shortcomings it does at least have the distinction of being an active protagonist in the post-1977 activist phase drama of the Supreme Court's advance in the fields of civil liberty, social welfare and public interest litigation. Not surprisingly Dr Wadhwa found himself researching agrarian tenancy legislation and its implementation in the State of Bihar. In the course of his research he came across successive Ordinances on the subject containing identical provisions. He probed the matter further, though not without difficulty. He immediately encountered the problem which quickly defeats a lawyer—non-availability of official texts. The Bihar Code containing the official, authentic and amended texts of the laws in force in the State of Bihar was last published in 1953-55. From 1954 to 1966 the State Government published an annual compendium of "Acts and Ordinances". Since 1967 this practice has been given up, for no apparent reason. But it does mean that a basic assumption of the Rule of Law is belied—that legislation is easily available for a citizen to adhere to the requirements of law. It could of course be argued in reply that the *Bihar Gazette* does publish the official text of legislation. But Dr Wadhwa discovered that all was not well there either. The *Gazette* is actually published long after the dateline of the Acts and Ordinances concerned, so that there is a glaring gap between promulgation and publication.

Dr Wadhwa's book is an absolute treasure trove of information, statistical and analytical on the number and nature of Ordinances, their actual life span, their implications for electoral democracy and the role of elected representatives of the people. In Chapter 3 for instance the author provides the following contrast — In 1971 the Bihar Legislature enacted 8 Acts as against 113 Ordinances promulgated by the Governor; in 1972 there were 5 Acts as against 175 Ordinances; in 1973 there were 13 Acts as against 127 Ordinances, and so on. The life span of Ordinances varies between 59 Ordinances for up to 1 year; 21 Ordinances each for 3 to 4, 4 to 5 and 5 to 6 years respectively.

The implications are extremely alarming. The author's immediate concern to highlight the fact itself does not allow for a wider sociological study of the reasons for which successive governments have shifted from legislation to promulgation. For instance, when there have been comfortable legislative majorities, when the party in power has had a monolithic political stance and ideological dissent has virtually disappeared from the vocabulary of politics, why does the Executive fight shy of getting its legislative majority to stamp approval on its devices? Does it mean that our legislators are not devoting sufficient time and effort to what must be at least one of the main reasons for their being in the Legislature—to legislate? Alternatively, have our legislatures become too inefficient and unmanageable to allow for a workable schedule of legislation? Finally, of course, are the national media and the electorate insensitive or indifferent to the scant interest people's representatives take in the making of laws which govern them? These and a host of similar questions are thrown up in the author's present work and one hopes that once he completes his present marathon wait to get a definite pronouncement on the subject from the Constitutional Bench of the Supreme Court, he will be able to delve further into the culture of Ordinances.

It must be clarified that the present work is primarily about re-promulgation only though a table of Central Ordinances is provided to complement the brief account of the President's Ordinances and the Constituent Assembly Debates relating to the scope of Central Ordinances. The author does not take a very rigid approach towards the justification for the power to promulgate Ordinances. Indeed he notices that there may be something in the argument that a power which was unacceptable in the hands of imperial masters may with circumspection be justified in the hands of persons whose ultimate authority comes from the electorate. But the author does not miss the opportunity of showing that Article 213 which gives the power to the State Governor, uses two expressions, "circumstances" and "immediate action". This seals the fate of "re-promulgation". Since it follows from the use of these expressions that the judgment as to the need for action must be exercised afresh every time recourse is had to the Ordinance-making power. In fact Bihar has not only resorted to repeated re-promulgation but also devised a mechanical scheme for the purpose in which the state bureau-

cracy to the exclusion of the Cabinet, automatically controls the "life, death and rebirth" of an Ordinance.

But that apart, thus far courts have been somewhat reluctant to interfere in the areas of constitutional authority where the primary responsibility of "satisfaction" is that of the Executive. So much so, that both Acts and Ordinances in public order and preventive detention matters have with impunity been able to make "subjective satisfaction" the fulcrum of non-justiciability. Furtive efforts made by some judges (as by the former Chief Justice Chandrachud in the matter of Article 74 and the President's response to a condemned prisoner's mercy petition) have made little headway. The Allahabad High Court has more recently shown determined opposition to unfettered Ordinance-making power. In *A.K. Roy v. Union of India*, (1982) 1 SCC 271 the Supreme Court of India made a bare passing reference to the subject of justiciability of the Ordinance-making power but in the circumstances, since an Act had replaced the Ordinance, did not take a deeper look. But the Court did at least leave a wedge in the door for later judges—"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."

Dr D.C. Wadhwa's book of 82 tightly argued pages which include a perceptive account of legal doctrines and precedents, and 170 laboriously prepared tables, presents a compelling brief for the scholar and citizen alike. Devoid of any sentiment except a passion for attributes of constitutional democracy, the author has contributed a major and thought-provoking document to the current commentary on the political institutions of our times.