

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,

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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.

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D. C. Wadhwa

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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.

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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 1908¹. 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 India², 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.

¹ Bengal Act 6 of 1908

² 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 Ordinances³. 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.

³Document 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.⁴

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 allowed⁵.”

⁴Document No. 2, pp. 30-33

⁵Document 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.”⁶

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

⁶Document No. 5, p. 39

Court⁷⁻⁸ and I filed my rejoinders to those counter affidavits of the State Of Bihar and the Union of India.⁹⁻¹⁰

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.¹¹

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.¹²

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

⁷ Document No. 6, pp. 40-45

⁸ Document No. 8, pp. 55-57

⁹ Document No. 7, pp.46-54

¹⁰ Document No. 10, pp. 60-62

¹¹ Document No. 11, p. 64

¹² 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:¹³

“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.¹⁴ 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

¹³ ibid

¹⁴ 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:¹⁵

“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:¹⁶

“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*]¹⁷ 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:¹⁸

“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

¹⁵ *Daily* dated July 30, 1985

¹⁶ *The Indian Express* dated July 30, 1985

¹⁷ State of, added by the author

¹⁸ *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:¹⁹

"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:²⁰

"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-*

¹⁹ *The Telegraph* dated July 30, 1985

²⁰ *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:²¹

“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:²²

“..., 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:²³

“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:

²¹ *The Sunday Observer* dated December 21, 1986

²² *The Statesman* dated January 11, 1987

²³ *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:²⁴

"... 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:²⁵

"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.**

²⁴ *The Sunday Statesman* dated October 26, 1986

²⁵ *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:²⁶

"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:²⁷

"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.

²⁶ *India Today* dated October 15, 1986, p. 172

²⁷ *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:²⁸

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),²⁹ 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.7.³⁰ From March 4, 1986, the Constitution Bench did not sit. On August 12, 19, 26 and

²⁸ *Asiaweek* dated August 16, 1985

²⁹ *Indian Express* dated September 4, 1985

³⁰ 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:³¹

“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.

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?

³¹ *The Statesman* dated November 19, 1986

Judgment Delivered³²

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:³³

“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

³²(1987) 1 SCC 387

³³*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]³⁴ operate were repromulgated almost in routine manner.”

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

“A constitution bench of the Supreme Court striking down the Bihar Intermediate Educational Council ordinance held that the systematic practice of repromulgation [sic]³⁶ 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]³⁷ 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]³⁸ 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]³⁹ 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

³⁴ be, deleted by the author

³⁶ of, added by the author

³⁸ s, added by the author

³⁵ *Amrita Bazar Patrika* dated December 21, 1986

³⁷ an, corrected by the author

³⁹ was, corrected by the author

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

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

“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:⁴³

“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*]⁴⁴ of Article 213 (ordinance-making power), usurp the law-making function of the Legislature”.

⁴⁰ resort, corrected by the author

⁴¹ usurp, corrected by the author

⁴² *Business Standard* dated December 21, 1986

⁴³ *The Hindu* dated December 21, 1986

⁴⁴ provision, corrected by the author

That could [sic]⁴⁵ 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:⁴⁶

“A CONSTITUTION Bench of the Supreme Court on Saturday ruled that repromulgation of ordinance [sic]⁴⁷ 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.

⁴⁵ would, corrected by the author

⁴⁶ *Indian Express* dated December 21, 1986

⁴⁷ 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:⁴⁸

"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*]⁴⁹ 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."

⁴⁸ *The Sunday Observer* dated December 21, 1986

⁴⁹ s, added by the author

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

“A Constitution Bench of the Supreme Court today held that every ordinance promulgated [*sic*]⁵¹ 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*]⁵² 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*]⁵³ 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.”

⁵⁰ *Northern India Patrika* dated December 21, 1986

⁵¹ promulgated, corrected by the author

⁵² petition, corrected by the author

⁵³ successively, corrected by the author

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

“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*]⁵⁵ 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:⁵⁶

“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.

⁵⁴ *Deccan Herald* dated December 21, 1986

⁵⁵ successively, corrected by the author

⁵⁶ *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:⁵⁷

“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]⁵⁸ Studies [sic]⁵⁹, Pune and directed the Bihar Government to pay costs of Rs 10,000 for his unique services in loringing [sic]⁶⁰ 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.

⁵⁷ *The Sunday Indian Nation* dated December 21, 1986

⁵⁸ s, added by the author

⁵⁹ Studies, deleted by the author

⁶⁰ 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 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.

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:⁶¹

"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.

⁶¹ *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:⁶²

“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*]⁶³ 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*]⁶⁴ times using the emergency provision of the Constitution never placing it before the state legislature.

⁶² *The Telegraph* dated December 21, 1986

⁶³ be, corrected by the author

⁶⁴ 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:⁶⁵

“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.⁶⁶

⁶⁵ *Newstime* dated December 22, 1986

⁶⁶ *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*]⁶⁷ 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*]⁶⁸ 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.”

⁶⁷ Legislature, corrected by the author

⁶⁸ 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:⁶⁹

“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:⁷⁰

“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

⁶⁹ *Amrita Bazar Patrika* dated December 24, 1986

⁷⁰ *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:⁷¹

“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:⁷²

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

⁷¹ *Free Press Journal* dated December 24, 1986 ⁷² *Indian Express* dated December 24, 1986

⁷³ 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:⁷⁴

“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.

⁷⁴ *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:⁷⁵

“A CONSTITUTION bench of the Supreme Court while denouncing the “Ordinance Raj” in Bihar held that power to promulgate ordinance [*sic*]⁷⁶ 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*]⁷⁷ 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*]⁷⁸ or if the assembly [*sic*]⁷⁹ 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*]⁸⁰ was prorogued that it [*sic*]⁸¹ 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.

⁷⁵ *The Times of India* dated December 24, 1986

⁷⁷ an, added by the author

⁷⁹ legislature, corrected by the author

⁸¹ that it, deleted by the author

⁷⁶ s, added by the author

⁷⁸ legislature, corrected by the author

⁸⁰ 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:⁸²

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

⁸² *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:⁸³

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*]⁸⁴ 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

⁸³ *Financial Express* dated December 25, 1986

⁸⁴ 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]⁸⁵-81, 256 ordinances were re-promulgated over and again. In this period, while state legislatures [sic]⁸⁶ 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]⁸⁷ 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]⁸⁸ 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:⁸⁹

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

⁸⁵ 1967, corrected by the author

⁸⁷ d. added by the author

⁸⁹ *The Hindustan Times* dated December 25, 1986

⁸⁶ legislature, corrected by the author

⁸⁸ 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:⁹⁰

⁹⁰ *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:⁹¹

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*]⁹² 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:⁹³

⁹¹ *Amrita Bazar Patrika* dated December 29, 1986

⁹² re-, added by the author

⁹³ *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*]⁹⁴ Ordinances! ... many Ordinances in Bihar have remained “in force” for several years at a stretch. Some [*sic*]⁹⁵ 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.

⁹⁴ 56, corrected by the author

⁹⁵ 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:⁹⁶

"... 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

⁹⁶The *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:⁹⁷

“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*]⁹⁸ notes that “even HM Seervai, who [*sic*]⁹⁹ 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.”¹⁰⁰

⁹⁷ *The Sunday Observer* dated December 28, 1986

⁹⁸ Upendra Baxi, added by the author

⁹⁹ se. added by the author

¹⁰⁰ 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:¹⁰¹

“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*]¹⁰², 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*]¹⁰³ 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

¹⁰¹ *The Forum Gazette* dated 5 January-19 January, 1987

¹⁰² 16, corrected by the author

¹⁰³ 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:¹⁰⁴

"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

¹⁰⁴ *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:¹⁰⁵

"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."

¹⁰⁵ *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:¹⁰⁶

"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]¹⁰⁷ and getting its [sic]¹⁰⁸ 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

¹⁰⁶ *Sunday* dated January 25-31, 1987

¹⁰⁷ and *Vidhan Parishad*, added by the author

¹⁰⁸ 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:¹⁰⁹

“The Constitution has clearly defined the roles and powers of the executive, the legislature and the judiciary. But what if they transgress [*sic*]¹¹⁰ 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]*¹¹¹ *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 20th 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

¹⁰⁹ *Free Press Journal* dated January 4, 1987

¹¹⁰ transgress, corrected by the author

¹¹¹ the, deleted by the author

days to convert some of the pending ordinances into bills [*sic*].¹¹² ... 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:¹¹³

"PROOF of the belief that "patience and perseverance [*sic*]¹¹⁴ 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*]¹¹⁵, 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!"

¹¹² Acts, corrected by the author

¹¹³ *The Statesman* dated January 11, 1987

¹¹⁴ perseverance, corrected by the author

¹¹⁵ 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:¹¹⁶

“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 20th 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

¹¹⁶Circular 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*]¹¹⁷ 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.”

¹¹⁷ 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:¹¹⁸

"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 repromulgate 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:¹¹⁹

"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

¹¹⁸ *Economic and Political Weekly* dated February 28, 1987

¹¹⁹ *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*]¹²⁰ 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”:¹²¹

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*]¹²² began its monsoon session in the last week of

¹²⁰ practice, corrected by the author

¹²¹ *The Times of India* dated July 3, 1987

¹²² Legislature, corrected by the author

June, the legislators were confronted with as many as 16 ordinances; of these eleven ordinances are [*sic*]¹²³ re-promulgated ones. The opposition even charged that in some case [*sic*]¹²⁴ 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:¹²⁵

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

¹²³ were, corrected by the author

¹²⁴ cases, corrected by the author

¹²⁵ *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:¹²⁶

"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?

¹²⁶ *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,¹²⁷ 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

¹²⁷ *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.

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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.

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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.

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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 land¹

¹ 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 study². 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* jurisdiction³ 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

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

³ 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 institutions⁴. 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

⁴ *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!⁵

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,

⁵ 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.⁶ 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

⁶ 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.⁷ 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.

⁷ 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.⁸ 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

⁸ 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*⁹. 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

⁹ 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.

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