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Krishna Kumar Singh II: The Menace of Unending Ordinances

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The article analyses the case Krishna Kumar Singh v State of Bihar[1]*. The Supreme Court of India's seven-judge panel ruled, among other things, that any laws passed while the legislature is in session must be compulsorily presented before it. The first part of the paper distinguishes between the constitutional law-making power and the legislative power of the parliament. Additionally, it also analyses the conditions for valid promulgation of an ordinance and judicial review for executive satisfaction to promulgate an ordinance. The second part of the paper deals with the consequences of failed ordinances and enduring rights while the third part deals with the legality of re-promulgating ordinances. This paper argues the consequences of the judgment regarding the re-promulgation of Ordinances and any changes to the previous locus classicus regarding re-promulgations. — Dr. DC Wadhwa v Bihar*[2] *is insufficient to keep the executive in check.*

Keywords: *ordinance-making power, legislative power, re-promulgation, enduring rights, judicial review.*

[1] *Krishna Kumar Singh v State of Bihar* (2017) (3) SCC 1
[2] *Dr. DC Wadhwa v Bihar* (1987) SC 579

INTRODUCTION

'Ordinance Raj' is a phrase that was coined due to the excessive use of the executive's power to promulgate and re-promulgate ordinances. The factual matrix of *Krishna Kumar Singh v State of Bihar*[3] is also based on similar lines. The Government of Bihar issued several Ordinances in succession between 1989 and 1992, following an observable pattern. When each Ordinance was set to expire, the government issued a new Ordinance with the same or very similar provisions. The State Legislature met numerous times during this time, but neither the Ordinances nor any laws that would have included their provisions were ever brought before the Legislature. Instead, further Ordinances were passed after the Legislature's sessions were adjourned and before they expired. The Bihar Non-Government Sanskrit Schools (Taking Over of Management and Control) Ordinance[4] was passed by the governor of Bihar on December 16, 1989, per his authority granted by Article 213[5] of the Indian Constitution. The staff of a few of these Sanskrit schools filed the writ case in Krishna Kumar Singh I, choosing to appeal a decision of the Patna High Court before a two-judge bench of the SCI. The division bench delivered a split verdict after which the case was heard by a seven-judge bench of the SCI and decided in 2017. This paper critically comments on the judgment of SC in *Krishna Kumar Singh v Union of India* and argues that the checks and balances on the executive's law-making power are not narrow enough to prevent abuse by the executive.

ORDINANCE-MAKING POWER AND JUDICIAL REVIEW

The mere reading of articles 123[6] and 213[7] highlights the conditions precedent to ordinance-making power. The conditions precedent to the ordinance-making power is: the executive should be satisfied that there is an emergent situation and the legislature should not be in session. Justice Chandrachud in his majority opinion in the case *Krishna Kumar Singh II* correctly interpreted, '*The expression 'necessity' coupled with 'immediate action' conveys the sense that it is*

[3] *Krishna Kumar Singh* (n 1)
[4] Bihar Non-Government Sanskrit Schools (Taking over of management and control) Ordinance 1989
[5] Constitution of India 1950, art 213
[6] Constitution of India 1950, art 123
[7] Constitution of India 1950, art 213

imperative due to an emergent situation to promulgate an Ordinance during the period when the legislature is not in session'. The principle highlighted here is that the parliament is the sovereign law-making authority. The power of the executive to make laws is not a parallel power of legislation,[8] and it is with the intent to confine the executive within certain limits.

The condition subsequent is that the ordinance should be tabled before the legislature as soon as it reconvenes. Clause 2 of Article 123[9] states that every ordinance has the same force and effect as an act of legislature but certain conditions should be met for the force and effect fiction to come into place. The conditions are mentioned in clauses 2 (a) and 2(b)[10]. Clause 2(a) of Article 123[11] states that an ordinance 'shall be laid' before the legislature with no exceptions. The court while reading these articles held that placement of ordinance before the legislature is a constitutional necessity.[12] The ordinance lapses after 6 months and 6 weeks after the reassembling of the legislature. The principle behind the laying of the ordinance before the legislature is to feature the supervisory role of the legislature and to ensure that the ordinance is debated upon and discussed by the legislature by which they can determine, the need for and expediency of the ordinance; whether a law should be enacted; and whether the ordinance should be disapproved. Justice Chandrachud says that the effect of violation of the conditions in 123(2) is that the ordinance 'ceases to operate' and is not considered void.[13] Therefore, the only consequence of not placing the ordinance before the legislature is its cessation after 6 weeks within the reassembly of parliament. Also, it will not have the force and effect of an act of the legislature. Justice Lokur gave a dissenting opinion and stated that the force and effect of an ordinance should not be dependent on uncertainty and the occurrence of a future event. He says, "*An Ordinance, on its promulgation either has the force and effect of a law or it does not – there is no halfway house dependent upon what steps the Executive might or might not take under Article 213(2) of the Constitution*".[14] The structural reading of the provisions of the constitution indicates that it

[8] *R K Garg v Union of India* (1981) SC 2138
[9] Constitution of India 1950, art 123(2)
[10] Constitution of India 1950, art 123(2)(b)
[11] Constitution of India 1950, art 123(2)(a)
[12] *Krishan Kumar Singh* (n 1)
[13] *Ibid*
[14] *Ibid*

is mandatory to place an ordinance before the legislature to keep a check on the executive and establish the legislature as the supreme law-making body. However, the repercussion of not placing it before the legislature is not stringent enough to prevent abuse by the executive.

The power to promulgate an ordinance is not an absolute right but conditional on the ground that the president should be satisfied that an emergent situation exists that renders it necessary for the executive to promulgate an ordinance. The court cited *S. R. Bommai v Union of India*[15] and reiterate established positions of law concerning the judicial review of presidential satisfaction and held that the satisfaction of the president that an emergent situation exists, is under judicial review. The standard of judicial review is quite limited. The court said that it will not decide on whether the circumstances were adequate or sufficient if some material is relevant to the satisfaction of the president. The court will only interfere in rare cases where there is fraud on power or abuse of power like when the power has been exercised to secure an oblique purpose.[16] This is against checks and balances because any material which is remotely related to the circumstances can be shown by the executive to justify the existence of conditions necessitating the exercise of ordinance-making powers. The court equated the standard of presidential satisfaction under Article 123 to presidential satisfaction under Article 356[17] by reiterating *Bommai*. However, this approach is fundamentally misplaced because the president's power under Article 356 is his power in the capacity of the executive head of India while the president's power under Article 123[18] is in his original legislative capacity.[19]

ENDURING RIGHTS ON DEATH OF ORDINANCE

[15] *S R Bommai v Union of India* (1994) (2) SCR 644
[16] *Krishan Kumar Singh* (n 1)
[17] Constitution of India 1950, art 356
[18] Constitution of India 1950, art 123
[19] Gaurav Mukherjee, 'The Supreme Court and executive law making: the afterlife of failed ordinances in Krishna Kumar Singh II' (2018) Indian Law Review <https://doi.org/10.1080/24730580.2018.1454811 > accessed 01 March 2023

An ordinance dies when it is placed before the legislature and it gets disapproved or when it automatically ceases to operate after six weeks after the meeting of parliament. The question that remains is what happens to the rights which are created after the death of such an ordinance.

In *State of Orissa v Bhupendra Kumar Bose*[20], it was held that the ordinance is the same as temporary legislation and the rights are of an enduring character which means it would survive after the death of the ordinance. Additionally, these rights could only be reversed by fresh legislation. The split verdict of the division bench in Krishna Kumar Singh I was that Justice Wadhwa decided that just the re-promulgation after the first Ordinance was ultra vires, however, Justice Sujata Manohar said that all of the Ordinances were part of a chain of promulgation and re-promulgation and constituted a fraud on the Constitution. Justice Wadhwa believed that the first Ordinance was a legitimate use of constitutional power and had established enduring rights that would survive the death of the ordinance. The only way to undo this long-lasting effect is through legislation.

Justice Chandrachud stating the majority opinion in Krishna Kumar Singh II gave the distinctions between temporary legislation and ordinance. The constitutional bench's opinion was that temporary legislation is created by the legislature which is competent to decide the time duration of the legislation and the rights which subsist. However, an ordinance is based on certain limitations and the Constitution prescribes the time limit for an ordinance. Therefore, the court said that the enduring rights theory gives a degree of permanence to the ordinance which is in derogation to parliamentary control and supremacy and against the principles laid down in S.R. Bommai v UOI[21] The court while referring to Sujata Manohar's judgment in Krishna Kumar Singh I said that the rights will be enduring only in cases when it is a "constitutional necessity" and against the "public interest" to reverse it. Irreversible or impracticability is to be subsumed in deciding where the public interest lies. However, even the sharpened approach adopted by the court is wide enough to be misused by the executive which may cause courts to

[20] *State of Orissa v Bhupendra Kumar Bose* (1962) Supp (2) SCR 380
[21] *S R Bommai* (n 15)

accept a broad range of defenses from an executive authority that is unable or unwilling to reverse the effects of an ordinance.[22]

RE-PROMULGATION

In constituent assembly debates, Pandit Hriday Nath Kunzru proposed an amendment that said that the ordinance promulgated by the president should automatically come to an end at the end of thirty days from the promulgation of the ordinance because if it is an "emergent" situation then the president must summon the parliament to say maximum in four months, then the six weeks also might be there that would be practicable for them to deal with such situation.[23] Dr. Ambedkar replied that "*I do not think that any such dilatory process will be permitted by the Executive of the day as to permit an ordinance promulgated under article 102 to remain in operation for a period unduly long, and I therefore, think that the provisions as they exist in the draft article might be permitted to remain*."[24] Therefore, it is clear from parliamentary debates that the constituent assembly intended to not give the executive the power to create laws for a long period and assume the role of parallel law-making authority.

The court in the case of *DC Wadhwa v State of Bihar*[25] held that the re-promulgations were nothing short of usurpation by the Executive of the law-making function of the Legislature, a colourable exercise of power and invalid. It then laid down two exceptions under which promulgation is valid which are, (i) when there is too much legislative business or (ii) when the session is short. These exceptions are used by the executive to re-promulgate ordinances maliciously. For example, in *Gyanendra Kumar v Union of India*[26], the executive successfully defended ten re-promulgations by arguing that the tabled Bills could not be passed during the legislative session on account of other important and urgent legislative business and that time was too short. The Wadhwa exceptions are criticized because it is upon the discretion of the legislature to extend the legislative session in case of an emergent situation, rendering the need for such an exception

[22] Gaurav Mukherjee (n 19)
[23] 'CONSTITUENT ASSEMBLY DEBATES (PROCEEDINGS) - VOLUME VIII' (*Lok Sabha*, 23 May 1949) <https://loksabha.nic.in/writereaddata/cadebatefiles/C23051949.html> accessed 01 March 2023
[24] *Ibid*
[25] *Dr D C Wadhwa* (n 2)
[26] *Gyanendra Kumar v Union of India* (1997) Del 58

in question. In Krishna Kumar Singh II, the court agreed that the re-promulgation of an ordinance is constitutionally impermissible because it represents an effort to overreach the law-making authority and supremacy of the center and state legislatures. It defeats the constitutional scheme of giving limited power to the executive to form laws. However, the court had the opportunity to address the Wadhwa exceptions but they chose to remain silent on the issue. This paves way for the executive to keep abusing the power conferred to them. Additionally, the only remedy available for an aggrieved party is to approach the Constitutional Courts for a declaration that such re-promulgation is illegal, which would take a lot of time and could get dismissed based on fundamentally flawed exceptions given in D.C. Wadhwa.[27]

CONCLUSION

Krishna Kumar II is an instance of the Executive simply ignoring the law laid down in DC Wadhwa. The concerned Executive successively re-promulgated Ordinances, without ever tabling Bills (corresponding to the Ordinances) before the Legislature. The court in Krishna Kumar Singh II held that the legislative power of the executive is conditional and not an absolute power. Therefore, it is subject to certain limitations. However, these limitations are not sufficient as the conditions for valid promulgation. The holding on judicial review is not sufficient to prevent abuse by the executive. The court's intention to restrict enduring rights is futile because the conditions are wide enough to cover almost everything the executive wishes. Lastly, the court said that re-promulgation is abhorrent but took no stringent step to stop its misuse.

[27] Sujoy Chatterjee, 'Krishna Kumar II: laying re-promulgations to rest?' (2018) Indian Law Review <https://doi.org/10.1080/24730580.2018.1453738 > accessed 01 March 2023