Constitutional Fiats: Presidential Legislation in India's Parliamentary Democracy

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I. INTRODUCTION: THE BASICS OF PRESIDENTIAL SATISFACTION

In March 2003, the State of Gujarat in Western India enacted a law – the Gujarat Control of Organized Crime Bill, 2003 (GUJCOC) – to deal with growing instances of terrorism and organized crime in the State. Given that a federal law on terrorism – The Prevention of Terrorism Act, 2002[1] – was already in force and the proposed State law was inconsistent in some respects, it was constitutionally required that the President assent to it.[2] In early 2004, then President A.P.J. Kalam, on the advice of the Union Cabinet, returned the Bill to the State Assembly recommending that three provisions dealing with

[1] Act No. 15 of 2002 (now repealed).

[2] The Seventh Schedule to the Indian Constitution carries three lists – Union, State and Concurrent – that define the legislative jurisdiction of the Parliament and the State Legislatures. Ordinarily, Parliament may enact laws on matters listed in the Union and Concurrent lists, while State Legislature may enact laws on items listed in the Sate and Concurrent Lists. However, if Union legislation on an item in the Concurrent list is already in force, and the State Legislature enacts a legislation that is in repugnant to the provisions of the former, the State legislation may come into force only when after it has received the assent of the President. India Const. Article 254(2) ("Where a law made by the legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State.")

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interception of communication be deleted.[3] The provisions on interception of communication, the Union Cabinet thought, encroached on the Parliament's exclusive jurisdiction to enact laws on electronic communication and possibly violated privacy rights in the Constitution.[4] Accordingly, the Gujarat State Assembly deleted the provisions and returned a newly enacted Bill for presidential assent in June 2004.[5] Despite non-binding resolutions in the State Assembly and other fora, calls to expedite the matter went unheard.[6] The Union Cabinet sat on it for *five* years. Finally, in June 2009, President Pratibha Patil, on the advice of the Cabinet, returned the Bill to the State Assembly suggesting further amendments. The Cabinet's objections, this time around, were less clear. The Union Home Minister lamely spoke of "inconsistencies" and the need for refinement.[7] Ironically, a law with identical provisions was already in existence in the neighboring State of Maharashtra, having received presidential assent earlier.[8] What of Gujarat then? For the moment, it would appear that the Union Cabinet has a veto over the State Assembly's legislative competence – a state of affair that raises questions about the appropriateness of executive control over legislative proceedings. [9]

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[3] See Anon, Tone down terror in Gujcoc: Centre, DNA India, 20 June, 2009 available at http://www.dnaindia.com/india/report_tone-down-terror-in-gujcoc-centre_1266723. (Last visited 31 July, 2009)

[4] The Union Cabinet of the NDA Government (that was in power then) was particularly uncomfortable with three provisions in the GUJCOC Bill. Clauses 14, 15 and 16 of the Bill provided important powers to the District Collector to intercept communication, electronic or otherwise, and made such evidence admissible during trials. Incidentally, the Supreme Court has upheld the constitutionality of such provisions that is already in force in the neighboring state of Maharashtra, rejecting arguments that the law violated privacy rights in the Constitution. See State of Maharashtra v Bharat Shah and others 2008(12) SCALE 167.

[5] Anon, Alternative to POTA: Assembly passes Bill, The Hindu, June 03, 2004 available at http://www.hindu.com/2004/06/03/stories/2004060310151100.htm (Last visited 31 July, 2009).

[6] See Syed Khalique Ahmed, Bitter Bill?: GUJCOC divides legal fraternity, The Hindu, September 28, 2008 available at http://www.indianexpress.com/news/bitter-bill-gujcoc-divides-legal-fraternity/366886/0 (Last visited 31 July, 2009).

[7] See Vishwa Mohan, Centre asks Gujarat to change anti-terror Bill, Times of India, June 20, 2009 available at http://timesofindia.indiatimes.com/India/Centre-asks-Gujarat-to-change-anti-terror-Bill-/articleshow/4676534.cms (Last visited 31 July, 2009). For a critical comment on the Cabinet's stand see Vinay Sitapati, Legal experts counter Shivraj's stand on rejecting GUJCOCA, The Indian Express, October 29, 2008 available at http://www.indianexpress.com/news/legal-experts-counter-shivrajs-stand-on-rejecting-gujcoca/379438/0. (Last visited 31 July, 2009). The nature of justifications given for rejecting the Bill has important ramifications for our understanding of this aspect of Centre-State relationship. For a critical analysis of related issues see part III.

[8] Maharashtra Control of Organized Crime Act, 1999 (Act No. 30 of 1999).

[9] This battle does not seem to be ending any time soon. In July 2009, the Gujarat State Assembly re-legislated the Bill, rejecting the recommendations of the Union Cabinet. The Bill, nonetheless, will not come into force without presidential assent. Anon, Gujarat passes anti-terror bill, rejects President's suggestions, Times of India, 28 July, 2009 available at http://timesofindia.indiatimes.com/articleshow/msid-4829638,prtpage-1.cms (Last visited 31 July, 2009).

A Parliament, in a representative democracy, is the principal legislative body. Statutes enacted by it are substantively legitimate, presumably, because they satisfy minimum constitutional requirements. Procedurally, Bills go through several stages of drafting, parliamentary readings and some form of majority consensus before they are enacted into law. Despite the numeric and procedural hurdles, control over proposed legislation from the point of introduction is, ordinarily speaking, *internal* to Parliament.[10] However, it is not uncommon for Constitutions, specifically in South Asian parliamentary democracies like India and Pakistan, to recognize conditions under which ordinary legislative controls may be entirely by-passed or, for limited purposes, placed with executive offices. For example, Presidents, Governors and Council of Ministers collectively often enjoy "original" legislative or review powers, which depending on the scope of such powers, may call into question the foundational basis of parliamentary democracy, namely, that a statute exists because (some sort of) a majority of elected members identify with it.

This Article (the first in a two-part series) evaluates the nature and scope of executive controls over primary legislation in India and Pakistan. Three forms of control are largely in play in the Indian Constitution. In its strongest form, executive offices may exercise control in the sense of entirely substituting the legislative procedure under specified conditions. In this Article, I shall limit my discussion to this form of "substitutive" control. Secondly, executive offices may exercise control by proposing *changes* to statutes validly enacted, and finally may exercise control in determining the *need* for particular legislation under specific circumstances. Both these aspects are less in the realm of control and conceptually closer to "influence." The President, Governors and the Council of Ministers, in the Indian context, exercise these forms of control (or influence) in varying degrees, both at the federal and state levels, and they have some sort

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In February 2010, the Union Cabinet, once again, recommended to the President that she refuse assent to the Bill. See Maneesh Chhibber, UPA to President: Block Gujarat crime law, Indian Express, 2 February, 2010 available at http://www.indianexpress.com/news/upa-to-president-block-gujarat-crime-law/574389/ (Last visited 2 February, 2010).

[10] To be sure, the "internal" metaphor is unhelpful, if pushed too far. Under Article 79, the President is a constitutive of Parliament. Therefore, for the internal reference to make sense, it must be understood in the limited sense of referring to a *deliberative* body of directly and indirectly elected members. See India Const. Article 79 ("There shall be a Parliament for the Union which shall consists of the President and two Houses to be known respectively as the Council of States and the House of the People.")

of symmetry. The Union Council of Ministers, for example, simultaneously control and are subjected to control. In India's constitutional set-up, the Union Council of Ministers have control over State Legislatures on specific matters[11] but are also subject to control in relation to the President.[12] Similarly, State Council of Ministers at times control State legislative matters but are also subject to control in relation to the Governor or the Union Council of Ministers.

In developing these forms of control, I shall work on the premise that executive control of legislative proceedings is an aberration and, therefore, must be limited. Parliamentary acts are the norm and qualitatively better, both in the sense that they satisfy procedural conditions and are an outcome of a somewhat deliberative process. In this Article, my endeavor is to articulate reasons that limit the scope of substitutive executive control, without necessarily offending the constitutional space afforded to it. To that effect, I will make three arguments. First, the concept of legislative emergency in non-emergency times and the practice of (strong forms of) judicial review fail to adequately account for substitutive control: Parliamentary democracies can (and do) function well without such executive control. Second, the Supreme Courts of India and Pakistan respectively, I will argue, have a somewhat mixed record. They have an acceptable record in some aspects of substitutive control, but not in others. Third, so-called textual arguments are relatively unhelpful in assessing the limits of constitutional impermissibility: In assessing the space for Ordinances, we would be better off evaluating policy considerations on their own terms rather than under the guise of textual arguments. I shall develop these arguments over the course of six sections. Sections II and III introduce readers to the basics and the legacy of substitutive control. Sections IV, V, VI and VII discuss, in comparative perspective, four distinct questions that the relevant texts raise. To be sure, issues discussed in these sections, thought important, do not exhaust the possibilities of substitutive control.

Also, three caveats may be useful here. First, the discussion in this Article (and the follow-up Article) is limited to the executive control of *primary* legislation. To that extent, I make no references to constitutional offices (such as those of the Chief Justice,

[11] See India Const. Article 254(2).
[12] See India Const. Article 111. I shall critically evaluate both these aspects of influence in my follow-up Article.

the Chief Election Commission) that exercise important legislative powers – powers that are conceptually closer to delegated, rather than primary, legislation. Second, the discussion is limited to executive control over primary legislation in ordinary times. Both in India and Pakistan, constitutions provide for significant executive controls over legislative processes in times of proclaimed emergency.[13] Those issues are not discussed here. Finally, though contextualized through a legislative experiment from the State of Gujarat, the Article should not be read as a defense of Gujarat's controversial Chief Minister Narendra Modi or a judgment about the need for (or the efficacy of) a special law on terrorism. To the contrary, these issues are adequately generic and, as I will argue, may have resonance in progressive contexts too. While used to provide an introductory context, the facts from Gujarat discussed at the top of this section shall not be the subject of discussion here. The facts relate to the third kind of control I have outlined earlier – Union Council of Minister's control over State legislation – and will be the subject of a fuller treatment in a companion Article.

II. PARLIAMENTARY DEVIANCE: INTRODUCING "SUBSTITUTIVE" CONTROL

The most obvious form of executive control over primary legislation in India is the President's power to promulgate legislation, otherwise known as Ordinances. An Ordinance is similar to an Act of Parliament, except that it is not subject to any form of parliamentary control, at least prior to promulgation. Article 123 in the Indian Constitution empowers the President to promulgate Ordinances during parliamentary recess, provided "circumstances exist which render it necessary for him to take immediate action."[14] Despite the language in the Constitution, in classic parliamentary tradition, satisfaction as to the circumstances must be that of the Council of Ministers, both at the federal and state level.[15] By definition, Ordinances do not go through ordinary legislative reviews; they are intended to help tide over contingent circumstances. They

[13] See e.g. India Const. Article 357(1).
[14] India Const. Article 123(1) ("If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate during action, he may promulgate such Ordinances as the circumstances appear to him to require.")
[15] India Const. Article 74(1) ("There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.")

have the "same force and effect" as that of an Act and unless enacted into law, expire six weeks from the date of Parliament's reassembly or at any prior time it is withdrawn.[16] Therefore, under ordinary conditions, an Ordinance can have a maximum life of seven and half months. Parliament must assemble at least once every six months[17] and, as mentioned, Ordinances promulgated during recess must be approved within six weeks of reassembly.[18] Under Article 213, Governors too are authorized to issue Ordinances at the state level that are valid for a period not extending seven and half months.[19]

2.1. Not Written in Stone: A Short Guide to Prolonged Ordinances

This validity period, it should be noted, is not written in stone. The Supreme Court's opinion in *In Reference by President*, (No. 1 of 2002)[20] is useful in explaining why that is the case. Recall that each House of Parliament must meet every six months, or in the words of Article 85(1) "… six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session." However, Article 82(2) limits the tenure of the Lower House of Parliament to five years, unless dissolved sooner.[21] What is the effect of reading Article 85(1) into Article 82(2)? Does Article 85(1) operate as an implied limitation on Article 82(1)? The following set of hypothetical facts may help in clarifying the question.

Assume that the House of the People holds its first sitting in June 2000. Ordinarily, its tenure is valid until May 2005. The House meets in January 2004, and is

[16] India Const. Article 123(2) ("An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such Ordinance - (a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, … (b) may be withdrawn at any time by the President.")

[17] India Const. Article 85(1) ("The President shall from time to time summon each House of Parliament to meet at such time and place he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.")

[18] For a description of the procedure for tabling an Ordinance see V. K. Agnihotri, *Handbook on the Working of the Ministry of Parliamentary Affairs* 41-43 (Concept Publishing House, New Delhi, 2004).

[19] India Const. Article 213(1) ("If at any time, except when the Legislative Assembly of a State is in session, … the Governor is satisfied that circumstances exist which render it necessary for him to take immediate during action, he may promulgate such Ordinances as the circumstances appear to him to require.")

[20] (2002) 8 SCC 237.

[21] India Const. Article 83(2) ("The House of the People, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the House.")

thereafter adjourned. It should be reconvened no later than July 2004: That is the mandate of Article 85(1). Now assume that an Ordinance is promulgated in February 2004. This Ordinance, under Article 123(2), is valid for a maximum duration of six weeks from the date of reassembly of the House. By implication, the Ordinance is valid till around mid-September 2004. Now also assume that the President dissolves the House in June 2004 and calls for fresh elections. However, Article 85(1) requires that six months not intervene between two sessions. Is it necessary to complete election formalities and constitute a new House by July 2004 so as not to fall foul of Article 85(1)? In 2002, A. P. J. Kalam, then President, turned to the Supreme Court for advice on that point.[22]

The six-month clause in Article 85(1), it turns out, might be understood in atleast two ways. Bear in mind that the House of the People ordinarily has a five-year tenure. Every five years, the Lower House is newly constituted based on fresh electoral verdict. One way of reading Article 85(1) is to limit its applicability to *intra*-House sessions. That is to say that the six-month clause applies to a Lower House attempting to complete its five-year tenure. The other way of reading Article 85(1) is to make the six-month clause also applicable to *inter*-House sessions. That is to say that after a particular House of the People is dissolved, six months should not intervene between the last sitting of that House and the first sitting of the next House, composition of which is contingent on fresh elections. The Supreme Court in *In Reference by President* (No. 1 of 2002)[23] concluded that the six-month clause applies to *intra*-House sessions only.[24] Article 85(1) [and its corresponding provision at the State level in Article 174(1)] which stipulates that six months shall not intervene between the last sitting in one session and the date appointed for its first sitting in the next session "is mandatory in nature and relates to *an existing and functional* (Parliament or) Legislative Assembly and not to a dissolved Assembly

[22] *In Reference by President*, (No. 1 of 2002) (2002) 8 SCC 237. The following facts led the matter to be referred to the Supreme Court. In July 2002, the Gujarat Legislative Assembly was dissolved by the Governor on the recommendation of the Council of Ministers. However, the last sitting of the Assembly was held in March 2002. Under Article 174(1), six months should not intervene between two sessions of an Assembly. Accordingly, it was required that the new Assembly be in session latest by October 2002. Despite acknowledging that the requirement of Article 174(1) is mandatory in character, the Election Commission pleaded its inability to complete electoral formalities by the due date. It was under those circumstances that the President in exercise of the powers conferred under Article 143(1) referred the matter to the Supreme Court for advice.

[23] (2002) 8 SCC 237.

[24] Para 85.

whose life has come to an end and ceased to exist."[25] To put it differently, the six-month clause does not apply to a case of dissolved Parliament. Therefore, to return to our hypothetical facts, the July 2004 deadline does not apply to the constitution of a new House.

Does all this affect the tenure of Ordinances? It does. Ordinances are valid till six weeks after the reassembly of Parliament, which ordinarily must meet atleast every six months. That limitation, we now know, does not apply to a dissolved Parliament. If elections are not held for so-called act of God reasons, or for other reasons, a new House of the People cannot be constituted. Indeed, as the Supreme Court itself acknowledged, there is no time constraint on the conduct of elections: "Obviously, neither the Constitution nor the Representation of People Act, 1951 prescribes any time limit for the conduct of election after the term of the Assembly is over either by premature dissolution or otherwise."[26] In other words, if Parliament is dissolved as in our hypothetical facts, and elections cannot be conducted for an extended period of time, an Ordinance, once promulgated, may remain valid for a period exceeding *well* over seven and half months. Not surprisingly, Ordinances raise uncomfortable questions: Their freestanding scope and extensive tenure of validity privilege executive control over primary legislation in possibly unacceptable ways.

2.2 Statistical Story: "Legislative Emergencies" in India and Pakistan

A cursory look at the number of Ordinances promulgated suggests that "contingent circumstances" frequently occur in Indian politics.[27] For example, in the eight years between 2000 and 2007, 55 Ordinances have been issued at the federal level.[28] Of these, 41 were duly enacted into law. Of the remaining 14, 10 are still pending at various forums or have lapsed and four were never introduced. These numbers are relatively small, but somewhat constant. Except in 1963, Ordinances have been promulgated every

[25] Para 85. (emphasis added)
[26] Para 106 (per Balakrishnan J.)
[27] For a comment on its gradual intrusion into democratic practices, see Romesh Thapar, Law or Ordinance? EPW Vol. 9(47) (Nov. 23, 1974) 1930-31.
[28] Anon, *Statistical Handbook: Ministry of Parliamentary Affairs* 56 (Govt. of India, New Delhi, 2009).

year since 1950.[29] In 1993, 34 Ordinances were promulgated in a single year, the highest so far. And that decade also saw the highest number of Ordinances – 196 in all. Following is a decade-wise break up of Ordinances promulgated by the Union Government.[30]

Table 1

1952-1959	57
1960-1969	67
1970-1979	133
1980-1989	84
1990-1999	196
2000-2009 [Till Mach 2009]	63

In neighboring Pakistan, Ordinances, arguably, have a more egregious record. Just between 2000 and 2007, atleast 380 Ordinances were federally promulgated.[31] Of these, 297 were promulgated between 2000 and 2003, 42 between 2004 and 2006 and the rest in 2007.[32] Nonetheless, direct statistical comparisons should be resisted. Pakistan's record of parliamentary democracy is littered with extended periods of martial detours. This is particularly true of the period between 2000 and 2009; General Pervez Musharraf was first the so-called Chief Executive Officer and, thereafter, the President of Pakistan for the better part of this decade.[33] Also, spikes in the rate of Ordinances directly correlate with periods in which Parliament was under suspension. There was really no Parliament

[29] Id.
[30] Id. See also V. K. Agnihotri, The Ordinance: Legislation by the Executive in India when the Parliament is not in session, Inter Parliamentary Forum: Association of Secretaries General of Parliaments, Addis Ababa Session, April 2009 available at http://www.asgp.info/Resources/Data/Documents/DSGLUMISWZXMFHMSMGKEQORWKOMYXW.doc.
[31] These figures are based on a search generated in *Pakistan LawSite* – a database of legislation and cases from Pakistan.
[32] These figures do not include the vast numbers of "Orders" that were also promulgated during the tenure. The count refers to pieces of legislation that was self-identified as an "Ordinance." Also, these figures refer to federal Ordinances only. Provinces also in Pakistan "enacted" vast numbers of Ordinances during the same period; the same is not included in this reference.
[33] For an introduction to the constitutional takeover and the early years of this period, see Stephen Cohen, *The Idea of Pakistan* (Brookings Institution Press, 2004).

to speak of between 2000 and 2002, and Ordinances were probably the only way to "legislate" while retaining a semblance of legality. It is not clear how many of these Ordinances were eventually enacted into law; data on this point is not easy to come by.[34]

Three points are relevant here. First, most Ordinances do little by way of spelling out the exigent circumstances that made them necessary except to recite the relevant constitutional provision. For example, the Banking Regulation (Amendment) Ordinance, 2007 explained its rationale thus: "And whereas Parliament is not in session and the President is satisfied that circumstances exist which render it necessary for him to take immediate action to give effect to some of the provisions of the said Bill and to make amendment to the Banking Regulation Act, 1949 … the President is pleased to promulgate the following Ordinance."[35] This sort of explanation – if it can be called that – is the norm; rarely do Ordinances mention circumstances more substantively. Second, Ordinances issued in this decade cover an eclectic mix of subject-matter, ranging from the mundane (such as administrative changes to laws relating to passports, minor changes to the law on bonuses etc.) to what may be regarded as highly important pieces of legislation (including major amendments to the law of patent and the introduction of a special law on terrorism).[36] The Ordinance introducing changes to the Patent Act, 1970, for example, was highly controversial, seeking to alter critical aspects of the patent regime in India.[37] Third, on occasions, it is possible that some of these important pieces of legislation do not command a majority in Parliament. Indeed, that may be the primary motivation for introducing it through an Ordinance. The Prevention of Terrorism Ordinance, 2001, with adequately harsh provisions, was promulgated in October 2001. The Ordinance, in this instance, was allowed to lapse (because it lacked majority support),

[34] To be sure, some effort is clearly being made. In 2009, for example, at least 53 Ordinances have already been laid before Parliament for formal approval. See Anon, Ordinances Laid: Official Website of the National Assembly of Pakistan available at http://www.na.gov.pk/ord_laid.html. (Last visited

[35] No. 1 of 2007.

[36] See e.g. The Passport (Amendment) Second Ordinance, 2001 (No. 11 of 2001); The Payment of Bonuses (Amendment) Ordinance, 2007 (No. 8 of 2007); The Patents (Amendment) Ordinance, 2004 (No. 7 of 2004); The Prevention of Terrorism (Second) Ordinance, 2001 (No. 12 of 2001).

[37] Act No. 39 of 1970. For a critical review, see Rajendra Sachar, Wrong Medicine: Patent Ordinance to Drive up Drug Prices, Times of India, January 5, 2005 available at http://timesofindia.indiatimes.com/Opinion/Editorial/THELEADER-ARTICLE-WrongMedicine-Patent-Ordinance-to-Drive-Up-Drug-Prices/articleshow/980623.cms (Last visited 31 July, 2009). See also Prabhu Ram, *India's New "Trips-Compliant" Patent Regime: Between Drug Patents and the Right to Health* Vol. 5 Chicago-Kent Journal of Intellectual Property 195 – 206 (2006); Shamnad Basheer, *India's Tryst with TRIPS: The Patents (Amendment) Act, 2005* Vol. 1(1) Indian Journal of Law and Technology 15- 46 (2005).

repromulgated with some modifications,[38] and eventually enacted into law through an extra-ordinary procedure.[39] In that sense, the power to issue Ordinances is a remarkable one; it includes the power to compel obedience to laws that may not enjoy requisite parliamentary support.

III. SUBSTITUTIVE LEGACY: A SHORT HISTORY OF ORDINANCES IN BRITISH INDIA

Where did this practice come from? India, or more appropriately, British India, has had a long history of Ordinances. While the provisions of the Government of India Act, 1935[40] (GI Act, 1935) inspired Article 123, the origins of the practice trace back to at least 1773.[41] For our purposes, it would be sufficient to consider the GI Act, 1935 and the related deliberations in the Constituent Assembly.

3.1 The Governor General under the Government of India Act, 1935

The Governor General, under the GI Act, 1935, had extensive original legislative powers. That should come as no surprise. The GI Act, 1935 did not constitute a fully responsible parliamentary system.[42] At best, it introduced a limited degree of self-representation in Indian politics.[43] The Act authorized the Governor General to "enact" three kinds of

[38] See Prevention of Terrorism Ordinance, 2001 (No. 9 of 2001); Prevention of Terrorism (Second) Ordinance, 2001 (No. 12 of 2001).

[39] While ordinarily Bills in India must be voted in by a majority in *each* of the two Houses of Parliament, Article 108 provides for the possibility of Bills enacted through a majority of members in a *joint* sitting of Parliament. In the case of the Terrorism Ordinance, the Government had a majority in the Lower House of Parliament but not in the Upper House of Parliament. However, the Government did have a majority in a joint or combined sitting of Parliament and it was through this avenue that the Ordinance was eventually enacted into legislation. See India Const. 108(1) ("If after a Bill has been passed by one House and transmitted to the other House – (a) the Bill is rejected by the other House; … the President may notify to the Houses by message of they are sitting ... his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill.)

[40] 25 & 26 Geo. 5 c. 42

[41] See § 36 East India Company Act, 1773; § 23 The Indian Councils Act, 1861; § 72 The Government of India Act, 1915. For commentary see D. C. Wadhwa, *Re-promulgation of Ordinance: A Fraud on the Constitution of India* 49-59 (Gokhale Institute of Politics and Economics, Pune, 1983).

[42] See John Percy Eddy, *India's New Constitution: A Survey of the Government of India Act, 1935* (Eddy, Macmillan and Co., Edinburgh 1935).

[43] See H. K Saharay, *A legal study of constitutional development of India* (Nababharat Publishers, Calcutta 1970).

Ordinances. First, § 42, the textual precursor to Article 123, provided for Ordinances in its classic form: "If at any time when the Federal Legislature is not in session the Governor-General is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require."[44] Second, § 43 authorized him[45] to promulgate Ordinances under circumstances that rendered "it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his, individual judgment …" Finally, § 44 provided for a new category of legislation – Governor-General's Act – for enabling the Governor to satisfactorily perform his discretionary duties under the GI Act, 1935.[46]

The power to promulgate Ordinances under § 42 was crucially different from those under §§ 43 and 44 of the GI Act, 1935. Under § 42, ordinarily, the Governor-General was required to act in accordance with the advice of his Council of Ministers, and Ordinances so promulgated had a life of six months unless enacted into law by the Federal Legislature.[47] In contrast, § 43 authorized him to issue Ordinances in situations where immediate action was needed for the purpose of satisfactorily discharging *his* functions under the Act. He had independent responsibility on certain matters: "The functions of the Governor-General with respect to defence and ecclesiastical affairs and with respect to external affairs, … shall be exercised by him in his discretion, and his functions in or in relations to the tribal areas shall be similarly exercised, …"[48] In addition, he was also vested with the special responsibility of preventing "any grave menace to the peace or tranquility of India or any part thereof; safeguarding of the financial stability and credit of the Federal Government; safeguarding of the legitimate

[44] § 42, Government of India Act, 1935.
[45] All Governor-Generals appointed by the Crown were men.
[46] § 44(1) Government of India Act, 1935. (If at any time it appears to the Governor-General that, for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under this Act required in the exercise thereof to act in his discretion or to exercise his individual judgment, it is essential that provision should be made by legislation, he may by message to both of the Legislature explain the circumstances which in his opinion render legislation essential, and either- (a) enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considers necessary; or (b) attach to his message a draft of the Bill which he considers necessary.)
[47] § 42(2)(a) Government of India Act, 1935.
[48] § 11(1)

interests of minorities; … and [protecting] the rights of any Indian State and the rights and dignity of the Ruler thereof; …"[49] Initially valid for six months, such Ordinances were extendable for a further period not exceeding six months.[50] Importantly, the Federal Legislature had no control over such Ordinances: They only had to be laid before both Houses of Parliament in Westminster.[51] Finally, the provision for Governor-General's Act in § 44 was truly an independent (or parallel) source of legislative power. As with § 43, the power in § 44 concerned the satisfactory discharge of his discretionary functions or those requiring the exercise of his individual judgment. However, § 44 was not conditioned on the necessity for any "immediate action;" he could "legislate" his Act anytime he wanted to, after explaining "to both Chambers of the Legislature … the circumstances which in his opinion [rendered] legislation essential …"[52] Also, unlike § 43, a Governor-General's Act was permanent. It had the same force and effect of that of an Act. Clearly, the Governor-General's Act was the most egregious of the three. In true dictatorial style, it vested original legislative authority in a single (and unrepresentative) office. While an Ordinance under § 42 was subject to some legislative control post-enactment, and that under § 43 was limited in point of time, a Governor-General's Act under § 44 had neither.

3.1.1. Courts Play the Governor's Tune

Nor did it help that the courts interpreted the provisions widely. The Judicial Committee in *Bhagat Singh And Others v The King-Emperor*[53] interpreted analogous provisions of the Government of India Act, 1915 to exclude the Governor-General's assessment of

[49] § 12(1)
[50] § 43(2) ("An ordinance promulgated under this section shall continue in operation for such period not exceeding six months as may be specified therein, but may be a subsequent ordinance be extended for a further period not exceeding six months.")
[51] § 43(3) ("An ordinance promulgated under this section shall have the same force and effect as an Act of the Federal Legislature assented to by the Governor-General, but every such ordinance - (a) shall be subject to the provisions of this Act relating to the power of His Majesty to disallow Acts as if it were an Act of the Federal Legislature assented to by the Governor-General; (b) may be withdrawn at any time by the Governor-General; and (c) if it is an ordinance extending a previous ordinance for a further period, shall be communicated forthwith to the Secretary of State and shall be laid by him before each House of Parliament.")
[52] § 43(1)
[53] (1931) 55 Ind. App. 169

"emergency" from the purview of judicial review.[54] A state of emergency "is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action, which is to be judged as such by some one," Viscount Dunedin wrote. [55] That someone "must be the Governor-General, and he *alone*."[56] But why? Any other view "would render utterly inept the whole provision. Emergency demands immediate action, and … [it] is he alone who can promulgate the Ordinance."[57]

The exclusionary rule quickly became standard reasoning. In *King-Emperor v Benoari Lal Sharma And Others*, [58] Viscount Simon L.C. repeated the *Bhagat Singh* dictum: "The question whether an emergency existed at the time when an ordinance is made and promulgated is a matter of which the Governor-General is the sole judge."[59] This wide latitude made life easy for Ordinances; they became the principle vehicle for general administration in India. But the frequent recourse to Ordinances, understandably, disappointed the nationalist leadership.[60]

3.2 Objections Forgotten: Ordinances in the Constituent Assembly

The nationalist objections, however, were largely forgotten in the Constituent Assembly. There was no serious (or sustained) challenge to the President's legislative powers in the broader parliamentary set-up. Whether in the drafting committees or in the Constituent Assembly, dissent was limited. Constitutional advisor B. N. Rau set the justificatory tone in his memo to the Union Constitution Committee:

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[54] Government of India Act, 1915 § 72
[55] (1931) 55 Ind. App. 169, 172
[56] (1931) 55 Ind. App. 169, 172 (emphasis added)
[57] (1931) 55 Ind. App. 169, 172
[58] (1945) 72 Ind. App. 57
[59] (1945) 72 Ind. App. 57, 64. See also Hubli Electricity Co. Ltd. v Province of Bombay L.R. 76 Ind. App. 57; Lakhi Narayan Das v The Province of Bihar [1949] F.C.R. 693.
[60] In his presidential speech to the Lucknow session of the Indian National Congress in 1936, Jawaharlal Nehru's condemned the practice in strong words. The "humiliation of ordinances," he said, was a reminder that the GI Act, 1935 had done little by way of introducing self-governance in India. For a reference to the speech, see A. K. Roy v Union of India AIR 1982 SC 710 para 7. See also H. M. Seervai, *Constitutional Law of India* 18-19 (1st ed., Tripathi, Bombay, 1968) ("S. 42 of the Government of India Act gave power to the Governor-General to promulgate ordinances during the recess of the federal legislature, and s. 88 of that Act conferred a similar power on the Governor to promulgate ordinances during the recess of the State legislature. These provisions were strongly assailed as involving 'rule by ordinances.' But their incorporation in our Constitution shows, that, here again, the objection was not to the nature and scope of the power but to the authorities by whom it was to be exercised.")

> The Ordinance-making power has been the subject of great criticism under the present Constitution. It must however be pointed out that circumstances may exist where the immediate promulgation of a law is absolutely necessary and there is no time to summon the Union Parliament … The President who is elected by the two Houses of Parliament and who has normally to act on the advice of the Ministers responsible to Parliament is not at all likely to abuse any Ordinance making power with which he may be vested. Hence the provision.[61]

In the Assembly, some members, at best, expressed a shared distrust of its proper applicability. Prof. K. T. Shah was the most articulate voice against Ordinances. But even he tacitly conceded the necessity point.[62]

> However, we may clothe it, however it may be necessary, however much it may be justified, it is a negation of the rule of law. That is to say, it is not legislation passed by the normal Legislature, and even would have the force of law which is undesirable. Even if it may be unavoidable, and more than that, even if it may be justifiable in the house of emergency, the very fact that it is an extraordinary or emergency power, that it is a decree or order of the Executive passed without deliberation by the Legislature, should make it clear that it cannot be allowed, and it must not be allowed, to last a minute longer than such extraordinary circumstances would require.[63]

The focus in the Assembly was not on if but the *extent* to which Ordinances were needed. Some worried about use of Ordinances for illegitimate purposes. Troubled by the practices under the GI Act, 1935, Pocker Sahib, for example, wanted a proviso to the

[61] B. N. Rau, Memorandum on the Union Constitution in *The Framing of India's Constitution* 486 (ed. B. Shiva Rao, Universal Law Publishing Ltd., 2006)

[62] Earlier in the Union Committee meeting, Shah circulated a copy of his draft articles that included a provision, but with specific grounds on which they could be invoked. There is no evidence to suggest that his draft was seriously debated. See K. T. Shah, General Directives in *The Framing of India's Constitution* 469 (ed. B. Shiva Rao, Universal Law Publishing Ltd., 2006). ("The Head of the Union, and the chief executive for any component part thereof, shall be entitled to make Ordinances to deal with any sudden emergency like a war, earthquake, epidemic, or any other similar natural or man-made calamity; provided that no such Ordinance shall have validity for more than six months from the date of its enactment; and provided further that any such Ordinance may be re-enacted or repealed or declared to be null and void by an Act of the Legislature concerned at any time during the currency of the Ordinance.")

[63] CAD 208

draft article stating "such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law."[64]

> The reason why I have given notice of this amendment is the recent experience we have had in various provinces in the matter of enforcing ordinances and even the Public Safety Acts which have taken the form of ordinances. The ordinances were later made into law, but the important matter to be noted is that the fundamental right of the citizen to be tried by a court of law has been lost to him … the scandalous way in which even the Public Safety Acts has been administered is an eye-opener to us that to give such a power to the President to pass ordinances, which give unrestricted powers to deprive the citizens of their liberty, should not be tolerated …[65]

In reply, both P. S. Deskmukh and B. R. Ambedkar dismissed the proposal. The draft of Article 123(3) could account for his concerns: "If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."[66] In other words, the legislative width of Ordinances, in its proposed form, was identical to that of Acts. For the purposes of competence, force and effect, both stood on the same footing. Whatever was out of bounds through an ordinary legislation, was also out of bounds for an Ordinance. Nonetheless, this equivalence is misleading: It could not have adequately accounted for Sahib's objection.

The following is the text of his proposed amendment: "Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law."[67] A person may be deprived of her right to personal liberty either upon conviction after trial by a competent court of law, or, without trial and conviction, under a law on preventive detention.[68] Given these possibilities, how does Article 123(3) account for Sahib's concerns? The simple answer

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[64] CAD 23rd May 1949, 203.
[65] CAD 203
[66] CAD 211
[67] CAD 203
[68] India Const. Article 22(4) ("No law providing for preventive detention shall authorize the detention of a person for a longer period than three months unless - (a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention: Provided that nothing in this sub-clause shall authorize the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or (b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).")

is that it does not. Laws on preventive detention are constitutional; Parliament is permitted to enact such legislation and, therefore, the President is permitted to promulgate an Ordinance authorizing preventive detention. When promulgated, a person may be deprived of her personal liberty without trial by a competent court of law. Wasn't that the core of Sahib's argument? In rejecting Sahib's proposal, the Constituent Assembly really rejected the idea of *substantive* limits on Ordinances. This rejection, we shall see later, matters for interpretative purposes.

Then, there were those concerned about the illegitimate use of Ordinances. H. V. Kamath, H. N. Kunzru and Prof. K. T. Shah argued that the draft Article did not limit the tenure of Ordinances sufficiently. For Kamath, seven and half months was too long.[69] Worried that a President inclined to dictatorship might take undue advantage of the tenure, his proposal was to have every ordinance "laid before both Houses of Parliament within four weeks of its promulgation, …"[70] H. N. Kunzru proposed a still shorter tenure, not exceeding four weeks.[71] Extending the tenure of validity to six weeks from the reassembly of Parliament was unjustifiably long, he said.[72] Prof. K. T. Shah would not even tolerate that. He wanted Ordinances to end *immediately* on reassembly of Parliament: "Every such Ordinance shall be laid before both Houses of Parliament immediately after each House assembles, unless approved by either House of Parliament by specific Resolution, shall cease to operate forthwith."[73]

Dr. Ambedkar resisted the proposals; extended tenure was justified in his view. Responding to Kamath and Shah, he fell back on the provisions of the GI Act, 1935. Unlike §§ 43 and 44, the draft provisions in the (then proposed) Constitution did not provide for any parallel (or independent) power of legislation to the Executive, he said.[74] The extraordinary power was limited only to cases of legislative emergency, and that too when Parliament was not in session. This exception, he thought, was defensible.

[69] CAD 205
[70] CAD 204
[71] CAD 206
[72] CAD 207
[73] CAD 208
[74] CAD 213

> My submission to the House is that it is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be deficient to deal with a situation which may suddenly and immediately arise. What is the executive to do? The executive has got a new situation, which it must deal with *ex hypothesi* it has not got the power to deal with in the existing code of law. The emergency must be dealt with, and it seems to me that the only solution is to confer upon the President the power to promulgate a law which will enable the executive to deal with that particular situation because it cannot resort to the ordinary processes of law, because again ex hypothesi the legislature is not in session. Therefore, it seems to me that fundamentally there is no objection to the provisions …[75]

3.3 Assessing Two Arguments: Does India Need Ordinances?

The "necessary evil" argument is less obvious than Dr. Ambedkar would have one believe. Three things should be pointed out. First, while some jurisdictions have adopted the concept of legislative emergency in non-emergency times, others have functioned (rather well) without such powers. South Asian jurisdictions – including Pakistan,[76] Bangladesh[77] and Nepal[78] – have adopted similar provisions. Sri Lanka[79] and Malaysia[80] also have some sort of provision for Ordinances. But these powers are conceptually closer to "Emergency Provisions" under the Indian Constitution.[81] The latter two do not have provisions for dealing with so-called cases of legislative emergency in non-

[75] CAD 214

[76] Pakistan Const. Article 89(1) ("The President, may, except when the National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require.")

[77] Bangladesh Const. Article 93(1) ("(1) At any time when [Parliament stands dissolved or is not in session], if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament …")

[78] Interim Const. Nepal Article 88(1) ("Article 88 Ordinance: (1) If at any time, except when the Legislative - Parliament is in session, the Government of Nepal is satisfied that circumstances exist which render it necessary to take immediate action, without prejudicing the provisions set forth in this Constitution, the government of Nepal may promulgate any Ordinance as deemed necessary.")

[79] Sri Lanka Const. Article 155(1) (The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament."). Public Security Ordinance (No. 25 of 1947) ("An Ordinance to provide for the enactment of emergency Regulations or the adoption of other measures in the interests of the public security and the preservation of public order and for the maintenance of supplies and services essential to the life of the community.")

[80] Malaysia Const. Article 151(2B) ("If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.")

[81] India Const. Part XVIII ("Emergency Provisions")

emergency times, and this despite the fact that in Sri Lanka, for example, the Constitution requires that Parliament meet at a minimum only once in a year.[82]

Commonwealth jurisdictions outside South Asia make the "necessary evil" argument even more tenuous. Australia, Canada, and the United Kingdom confer varying degrees of legislative control to the executive.[83] The powers, however, are predicated on *specific* cases of emergency. In the UK, a senior Minister of the Crown may make regulations[84] under the Civil Contingencies Act, 2005, if it is urgently "necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency."[85] For the purposes of the Act, emergency means "an event or situation which threatens serious damage to human welfare …, [or] …threatens serious damage to the environment …, or (c) war, or terrorism, which threatens serious damage to the security of the United Kingdom."[86] And such regulations have a maximum tenure of 30 days, and are subject to parliamentary scrutiny within a relatively short period of time.[87] As with Sri Lanka and Malaysia, the emergency powers in these commonwealth jurisdictions are closer to "Emergency Provisions" in the Indian Constitution. Thirdly, specific examples of promulgations do not bear out Dr. Ambedkar's argument. None of the 55 Ordinances promulgated between 2000 and 2007, satisfy his test of "deficiency in existing law" or "immediate need for new law." In some cases, there was no emergency to speak of; in other cases, need for new legislation was entirely predictable.

Presumably, H. M. Seervai anticipated this sort of an objection. He defended the practice less on grounds of governmental necessity, but more so through the lens of judicial review.[88] Articles 123 and 213 "have secured considerable flexibility both to the

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[82] Sri Lanka Const. Article 70 (2) ("Parliament shall be summoned to meet once at least in every year.")

[83]See Civil Contingencies Act 2004 (c. 36) (UK); Emergencies Act, 1985 c. 22 (4th Supp.) (Canada). For commentary on the Civil Contingencies Act, see Clive Walker & James Broderick, *The Civil Contingencies Act 2004: Risk, Resilience and the Law in the United Kingdom* (2006). Emergency legislation in Australia varies in the provinces. See e.g. Victoria State Emergency Act, 2005 (Act 51 of 2005).

[84] § 20(2) Civil Contingencies Act 2004 ("A senior Minister of the Crown may make emergency regulations if satisfied— (a) that the conditions in section 21 are satisfied, and (b) that it would not be possible, without serious delay, to arrange for an Order in Council under subsection (1).")

[85] § 21 Civil Contingencies Act 2004 ["(2) The first condition is that an emergency has occurred, is occurring or is about to occur. (3) The second condition is that it is necessary to make provision for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency. (4) The third condition is that the need for provision referred to in subsection (3) is urgent."]

[86] § 19 Civil Contingencies Act 2004.

[87] § 21 Civil Contingencies Act 2004.

[88] H. M. Seervai, *Constitutional Law of India* 19 (Tripathi, 1st ed., 1968).

Union and to the State to enact laws to meet emergent situations as also to meet circumstances created by laws being declared void by courts of law," he wrote.[89] He had reasons to worry: "Gravest public inconvenience would be caused if on an Act, like the Bombay Sales Tax Act, being declared void, no machinery existed whereby a valid law could be promptly promulgated to take the place of the law declared void."[90] In other words, judicial review, or atleast strong forms of judicial review and Ordinances, Seervai seemed to suggest, must go together. If one exists, the other is necessary. This argument is somewhat distinct from the one about legislative necessity: The very working of the Constitution (through the application of judicial review) may generate cases of legislative emergency. The argument, however, does not cut much ice. Sri Lanka, Malaysia and South Africa, amongst others, practice judicial review without any provisions for Ordinances.[91]

Even so, what about the specific decision? In making his point, Seervai referred to the Bombay High Court decision - *United Motors India Ltd. v State of Bombay*[92] - invalidating the Bombay Sales Tax Act, 1952.[93] Without an alternate immediate legislative avenue, "gravest public inconvenience," he thought, was unavoidable. In *United Motors*, the High Court concluded that the "Act as passed by the State Legislature [was] ultra vires …" – the definition of "sale" included in the Act was beyond the legislative competence of the Bombay Legislature.[94] The *whole* Act was declared ultra vires because it was "impossible to sever any specific provision of the Act so as to save the rest of the Act … [because] the definition [permeated] the whole Act…"[95] Presumably, except under a new law, State agencies could not charge sales tax, and in that sense would suffer revenues losses for a limited duration. Beyond that, it is unclear

[89] Id.
[90] Id. (references omitted)
[91] Sri Lanka Const. Art. 120 ("The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution ..."); Malaysia Const. Art. 4(1) ("This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.") ; South Africa Const. Art. 2 (This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.")
[92] United Motors India Ltd. v State of Bombay 55 Bom LR 246.
[93] Act XXIV of 1952
[94] Para 25
[95] Para 25

what "gravest public inconvenience" Seervai had in mind. To be sure, sales tax was (and remains) an important source of government revenue. But its non-collection for a limited duration could hardly have had the sort of catastrophic consequences Seervai suggests.[96]

More importantly, Seervai, I think, misses the larger point here. The Constitution, we have already seen, requires that the Parliament and State legislatures meet atleast once every six months.[97] While setting this minimum standard, the original expectation was unequivocally in favor of frequent meetings. In reality, Parliament and State legislatures have a less-than-inspiring record on this matter. In the last five years, Parliament, for example, has on average met for 67.8 days every year.[98] To put it differently, between 2005 and 2009, for every five days, Parliament has *not* been in session four days or more. Government statistics suggest that in 2005 the Lower House met for 85 days, in 2006 for 77 days, in 2007 for 66 days, in 2008 for 46 days and in 2009 for 64 days.[99] This legislative record (or, rather, non-record), if anything, is on a downward spiral. Till 1974, Parliament regularly sat for 100 days or more annually, though never exceeding 151 days – the highest so far achieved. Post 1975, with the exception of 5 years (1978, 1981, 1985, 1987 and 1988), Parliament has never been in session for more than 100 days annually.[100] And atleast on eight occasions since 1990, the Lower House has been in session for 70 days or less. Upendra Baxi is surely correct in saying that "Indian legislatures far too disproportionately dedicate their precious time to purposes other than making laws and public policies, mandated by Indian constitutionalism."[101] Given this appalling attendance, legislative emergencies – even genuine cases of legislative emergencies in

[96] In fairness, it must be pointed out that the share of sales tax revenues is a substantial part of the State's overall tax revenues. While its proportion has gradually decreased in the last few years, it nonetheless remains an important source of revenue. For some recent government statistics on sales tax from the State of Maharashtra, see Anon, Sales Tax Revenue Budget share in State Tax Revenue Budget available at http://www.mahavat.gov.in/mahavat/S%281%29.T._Revenue_Budget_share.html (Last visited)
[97] India Const. Article 85(1)
[98] Anon, *Statistical Handbook: Ministry of Parliamentary Affairs* 52 (Govt. of India, New Delhi, 2009).
[99] Id.
[100] Id.
[101] Upendra Baxi, Introduction in D. C. Wadhwa, *Endangered Constitutionalism: Documents from a Supreme Court Case* lxxix – xc, lxxxix (Gokhale Institute of Politics and Economics, Pune, 2009). See also Anon, Parliament should have 100 sittings a year: Speaker, CNN-IBN 26 August, 2009, available at http://ibnlive.in.com/news/parliament-should-have-100-sittings-a-year-speaker/100001-37.html?from=search-relatedstories.

non-emergency times – should not be surprising.[102] The antidote to that, however, is not to promote parallel legislative mechanisms. While Seervai's concern for public inconvenience is justified, a better legislative record can presumably resolve much of it.

Neither legislative emergency nor arguments from judicial review, it seems, is adequate to explain the necessity point. So how does one explain Dr. Ambedkar's conviction that the power to enact Ordinances was indeed necessary? In part, Kamath, Kunzru and Prof. Shah viewed future political leadership with suspicion. Kamath, for example, raised the specter of a dictator: "Suppose the President summons Parliament say, after one year – Dr. Ambedkar says 'no' by a gesture – perhaps he is constitutionally minded and he does not aspire to dictatorial powers if he be elected President – certainly a man different from him take unfair advantage of this article and refrain from summoning parliament within a reasonable period …"[103] Prof. Shah echoed similar worries. "It is true that though the nominal authority which makes the Ordinance, is that of the President, he would be acting only on the advice of the Prime Minister..."[104] Even so, he did not want to "leave it to the exigencies or to the possibilities of party politics, to see that such extraordinary powers are exercised at any time or for any time, and that is

[102] This might also explain why in some years, the difference between the number of legislation enacted and the number of Ordinances promulgated was relatively small. Following is comparison between legislation and Ordinances for the period 1990-98. As the table shows, much of the legislative business throughout the nineties was transacted through Ordinances, including years when Ordinances nearly equaled the number of Bills enacted into law. See V. K. Agnihotri, The Ordinance: Legislation by the Executive in India when the Parliament is not in session, Inter Parliamentary Forum: Association of Secretaries General of Parliaments, Addis Ababa Session, April 2009 available at http://www.asgp.info/Resources/Data/Documents/DSGLUMISWZXMFHMSMGKEQORWKOMYXW.doc.

Year	Bills passed by Parliament	No. of Ordinances promulgated	Percentage of Ordinances with respect to Bills
1990	30	10	33%
1992	44	21	47.7%
1993	75	34	45.3%
1995	45	15	33.3%
1996	36	32	88.8%
1997	35	31	88.5%
1998	40	20	50%

[103] CAD 205
[104] CAD 209

why [he] would require, under the constitution and by the constitution that a maximum period is prescribed to the life of an ordinance …"[105]

Dr. Ambedkar would have none of this. With his charitable view of future political leadership and parliamentary functioning, there was no cause for alarm.

> Well, I do not know what exactly may happen, but my point is this that the fear … is really unfounded, because we have provided in another article 69, which says that six months shall not elapse between two sessions of the Parliament … Therefore, I say, having regard to article 69, having regarding to the exigencies of business, having regard to the necessity of the Government of the day to maintain the confidence of Parliament, *I do not think that any such dilatory process will be permitted by the Executive of the day as to permit an ordinance promulgated … to remain in operation for a period unduly long*.[106]

His charity prevailed. When put to vote, the Constituent Assembly rejected all proposed amendments. Article 123, in its present form, was added to the Constitution.

IV. TEXTUAL STRUGGLES: THE CONSTITUTIONALITY OF REPROMULGATION

4.1 Continuity of Form: The (Im)permissibility of Re-promulgation

The text of Article 123 makes four questions – concerning form, effect, review and substance – relevant. I shall critically discuss each of these in turn. First, in relation to the text of Article 123, there is a question regarding continuity of *form*. Article 123(1) [or its State-equivalent in Article 213(1)] provides that an Ordinance "shall cease to operate at the expiration of six weeks from the reassembly of Parliament..." Can the same Ordinance be *re*-promulgated? Are there limits to the number of times it can be re-promulgated, if at all? Between 1967 and 1981, the State of Bihar promulgated 256 Ordinances that "were kept alive for periods ranging between one and 14 years by repromulgation from time to time."[107] Re-promulgated mechanically and strategically,

[105] CAD 209
[106] CAD 215 (emphasis added). See also Amal Ray, From a Constitutional to an Authoritarian System of Government: Interactions between Politics and the Constitution in India *Journal of Commonwealth and Comparative Politics* Vol. 25(3) 275-291 (1987).
[107] D. C. Wadhwa v State of Bihar AIR 1987 SC 579 para 4.

the authorities ensured that the Ordinances did not outlive their prescribed tenure.[108] In *D. C. Wadhwa v State of Bihar*,[109] the Supreme Court concluded that the practice was unconstitutional.[110] Four steps made up most of the Court's reasoning: (a) Lawmaking function in the Constitution is entrusted to the Legislature (b) It is contrary to democratic norms that the Executive should have the power to make law (c) The power to issue Ordinances to tide over emergent situations is exceptional and, therefore, of necessity be limited in point of time (d) A contrary view – of allowing the Executive to usurp legislative functions – is opposed to India's "constitutional scheme."[111] It is worth pointing out that these steps engage inadequately with the text of Article 123 (or its State counterpart in Article 213), rather relying on "norms" and "schemes" embedded it in.

Though defensible, this conclusion is far from uniform. On two separate occasions, the Patna High Court interpreted Article 213 in favor of re-promulgative powers.[112] Referring to the permissibility of re-promulgation, in *Mathura Prasad Singh and others v State of Bihar*,[113] Singh J. concluded that "the Constitution having vested the Governor with power to promulgate Ordinance when Legislature is not in session and such an Ordinance is given the same force and effect as an Act of Legislature …, it [was]

[108] For a copy of a circular letter advising repromulgation see para 5. For the detailed description of the assiduous manner in which Legislative sessions were timed, and their implications for keeping Ordinances alive, see D. C. Wadhwa, *Re-promulgation of Ordinances: A Fraud on the Constitution of India* 8-17 (Orient Longman, New Delhi, 1983).

[109] AIR 1987 SC 579. The case has an interesting history. Agrarian economist Dr. D. C. Wadhwa is undoubtedly India's most well-known expert on Ordinances. In 1982, while researching on land reforms in the State of Bihar, he stumbled upon this phenomenon of repromulgated Ordinances in Bihar. Over the next couple of years he painfully put together necessary documents from governmental archives to make the case against repromulgation under the Indian Constitution. See D. C. Wadhwa, *Re-promulgation of Ordinances: A Fraud on the Constitution of India* (Orient Longman, New Delhi, 1983). For selected reviews see, Ashok Desai, Government by Ordinances, Vol. 19(49) EPW 2076-77 (Dec. 8, 1984); Jill Cottrell, Book Review *The International and Comparative Law Quarterly*, Vol. 33, No. 2 (Apr., 1984), 503- 504; Craig Baxter, Vol. 477 *Annals of the American Academy of Political and Social Science* (Jan., 1985), 158-159. In 1984, he approached the Supreme Court through a so-called Public Interest Litigation seeking a stay on the practice and a declaration to the effect that the same was unconstitutional. The decision of the Supreme Court in *D. C. Wadhwa* was the outcome of that writ petition.

[110] In 2009, Dr. Wadhwa published a collection of documents detailing the trajectory of the case in the Supreme Court. For a detailed account of the hearings and orders published leading to the decision, see D. C. Wadhwa, *Endangered Constitutionalism: Documents from a Supreme Court Case* xvii – lxxviii (Gokhale Institute of Politics and Economics, Pune, 2009).

[111] Para 6-7.

[112] Chakardharpur Biri and Tobacco Merchants' Association and others v State of Bihar 1973 Tax L R 2132; Mathura Prasad Singh and others v State of Bihar AIR 1975 Pat 29.

[113] AIR 1975 Pat 295

not for the Court to declare such an Ordinance ultra vires on this score."[114] For him, the impropriety, if any, excluded a judicial remedy: "It is for the Legislature of the State to disapprove of it, if the State is sought to be ruled by successive Ordinances, as and when it meets, or for the electorate to disapprove of the conduct of its accredited representatives for having ruled the State by means of Ordinances and reject them at the next poll."[115] S. P. Sathe sympathized with this sort of reasoning. Referring to Wadhwa's petition to the Supreme Court, he wrote: "Although the matter he brought before the Court was of great importance, it should have been brought before the legislature because such clandestine re-promulgation of ordinances was an affront to the legislation and the legislature alone should have corrected it and reprimanded the government."[116] D. C. Wadhwa, however, saw it differently. "The political approval of a measure by the Legislature on the one hand and the need for legal compliance with constitutional requirements on the other hand are two different things. The Patna High Court judgment attributes importance only to the former, putting the latter in a low key or even in a negative key," he wrote.[117]

So what distinguished Wadhwa from Sathe? Presumably, at issue here is the appropriate scope of judicial remedy in redressing unconstitutional practices. Both Sathe and Wadhwa agreed on the constitutional wrong; re-promulgation was an impermissible practice. However, Wadhwa further believed and Sathe denied that the wrong had a *judicial* remedy: "The only justification for the Court's intervention was that such fraudulent re-promulgation of ordinances was a gross violation of the Constitution. But article 32 was not meant for providing remedies against any violation of the Constitution. It is specifically provided for being used against violations of fundamental rights … Did that mean the Court conceded that Wadhwa had a fundamental right that he should be governed according to the Constitution?"[118] Though valid in the context of the particular petitioner, Sathe's arguments might carry less weight where the petitioner is more closely

[114] AIR 1975 Pat 295, para 16
[115] AIR 1975 Pat 295, para 16
[116] S. P. Sathe, *Judicial Activism in India* 124 (OUP, New Delhi, 2002).
[117] D. C. Wadhwa, *Re-promulgation of Ordinances: A Fraud on the Constitution of India* 33 (Orient Longman, New Delhi, 1983).
[118] S. P. Sathe, *Judicial Activism in India* 124 (OUP, New Delhi, 2002).

tied to the legislative (mal)practice, or if need be, directly affected by it.[119] At that point, Sathe might be constrained to agree with Wadhwa that a judicial remedy is indeed appropriate.

4.2 Re-promulgative Exceptions: Are All Re-promulgations Invalid?

Two aspects in *D. C. Wadhwa* have attracted wide attention, and criticism. First, there was a mismatch between the Court's hortatory denunciation of the practice and its formal order. At various points, Bhagwati C.J., was scathing in his assessment of the re-promulgative practice. He considered the "enormity of the situation … startling" [120] at one point; elsewhere, he anointed the practice as "nothing short of usurpation,"[121] a clear "subverting of the democratic process,"[122] a "subterfuge, "[123] as "reprehensible"[124] and finally as "a fraud on the Constitution."[125] Yet, the litany of linguistic censures did not quite translate into judicial strictures. Except for invalidating one of the three Ordinances specifically challenged in the petition, the Court fell back on "hope and trust that such practice shall not be continued in the future …"[126] It said (or did) nothing about the endemic practice that had otherwise taken deep roots in Bihar. The narrative of subversion, subterfuge and fraud, Upendra Baxi suggests, was inconsistent with the Court's eventual "hope and trust" kind of order.[127] 'Hope' and 'trust' are singularly misplaced, he writes, "in a context where a state has usurped unconstitutionally the power

[119] Beyond that, there are other avenues through which the matter may have been "appropriately" decided. For example, the matter may have been decided in exercise of the Supreme Court's appellate powers while hearing matters originally decided by the High Courts in exercise of their writ jurisdictions. The scope of the writ jurisdiction of the High Courts under Article 226 is considerably wider than that of the Supreme Court under Article 32. See India Const. Article 226(1) ("Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and *for any other purpose*.") (emphasis added)
[120] AIR 1987 SC 579 Para 4
[121] Para 6
[122] Para 6
[123] Para 6
[124] Para 7
[125] Para 6
[126] Para 7
[127] Supra n. 96, at lxxxvi

of the elected representatives of the people."[128] "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 behavior of the State of Bihar. But they make no visible attempt to understand let alone explain its original epidemiological dimensions," Baxi wrote.[129]

Secondly, the Court's conclusion that re-promulgation is unconstitutional leaves certain matters unclear. For example, is re-promulgation *per se* unconstitutional? That is unlikely: Bhagwati C.J. recognized possible circumstances when the Executive may be compelled to repromulgate an Ordinance. "Of course, there may be a situation," he said, "where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business … or the time at the disposal of the Legislature … may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the Ordinance."[130] Note that there is nothing in the four steps outlined earlier that requires (or validates) this exception. Nonetheless, what the exception suggests is that the Supreme Court only invalidated *mechanical* re-promulgation of Ordinances, not re-promulgation *per se*. Promulgation (or re-promulgation), as an exercise of legislative powers, requires an application of mind and not just a clerical approval. If emergent conditions persist alongside adequate reasons for failing to legislate an Ordinance into law, re-promulgation may be valid. In that sense, the validity of re-promulgation, unlike promulgation, is predicated on both the persistence of emergent conditions *and* the availability of reasons as to why an Ordinance was not transacted in the intervening legislative session.

4.3 Assessing Exceptions: Text, Policy and "Justifiable Reasons"

Our focus must then be on "adequate reasons:" What reasons could justify re-promulgation? Bhagwati C.J. pointed out two. First, if the volume of legislative business in the intervening session were such that the Government failed to push a Bill through,

[128] Id.
[129] Id. at lxxxvii
[130] Para 6

repromulgation would be acceptable.[131] Second, if time were too short during an intervening session to enact an Ordinance into law, re-promulgation would be acceptable.[132] Both these options, to some extent, belie the fundamental requirement that an emergent situation must exist for re-promulgation. If a legislative emergency truly persists with a make-do Ordinance brought in to tide over it, it is difficult to understand why such a matter should be treated with low priority. If a Legislature does not prioritize Ordinance-related matters, for reasons of volume or duration, that itself may be a ground to doubt the existence of emergent conditions.

Not surprisingly, the exceptions were greeted with skepticism. A. G. Noorani was somewhat personal in his criticism: "When Justice P. N. Bhagwati retired as the Chief Justice of India even those who had made it their vocation in recent years to extol his qualities had to concede that when it came to great power timidity was his watchword."[133] The exemption carved out by Chief Justice Bhagwati, Noorani thought, was "wholly gratuitous and [robbed] the judgment of merit and value."[134] For him, "it was a case of interpretation and the exception, based on pure legislative convenience, [derived] no sanction from Article 213."[135] It was, as he put it, devoid of any justification.[136] Anil Nauriya, in his more measured analysis, pointed out the potential incoherence of the propositions.[137] Given that the decision outlawed "only *successive* re-promulgations indulged in as a practice," Nauriya argued that the Court had in effect upheld three contradictory and inconsistent propositions.[138] "The first, that the subjective satisfaction of the governor as to whether an ordinance is necessary remains outside judicial scrutiny. The second, that in some cases repromulgation may be constitutionally justifiable, and finally, that successive repromulgation would be bad. If the first and second propositions are maintained, it is difficult to see how the third can stand."[139]

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[131] Para 6
[132] Para 6
[133] A. G. Noorani, Supreme Court and Ordinances EPW 22(9) 357-358
[134] Id.
[135] EPW
[136] EPW For other comments see Jill Cottrell, Re-Promulgation of Ordinances in India: A Note *The International and Comparative Law Quarterly*, Vol. 37(4) 1044 -1045 (Oct., 1988).
[137] Anil Nauriya, Indian Judicial Renascence: The Lines Not Crossed Vol. 22 (6) EPW 239-242 (Feb. 7, 1987)
[138] Id. 239 (emphasis in original)
[139] Id. 239

Nauriya, in other words, is not so much concerned with the exceptions alone. Rather, he is interested in how the exceptions compete with the other strands of reasoning – particularly those relating to judicial review – in *D. C. Wadhwa*.[140] For him, the potential for incoherence is too obvious: The propositions don't really add up. But this incoherence, or what he refers to as "judicial creativity combined with judicial coyishness," is not totally useless.[141] Lest his analysis is read too strongly, he is quick to add: "It should not be assumed that we are deploring this phenomenon, for a restrained form of judicial artistry may well be necessary if the court is to uphold essential democratic principles and yet survive."

Noorani, however, is different. Adamantly clear that the exceptions do *not* have justifications, he wants *all* forms of re-promulgations invalidated, not just mechanical ones. And unlike Nauriya, he has no time for "artistry," "creativity" or "coyishness." But for his entire conclusory belligerence, Noorani is remarkably empty in his arguments. He gives no reason for opposing all forms of re-promulgation, except to make the rather banal point that "the exception … derives no sanction from Article 213."[142] Now it is one thing to "describe" or "mention" that the exceptions do not adequately engage with the text. It is entirely something else to pin one's critique solely on the basis that a piece of text (does or) does not "include" something. Texts are more malleable than Noorani is willing to admit, at least in this instance. Secondly, it is unclear how much of Indian constitutional law will meaningfully survive if Noorani's textual standards – whatever they are – are taken seriously. Is the "reasonableness doctrine" of equality borne out by the *text* of Article 14?[143] Is the expansive array of fundamental rights borne out by the

[140] Issues relating to judicial review are discussed in section IV. See infra
[141] Id.
[142] Noorani
[143] India Const. Article 14 ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.") For a judicial exposition of the "reasonableness doctrine" in Article 14, see E. P. Royappa v State of T.N. (1974) 4 SCC 3; Maneka Gandhi v Union of India (1978) 1 SCC 248; Ajay Hasia v Khalid Mujib (1981) 1 SCC 722. For commentary, see M. P. Singh, *The Constitutional Principle of Reasonableness* (1987) 3 SCC (Jour) 31.

text of "life and personal liberty" in Article 21?[144] Is the doctrine of "basic structure" borne out by the text of Article 368(1)?[145] These examples could be easily multiplied.

The textual argument, however, remains attractive; Dr. Wadhwa, in his recent analysis, reiterated the same point.[146] A host of English and Indian decisions on statutory interpretation[147] helped him to the conclusion "… that courts cannot add words into a Statute if the language of the Statute is clear and unambiguous."[148] The language of Article 213, he felt, was "very clear and unambiguous;" re-promulgative exceptions, therefore, had no textual basis.[149] These textual arguments, not to belabor the point, are relatively unhelpful. Clarity, or ambiguity, of the text depends as much on the reader; it is only understandable that Dr. Wadhwa with his long years of dedicated research should find in the text of Article 213 a strong justification for prohibiting what is admittedly an undemocratic practice. Whatever the strength of his textual arguments, Dr. Wadhwa does have credible arguments against re-promulgation. Responding to the twin exceptions of short legislative tenure and too much legislative business carved out by Bhagwati C.J., he says: "If the time at the disposal of the legislature in a particular session is short, the solution does not lie in the repromulgation 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."[150] This may yet be the strongest argument against the specific exceptions carved out in *D. C. Wadhwa*.

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[144] India Const. Article 21. ("No person shall be deprived of his life or personal liberty except according to procedure established by law.") For commentary see S. P. Sathe, *Judicial Activism in India* 106-146 (OUP, New Delhi, 2002).

[145] India Const. Art. 368(1) ("Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.") For a judicial exposition of the doctrine of "basic structure" in Article 368 see Kesavananda Bharati v State of Kerala (1973) 4 SCC 225; Minerva Mills Ltd. V Union of India (1980) 3 SCC 625; Waman Rao v Union of India (1981) 2 SCC 362; S. R. Bommai v Union of India (1994) 3 SCC 1. For analysis, see Sudhir Krishnaswamy, *Democracy and Constitutionalism in India* (OUP, 2009).

[146] Supra n. 106 at 259-62, Endangered Constitutionalism.

[147] See e.g. Renula Bose v Manmatha Nath AIR 1945 PC 108, Sri Ram Narain v State of Bombay AIR 1957 SC 18, Ramnarain v State of Uttar Pradesh AIR 1959 SC 459, Vickers, Sons & Maxim Limited v Evans (1910) AC 444, Magor and St. Mellons Rural District Council v Newport Corporation [1951] 2 All ER 839.

[148] Supra n. 106 at 262, Endangered Constitutionalism

[149] Id.

[150] Id. at 263

In any event, if the Supreme Court is to insist on a category of limited exceptions, what other reasons – apart from those of volume or duration – might validate a re-promulgation? Consider the following events. On October 24, 2001, in the aftermath of the September 11 attacks in New York City, the Vajpayee-led NDA Government brought into effect the Prevention of Terrorism Ordinance (POTO) 2001.[151] Promulgated, barely five weeks before the winter-session of Parliament, the Ordinance created a predictable outrage.[152] When Parliament reassembled for its winter session, the Union Cabinet decided against introducing the Ordinance for parliamentary approval. There was little consensus (among political parties) on the need for such an Ordinance and the Government lacked numerical support, particularly in the Upper House of Parliament, to get the law passed.[153] With the Lower House eventually adjourned *sine die*, the Vajpayee Government decided to repromulgate the Ordinance – The Prevention of Terrorism (Second) Ordinance, 2001 – with some changes.[154] Is the absence of legislative support an adequate reason for re-promulgating an Ordinance? If anything, the absence of legislative support was an indication that legislators disapproved of the law, irrespective of whether the Executive considered it necessary. The acceptability of the lack of legislative support as evidence of "adequate reasons" partly depends on how expandable the latter is. *D. C. Wadhwa* provides no guidelines in this regard. It is unclear if the two exceptions Bhagwati C.J. admitted in his judgment should be read as a closed category.[155]

4.3.1 Experience from Across the Border: Repromulgation in Pakistan

Interestingly, in *The Collector of Customs, Karachi v New Electronics (Pvt.) Limited*,[156] the Supreme Court of Pakistan invoked exceptions similar to *D. C. Wadhwa* in deciding

[151] For contrasting views about the need and efficacy of such an Ordinance, see Rajeev Dhawan, POTO: an attack http://www.hindu.com/2001/11/16/stories/05162523.htm; R. K. Raghavan, Old wine in new bottle? Frontline Vol. 18 (22) 2001 available at http://www.flonnet.com/fl1822/18221140.htm
[152] POTA Ordinance opposition
[153] V Venkatesan, POTO and a stand-off, http://www.hindu.com/fline/fl1826/18260190.htm
[154] POTO promulgated with amendments, http://www.tribuneindia.com/2002/20020101/nation.htm#3
[155] For a less-than-persuasive argument that the repromulgation in this case was unconstitutional see D. Nagasaila & V. Suresh, Re-promulgation of POTO: Is It Legal? Vol. 37(5) EPW 371-372 (2002). See also Era Sezhiyan, Perverting the Constitution Vol. 18(25) *Frontline* Dec. 8-21, 2002 available at http://www.hinduonnet.com/fline/fl1825/18251010.htm.
[156] PLD 1994 SC 363

the legality of re-promulgation in Pakistan. Under Article 89(1) of Pakistan's Constitution, the "President, may, except when the National Assembly is in session, if satisfied that circumstances exist which render it necessary to take immediate action, make and promulgate an Ordinance as the circumstances may require."[157] Such Ordinance, unless withdrawn by the President or disapproved by the National Assembly earlier, "shall stand repealed at the expiration of four months …"[158] In *Collector of Customs*, a Finance Ordinance, containing identical provisions of a previously promulgated ordinance, was reissued at the expiry of four months.[159] As required, the National Assembly was not in session at the moment of repromulgation.

Ajmal Mian and Sajjad Ali Shah JJ., writing for the majority, concluded that the re-promulgation was valid: The underlying philosophy of Article 89 was to ensure that the legislative power remains with the legislative bodies and not usurped by the executive. That justification, however, was not applicable, they said, in cases where the "Assembly [stood] dissolved and for a justifiable reason, [had] not been reconstituted."[160] They explained: "Suppose the National Assembly completes its constitutional tenure, but elections could not take place within constitutional mandate on account of an act of God for nearly one year. Can it be said that after the expiry of a Finance Ordinance upon the expiry of four months, the President cannot re-enact the same by invoking reserve power contained in Article 89 of the Constitution."[161] While Mian and Shah JJ. did not lay down a test for determining cases of valid repromulgation, their hypothetical scenario may be another instance that Bhagwati C.J. would approve of as an exception to the rule that repromulgations are generally prohibited. Like in *D. C. Wadhwa*, the focus in *Collector of Customs* was on adequate reasons. Mian and Shah JJ. did not make an exception for all cases of failed reconstitution: They limited it to cases of failed reconstitution with "justifiable reasons."

[157] Pakistan Const. Article 89(1)
[158] Pakistan Const. Article 89(2)(a)
[159] Finance Ordinance, 1988 (XXII of 1988).
[160] PLD 1994 SC 363
[161] PLD 1994 SC 363

4.4. The Challenge of Contiguous Texts: "Legislative Entry" a Possible Solution?

Back to the Indian Constitution, *D. C. Wadhwa*'s insistence on adequate reasons points towards a higher justificatory burden in cases of re-promulgation. It raises an additional question: When is an Ordinance "the" Ordinance? Consider, once again, both versions of POTO. Three provisions included in the first Ordinance – a five-year sunset clause,[162] the disclosure of journalists' sources of information regarding terrorist activities[163] and forfeiture of the property of terrorists[164] – were particularly objectionable to many political parties. While promulgating it for the second time, the Vajpayee Government deleted the provision relating to the compulsory disclosure of journalists' sources of information, reduced the sunset clause to three years and provided a judicial mechanism for forfeiture of property belonging to convicted terrorists.[165] These amendments, important but presumably not definitive, raise the "difference" question. How different should the second Ordinance be for it to stay clear of the shadows of the first? Or, as I put it before, when is an Ordinance no longer "the" Ordinance? If (mechanical) re-promulgation is constitutionally impermissible, we need a standard by which to distinguish between contiguous Ordinances. The two terrorism-related Ordinances did not raise the issue. The Government admitted that it was re-promulgating the earlier Ordinance. However, what of a situation where the Government insists that the changes to the text of an Ordinance are sufficient to regard the second Ordinance not as an instance of re-promulgation but a new promulgation?

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[162] Prevention of Terrorism Ordinance, 2001, § 1(6). ("It shall come into force at once and shall remain in force for a period of five years from the date of its commencement,…")

[163] Prevention of Terrorism Ordinance, 2001, § 3(8). ("A person receiving or in possession of information which he knows or believes to be of material assistance-(i) in preventing the commission by any other person of a terrorist act; or (ii) in securing the apprehension, prosecution or conviction of any other person for an offence involving the commission, preparation or instigation of such an act, and fails, without reasonable cause, to disclose that information as soon as reasonably practicable to the police, shall be punishable with imprisonment for a term which may extend to one year or with fine or with both; Provided that a, legal practitioner of the accused shall not be bound to disclose such information which he might have received while defending the accused.")

[164] Prevention of Terrorism Ordinance, 2001, § 6(2). ("Proceeds of terrorism, whether held by a terrorist or by any other person and whether or not such person is prosecuted or convicted under this Ordinance, shall be liable to be forfeited to the Central Government or the State Government, as the case may be, in the manner provided under this Chapter.")

[165] Despite the changes and the efforts to mollify political allies, the Vajpayee Government could not gain a majority consensus on both Houses of Parliament and, therefore, opted to repromulgate the Ordinance.

Presumably, contiguous Ordinances fall on a spectrum. At one end are situations where the texts are practically identical, and changes in it are no more than "cosmetic." These changes are more likely meant to provide an appearance of change rather than any meaningful change. At the opposite end are possibly situations where the entire text is different, in that it defines itself differently, establishes different bodies, proposes different remedies and imposes different punishment, if any. In short, there can be situations at this end where the Government, based on inputs received on the first Ordinance, seeks to promulgate an Ordinance to cover for the same emergent circumstances but does so in a way that is genuinely different from the first. Incidentally, the 256 Ordinances promulgated by the State of Bihar do not fall within this spectrum: The Government had no interest even in cosmetic changes. It is not difficult to see through the colorable claims in the first instance, that is, in the case of cosmetic changes. In the second situation, there may be good reasons to believe that it is a genuine case of a new Ordinance, rather than a re-promulgation of the prior text and to that extent may overcome the "mechanical" objections of *D. C. Wadhwa*.[166] Most cases of re-promulgation, however, are likely to fall somewhere in between. Like in POTO, important changes to the existing text may lead to claims that it is a case of fresh promulgation rather than re-promulgation and, therefore, permitted.

However, will textual comparisons help us settle these questions? May be what we need is a test that allows us to distinguish between levels of continuity and change such that there is some meaningful basis for arguing that certain levels of change would metamorphose an Ordinance into a new one.[167] Dr. Wadhwa's recent suggestion for a constitutional amendment, though valuable, is not particularly helpful for interpretative purposes.[168] He suggests the following amendment to Article 123: "Notwithstanding any provision contained in this Constitution and notwithstanding any judgment of any court, no Ordinance promulgated by the President shall be repromulgated by him nor any

[166] Note, however, that we may still have to deal with situations where a sufficiently differently worded text achieves the same result as the first Ordinance. Therefore, our efforts should be directed less towards the text and more towards what it seeks to achieve.

[167] I am sceptical about the possibility of such a test and, more importantly, sceptical about its utility. Tests rarely have a controlling effect. They, at best, provide a form through which to couch one's legal arguments. They are useful, may be, to the extent that they the requirements limit the argumentative capacity of counsels and judges.

[168] Supra n. 106 at 292-93, *Endangered Constitutionalism*.

Ordinance reproducing substantially the provisions of the repealed or lapsed Ordinance shall be promulgated by him under any circumstances."[169] Though a good start, I doubt its eventual utility. After all, "substantial similarity" is precisely the point of contention. Therefore, as opposed to comparing texts, we might be better off looking at the legislative *entry* in which a given promulgation (or its avatar) is situated.

V. THE CONTINUITY OF EFFECT: HOW LONG IS SEVEN AND HALF MONTHS?

5.1 Separating the Continuities of "Tenure" and "Validity"

Secondly, in relation to the text of Article 123, there is a question regarding the continuity of *effect*. As suggested earlier, unless enacted into law, Article 123 ordinarily limits the legal effects of Ordinances to a maximum period of seven months and two weeks. The significance of this tenure is not easily clear. Do actions initiated under an Ordinance have legal effect after it ceases to exist? Or, do actions initiated under an Ordinance continue to have legal effect even though legislation repealing the former does not specifically say so? Should they? Answers to these questions possibly depend on concepts of "tenure" and "validity" and the ways in which they bear upon the text of Article 123(1).

Consider the following situation. An Ordinance is promulgated and, thereafter, enacted into law with identical provisions. After the Act comes into force, a person is prosecuted for an offence purported to have been committed while the Ordinance was in force. Do the provisions of the now repealed Ordinance "carry over" in effect to the new Act to generate a fiction of continuing legal validity? The Supreme Court was confronted with the question in *State of Punjab v Mohar Singh*.[170] The respondent was prosecuted for providing false information under the provisions of a legislation that was not in force when the offense was committed.[171] At the relevant time, an Ordinance, which was subsequently repealed and replaced with the Act, was in force.[172] In short, the effect of repeal of an Ordinance was in question.

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[169] Supra n. 106 at 293, *Endangered Constitutionalism*.
[170] AIR 1955 SC 84.
[171] Act XII of 1948.
[172] No. VII of 1948

In deciding the matter, the High Court turned to the General Clauses Act, 1897.[173] Under section 6, where "any Central Act or regulation … repeals any enactment … then, unless a different intention appears, the repeal shall not … (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid." For the High Court, the words "where any Central Act repeals" were capable of at least two distinct meanings, a narrow and a wide one. Narrowly construed, "repeal" could mean repeal *simpliciter*, i.e. an enactment that simply repeals the existing law without saying anything more. Widely construed, "repeal" could include situations where the existing Act is repealed and replaced with a new law, as in *Mohar Singh*. The High Court concluded that the application of Section 6 (i.e. the continuing validity of right, privilege, obligation, liability etc.) is limited only to cases of narrow repeal.[174] Why so?

Cases of narrow appeal, the High Court contended, raise the possibility that the Legislature may not have given thought to the matter of prosecuting old offenders or the matter may have been inadvertently omitted. In those situations, the presumption raised in Section 6 would apply. But no such inadvertence may be presumed in cases of wide repeal: If the new Act does not deal with the matter, it may be presumed that the Legislature did not deem it fit to keep alive the liability incurred under the old law.[175] In other words, for the High Court, obligations incurred under the old law do *not* have continuing validity unless the latter legislation unequivocally says so. The Supreme Court disagreed. The presumption in section 6, Mukherjea J. writing in the Supreme Court said, applied in both cases of repeal, narrow and wide. In cases where repeal is followed by fresh legislation on the same subject, "one has to look to the provisions of the new Act not to ascertain if it expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them."[176] In other words, unless the new legislation betrays a clear intention to the contrary, the presumption applies and obligations incurred under the old law do have continuing validity.

[173] Act 10 of 1897
[174] Para 10
[175] Para 10
[176] Para 10

5.2 Distinguishing Six Possibilities of Repeal

In some ways, the point of law raised in *Mohar Singh* pertains to statutory interpretation. However, it does have an interesting and somewhat important bearing when discussed specifically in the context of Ordinances. There are six possibilities regarding repeal and the introduction of a new enactment:

A. An Act is (simply) repealed. Nothing else follows.
B. An Act is repealed and replaced by another Act.
C. An Act is repealed and replaced by an Ordinance.
D. An Ordinance is repealed and replaced by an Act.
E. An Ordinance is repealed and replaced by another Ordinance.
F. An Ordinance is (simply) repealed (by an Act). Nothing else follows.

(B) and (E) do not raise much difficulty. In case of (B), where an Act replaces another Act, the locus of the presumption is not particularly significant, in the sense that either interpretation would validate a parliamentary enactment. Similarly, (E) does not raise much difficulty either, given our earlier discussion regarding the continuity of form. To repeal an existing Ordinance and (mechanically) replace it with a "substantially similar" one would fall foul of Article 123. However, (C) and (D) are somewhat problematic. If the Supreme Court were correct in its interpretation of the repeal provision, it would follow that a validly enacted legislation that repeals an Ordinance, i.e. (D), would continue to provide legal cover for all actions done under the prior Ordinance, even when it does not unequivocally say so.

For the same reason, it would follow that an Ordinance that repeals and replaces an existing Act, i.e. (C), cannot wipe out the validity of acts done under the repealed Act unless it specifically says so. To the extent that our objective is to constrain the scope and effect of Article 123, the Supreme Court's interpretation produces a favorable result in (C), but an unfavorable one in situation (D). To say the obvious, the converse would be true for the High Court. If the High Court is correct in its interpretation of the repeal provision, it would follow that a validly enacted legislation that repeals an Ordinance, i.e. (D), would not provide legal cover for actions done under the prior Ordinance, unless it unequivocally say so. For the same reason, it would follow that an Ordinance that repeals and replaces an existing Act, i.e. (C), can wipe out the validity of acts done under the

repealed Act unless it specifically excludes such a possibility. Once again, if our objective is to constrain the scope and effect of Article 123, the High Court's interpretation produces a favorable result in (D), but an unfavorable one in situation (C).

The symmetrical structure of the effect of section 6 on Acts and Ordinances suggests that neither interpretation does better. Irrespective of where the locus of presumption is made to fall, it is difficult to avoid privileging Ordinances, at least on certain occasions. One way of avoiding this impasse may be to introduce an Act-Ordinance distinction in the interpretation of Section 6 of the General Clauses Act, 1897. To use the Supreme Court's reasoning, that would imply that in cases where an Ordinance repeals an existing Act, all prior rights, privileges, obligations etc. survive unless there is manifest intention to destroy them. Conversely, when an Act repeals an existing Ordinance, all prior rights, privileges, obligations are wiped out unless there is a manifest concession to the contrary. If we preferred the High Court's version of presumption, the arguments would be in the reverse. However, this distinction, attractive as it may be, is presumably unconstitutional. Article 123(2) makes it somewhat clear that "an Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament." To the extent that the foregoing argument privileges Acts over Ordinances, it does not satisfy the "same force and effect" requirement of Article 123(2).

This discussion on the continuity of effect of Ordinances points to two things. First, it is perhaps unlikely that any interpretation could be proposed that would not privilege Ordinances at least on certain occasions. Nonetheless, empirically speaking, Ordinances generally been used to introduce legislations that are subsequently enacted into Acts, and rarely to repeal existing legislations that were validly enacted earlier. Therefore, if the sole purpose of interpreting section 6 was to constrain the extra-ordinary legislative powers of the Executive, the High Court's interpretation of favoring a narrow reading of repeal is a better view. That view would require that for prior rights, privileges, obligations etc. under a repealed Ordinance to survive in a newly enacted legislation would require that the Parliament manifestly authorize the same.

5.3 The Difference Quotient: Why is an Ordinance not an Act?

More importantly, our discussion also focuses light on an aspect of Ordinance that is usually overlooked. An Ordinance, by its very nature, is different from an Act in one respect. Acts do not lapse, *only* Ordinances and Bills do. An otherwise valid Act ceases to have legal effect if and only if it is repealed, either by a separate Act or by the terms of the Act itself. Of course, an Act may fall into disuse. A state of disuse, however, is not the same as being legally invalid. In contrast, an Ordinance ceases to have effect, i.e. lapse, after six weeks from the date Parliament reassembles, unless both Houses of Parliament enact the same into law. But the lapse of an Ordinance is not the same as its repeal. Repeal involves an affirmative act; it is a conscious decision to remove a valid legislation from having the force and effect of law. In contrast, lapse involves inaction; to allow an Ordinance to lapse is to let it drift into a state of legal invalidity. In other words, repeal is a formal statement of parliamentary approval. Lapse of a Bill or Ordinance, on the other hand, signifies a *failure* to secure such an approval.

The distinction is important as far as the General Clauses Act, 1897[177] provides for the continuity of rights, privileges, obligations etc. *only* in cases of repeal.[178] There is no provision in the Act that provides for the continuity of legal actions initiated under Ordinances (and Bills) that have lapsed. Consider, once again, the set of Ordinances promulgated by the Vajpayee-led NDA Government in October 2001. With the Lower House adjourned *sine die*, the Vajpayee Government decided to repromulgate the Ordinance - The Prevention of Terrorism (Second) Ordinance, 2001- with some changes. Section 64(1) of the (Second) Ordinance clarified that "The Prevention of Terrorism Ordinance, 2001 is hereby repealed." Additionally, "notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Ordinance." It is only because section 64 repealed the earlier Ordinance that the presumption raised in Section 6 of the General Clauses Act, 1897 kicked in. Attorneys were correct in insisting that prosecutions initiated against accused persons during the term of the first Ordinance had

[177] Act 10 of 1897
[178] See General Clauses Act, 1987, §§ 6 & 6A

continued validity.[179] This validity, however, depended not on any abstract principles but on section 64 of the latter Ordinance.

Now consider a situation where the first Ordinance simply lapses and is not superseded by any other Ordinance or Act covering the same field. Would actions initiated during the term of the Ordinance enjoy continuing validity? Section 6 of the General Clauses Act, 1897 would *not* apply. It is not a case of repeal. Indeed, there is nothing in the General Clauses Act, 1897 that could be summoned to explain the continuing validity of actions initiated under a lapsed Ordinance. In such circumstances, it is misleading to suggest that actions initiated under a lapsed Ordinance can never be wiped out retrospectively. Rather, prior rights, privileges, obligations etc. under a lapsed Ordinance *always* get wiped out retrospectively unless it is superseded by a "Repeal" Act or Ordinance (which in turn would have to be eventually legislatively validated).[180] In other words, for actions under a lapsed (or "failed") Ordinance to enjoy continuing validity, at least its repeal must be legislatively enacted.

5.4 Judicial Narratives: Three Reasons Why The Supreme Court is Wrong

This foregoing argument suggests that the Supreme Court erred in *State of Orissa v Bhupendra Kumar Bose*[181] in upholding the continuing validity of rights created under an Ordinance that eventually lapsed. The State of Orissa promulgated an Ordinance that, amongst others, sought to nullify a High Court decision invalidating the results of a local municipal election.[182] The Ordinance lapsed. The Supreme Court was confronted with a question concerning its effect. Did the Ordinance, despite its lapse, have continuing validity? Or, did its lapse revive the effects of the High Court's earlier invalidation? Gajendragadkar J., writing for the Supreme Court, rejected what he called the "inflexible and universal rule" that all rights, obligations etc. cease to have effect on the expiry of a temporary Act.[183] "What the effect of the expiration of a temporary Act would be must

[179] http://www.tribuneindia.com/2001/20011221/nation.htm#3
[180] So without the (Second) Terrorism Ordinance, all arrests made and prosecutions initiated under the first during its two-month tenure would have lost legal validity.
[181] AIR 1962 SC 945.
[182] Para 1
[183] Para 21

depend upon the nature of the right or obligation resulting from the provisions of the temporary Act," he wrote[184] "If the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and had been imposed upon a person, the imposition of the penalty would survive the expiration of the statute."[185] Therefore, based on what he took to be "the true legal position in the matter," Gajendragadkar J. concluded that the Ordinance provided continuing validated to the municipal elections, even after its lapse.

This rationale was taken up further in *T. Venkata Reddy v State of Andhra Pradesh*,[186] where the Supreme Court concluded that the lapse of an Ordinance does not revive the government posts abolished under it.[187] To understand *Venkata Reddy*, consider the text of Article 213(2): "An ordinance promulgated under this article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor, but every such Ordinance — (a) shall be laid before the Legislative Assembly of the State, or where there is a Legislative Council in the State, before both the Houses, and *shall cease to operate* at the expiration of six weeks from the reassembly of the Legislature..."[188] The Supreme Court concluded that "the Constitution does not say that the Ordinance shall be void from the commencement on the State Legislature disapproving it."[189] Rather, "it shall cease to operate."[190] The Court took this to mean "it should be treated as being effective till it ceases to operate on the happening of the events mentioned in Clause (2) of Article 213."[191]

Operation or tenure is separate from validity. *Venkata Reddy* conflates the two. An Ordinance ceases to operate on its failure to secure a legislative approval. This point, however, says nothing about the validity of actions previously undertaken. What make an Ordinance valid? Necessary circumstances and future legislative approval make an Ordinance valid. To put it differently, the validity of an Ordinance is not dependent on

[184] Para 21
[185] Para 21
[186] AIR 1985 SC 724
[187] Para 18
[188] India Const. Article 213(2) (emphasis added)
[189] Para 18
[190] Para 18
[191] Para 18

separate time zones. Rather, future legislative approval is built into its *initial* validity. So, when Article 213(2) says that an Ordinance ceases to operate, it ceases to operate as if it had never existed.

Having legitimized previous actions under a failed Ordinance, the Supreme Court went a step further. How does one undo the permanent effects of the failed Ordinance? If *Venkata Reddy* to be believed, it "can be achieved by passing an express law operating retrospectively to the said effect."[192] The argument leaves us with a situation that looks something like this. The Executive may create or destroy rights, enact new crimes or impose new taxes and all actions taken, at least within a certain period, have permanent validity. A Legislature, even by its active disapproval, cannot invalidate these actions. A properly enacted law would be needed to undo the effects of an executive act. This is a cavalier state of affairs. And it undermines the fundamental idea that law with permanent effects can only be enacted through a legislative forum.

In reiterating my earlier argument that rights, privileges, obligations etc. do not survive beyond the life of a lapsed Ordinance, I will reiterate three points. *Bhupendra Bose* misreads section 6 of the General Clauses Act, 1897; *Venkata Reddy* misreads Article 213. They fail to distinguish between the repeal of a law and the lapse of an Ordinance. Also, English decisions, based on the Interpretation Act, 1889, are unhelpful in this regard. The particularities of the argument need to take into account the extra-ordinary legislative power that Ordinances represent and the necessity of curtailing its scope and effect.[193] Finally, *Bhupendra Bose* negatives an important limitation in Article 123; *Venkata Reddy* does so for Article 213. In providing a continuing life to the rights and obligations created under a lapsed Ordinance, an Ordinance, even when it ceases to operate under Article 123 (or Article 213), does not *really* cease to operate. Seven and half months, for Gajendragadkar J. it seems, are not really seven and half months. It could mean a year, five years, 10 years or even an indefinite period of time. If *Bhupendra Bose* were correct, it would imply that taxes imposed under an Ordinance that eventually lapses may be valid for an indefinite period. There are strong reasons to suggest that such a view is inconsistent with the "cessation" requirement in Article 123. Bearing in mind

[192] Para 19

[193] See Steavenson v Oliver 151 E.R. 1024; Warren v Windle 102 E.R. (K.B.) 578; Wicks v Director of Public Prosecutions (1947) A.C. 362.

these infirmities, the rule concerning continuing validity of lapsed Ordinances must be exactly what Gajendragadkar J. said it could not be – inflexible and universal. Lapsed Ordinances do *not* have continuing effect; everything done under its authority gets wiped out.

We may also add policy considerations to this list of reasons for restricting the operation of Ordinances. Admittedly, undoing the effects of administrative and judicial actions initiated, considered and completed is an arduous task. It has the potential to create infinite complexities. That is a good thing. Prior knowledge that the Executive would have to undo actions already completed – unless it succeeds in securing legislative approval in future – will (and should) weigh heavily in deciding if an Ordinance is needed. At the moment, the rule of *defacto* validity invites a cavalier approach. A failed Ordinance has no legal cost so to speak; it is unlikely to promote responsible practices. A legal requirement to undo completed transactions under a failed Ordinance will do much to promote responsible attitude while dramatically decreasing the number of Ordinances to begin with.

To that extent, the separate opinion of Sujata Manohar J. in *Krishna Kumar Singh v State of Bihar*[194] careful consideration. The State of Bihar, had by a series of (nearly identical) Ordinances taken over the management and control of non-governmental educational institutions, making previous employees government employees under the new management.[195] Eventually, the Ordinance (and its subsequent avatars) failed: The Bihar Legislative Assembly did not enact it into law.[196] Manohar J. concluded that the failed Ordinance did not create any permanent effects. While her views, in my opinion, do not go far enough, they are closest to the arguments outlined earlier, and a possible judicial basis for reassessing the law on permanent effects.

> The general rule [is] that an Ordinance ceases to have effect when it lapses or comes to an end … Since an Ordinance by its very nature, is limited in duration and is promulgated by the Executive in view of the urgency of the situation, we must examine the rights which are created by an Ordinance carefully before we

[194] AIR 1998 SC 2288.
[195] Para 16
[196] Para 15

> decide whether they are permanent. Every completed event is not necessarily permanent.[197]

What is done, Mohar J. reminded us, can often be undone. Similarly, what is constructed can be demolished.[198] Therefore,

> One should not readily assume that an Ordinance has a permanent effect, since by its very nature it is an exercise of a limited and temporary power given to the Executive. Such a power is not expected to be exercised to bring about permanent changes unless the exigencies of the situation so demand. Basically, an effect of an Ordinance can be considered as permanent when that effect is irreversible or possibly when it would be highly impractical or against public interest to reverse it e.g. an election which is validated should not again become invalid. In this sense, we consider as permanent or enduring that which is irreversible. What is reversible is not permanent.[199]

Using this interpretative approach, Manohar J. reversed the status of employees to their previous version. The lapsed Ordinance, she concluded, did not make the staff permanent government employees.[200]

5.5 Learning From Neighbors: Pakistan's Struggle With Foundational Concepts

Ordinance-related provisions in Pakistan's Constitution stand in contrast to the argument I have sketched out. Article 89(2) declares that "An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament and … (a) shall be laid before both Houses (of Parliament), and shall stand *repealed* at the expiration of four months from its promulgation or, if before the expiration of that period a resolution disapproving it is passed by either House, upon the passing of that resolution."[201] Note that this provision, unlike Article 123 in the Indian Constitution, equates the failure to validly enact an Ordinance into law with repeal. In Pakistan, to say that an Ordinance has lapsed is to say that it was repealed: They are one and the same. Further, Article 264 provides for the effect of repeal: "Where a law is repealed or is deemed to have been

[197] Para 31
[198] Para 31
[199] Para 31
[200] Para 37
[201] Pakistan Const. Article 89(2) (emphasis added).

repealed, by, under, or by virtue of the Constitution, the repeal shall not except as otherwise provided in the Constitution, … (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law; … or (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the law had not been repealed."[202]

Radical implications of the "repeal effect" are not difficult to see. An Ordinance, say, criminalizing kite flying, is promulgated in Pakistan. When introduced in the National Assembly, the Ordinance, given the popularity of the sport, fails to get majority support. It lapses, or, to use the language of Article 89 stands repealed. Under Article 264, the so-called repeal notwithstanding, all prosecutions initiated during the tenure of the Ordinance (and possible future convictions) are legally valid. This (enforced) legality is disturbing, and its justifications aren't easily clear. Penalizing a person (or, for that matter conferring any right, privilege, obligation or liability) under a piece of "legislation" that a majority of elected members have expressed formal opposition to is troubling. And if *Bhupendra Bose* and *Venkata Reddy* are correct, some version of Article 89 exists in the Indian Constitution too, even though it does not seem to exist.

Why is Pakistan saddled with this troubling possibility? Inability to make a relatively simple distinction between repeal and lapse is a large part of the story. Repeal, to reiterate an earlier point, is an affirmative act: Members agree to remove a law from the statute books. Lapse, on the other hand, is about Parliament *refusing* to do something: Members agree that something should not be enacted into law. This is most evident in case of Bills. A Bill lapses when the Executive, having introduced it in Parliament, fails to secure a majority. No one argues, and rightly so, that a Bill, whether lapsed or

[202] Pakistan Const. Article 264. (Where a law is repealed or is deemed to have been repealed, by, under, or by virtue of the Constitution, the repeal shall not except as otherwise provided in the constitution, (a) revive anything not in force or existing at the time at which the repeal takes effect; (b) affect the previous operation of the law or anything duly done or suffered under the law; (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the law; (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the law; or (e) affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may he imposed, as if the law had not been repealed.")

otherwise, should have formal quality in a legal system. The argument is no different for Ordinances. Secondly, Ordinances modify the classic Westminster system in an important way. Unlike in the UK, the Executive in India or Pakistan may promulgate "enactments." When in exercise of executive power, the permanence of an enactment remains subject to future parliamentary approval. Without such approval, an Ordinance is really an executive decree with the trappings of an Act. Allowing an Ordinance to generate permanent effects despite its failed status legitimizes an alternative forum for enacting laws and undermines the fundamentals of parliamentary democracy. This is a dangerous slippery slope Pakistan has treaded into. And the option is not worth emulating. There are good reasons for reconsidering *Bhupendra Bose* and *Venkata Reddy*.

VI. MAJESTIC SATISFACTION: WHAT IF A PRESIDENT BELIEVES IN FLYING HORSES?

Provisions of an Ordinance, like those of any Act, are subject to judicial review. Ordinances may not contain provisions "which Parliament would not under this Constitution be competent to enact."[203] However, is the satisfaction of the President about the "need for immediate action" subject to judicial review? Consider, once again, the text of Article 123(1): "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."[204] The focus here, it must be emphasised, is on the President's satisfaction that a new law is immediately needed. When Parliament is in session, ordinarily, a Parliamentary Committee will inquire into the need for a particular legislation. Presumably, such a Committee will study the existing legal arrangements, applicable laws, consider new situations and, if necessary, propose a new piece of legislation to Parliament.

With Ordinances, however, a similar assessment is not possible; by definition, Parliament is not in session. It is for the President, on the advice of the Council of Ministers, to assess the need for an Ordinance. When we talk of judicial review of

[203] Article 123(3). See also Nagaraj v State of Andhra Pradesh AIR 1985 SC 551.
[204] Article 123(1) (emphasis added)

presidential satisfaction, that is the core of our discussion. Is the President's assessment of immediacy subject to judicial review? In 1975, the following amendment was appended to Article 123: "Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in Clause (1) shall be final and conclusive and shall not be questioned in any Court on any ground."[205] Three years later, it was deleted.[206]

6.1 Judicial Review of Executive Presidential Satisfaction: An Outline

Before we get to the discussion, some matters should be clarified. Presidential satisfaction in the Indian Constitution, under certain circumstances, it is now commonly agreed, *is* subject to judicial review.[207] Three kinds of emergencies in Part XVIII of the Constitution directly implicate presidential satisfaction. Article 352 deals with "national security:" "If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by proclamation, make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as may be specified in the proclamation."[208] Article 356 deals with failure of constitutional machinery in the states: "If the President, ... is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the legislature of the State ..."[209] Finally, Article 360 deals with financial emergency: "If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened, he may by a Proclamation make a declaration to that effect."[210] Proclamation of emergency in either situation involves significant transfer of powers to the Union Executive, including the authority to "enact" legislation, if delegated

[205] 38th Constitution (Amendment) Act, 1975, § 2
[206] 44th Constitution (Amendment) Act, 1978, § 14
[207] See Rameshwar Prasad v Union of India (2006) 2 SCC 1; S. R. Bommai v Union of India (1994) 3 SCC 1, Sunderlal Patwa v Union of India 1993 Jab L.J. 387.
[208] India Const. Article 352(1)
[209] India Const. Article 356(1)
[210] India Const. Article 360(1)

by Parliament.[211] While emergency under Article 352 has been invoked thrice but never judicially challenged, Article 360 has never been invoked.[212] In contrast, Article 356(1) has been invoked over a hundred times, and the President's satisfaction frequently challenged.[213]

In *S. R. Bommai v Union of India*,[214] a plurality in the Supreme Court concluded that a President's satisfaction under Article 356(1) is judicially reviewable. Such satisfaction, Sawant J. wrote, cannot be "the personal whim, wish, view or opinion or the *ipse dixit* of the President." Rather, it must be

> ... a legitimate inference drawn from the material place before him which is relevant for the purpose. In other words, the President has to be convinced of or has to have sufficient proof of information with regard to or has to be free from doubt or uncertainty about the state of things indicating that the situation in question has arisen. Although, therefore, the sufficiency or otherwise of the material cannot be questioned the legitimacy of inference drawn from such material is certainly open to judicial review.[215]

In his concurring opinion, Jeevan Reddy J. confirmed the same view.

> Without trying to be exhaustive, it can be stated that if a Proclamation is found to be mala fide or is found to be based wholly on extraneous and/or irrelevant grounds, it is liable to be struck down ... In other words, the truth or correctness of the material cannot be questioned by the court nor will it go into the adequacy of the material. It will also not substitute its opinion for that of the President. Even if some of the material on which the action is taken is found to be irrelevant, the court will still not interfere so long as there is some *relevant* material sustaining the action. The ground of malafide takes in inter alia situations where the Proclamation is found to be a clear case of abuse of power, or what is sometimes

[211] See India Const. Article 357(1) ("(1) Where by a Proclamation issued under clause (1) of article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent - (a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorize the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;")

[212] M. P. Singh, *V. N. Shukla's Constitution of India* 843 (EBC, New Delhi, 2008).

[213] For a description of some of these "emergencies" see Glanville Austin, *Working of a Democratic Constitution* 534 – 545 (OUP, New Delhi, 1999). See also

[214] (1994) 3 SCC 1

[215] (1994) 3 SCC 1 para 74 (per Sawant J.)

called fraud on power – cases where this power is invoked for achieving oblique ends.[216]

In *Rameshwar Prasad v Union of India,*[217] Sabharwal C.J., for the majority, reiterated the *S. R. Bommai* view that presidential satisfaction under Article 356(1) is justiciable: "The existence of satisfaction can be challenged on the ground that it is malafide or based on wholly extraneous and irrelevant ground." [218] This view, he thought, was consistent even with the narrow principles of judicial review upheld in *State of Rajasthan v Union of India.*[219] To wit, with or without the expanded version in *S. R. Bommai*, subjective satisfaction of the President is subject to judicial review. To be sure, courts will not lightly attribute bad faith or motive to the President or the Union Council of Ministers on whose advice she acts.[220] But if adequate materials are shown to exist, presidential satisfaction can be (and has been) successfully challenged.

So doesn't this argumentative scheme exhaust the question of judicial review in Article 123? After all, Article 123(1) also deals with cases of presidential satisfaction. Syllogistically put, the argument goes like this.

1. Presidential satisfaction [e.g. in Article 356(1)] is judicial reviewable.
2. An Ordinance under Article 123(1) involves presidential satisfaction.
3. Therefore, presidential satisfaction in Article 123(1) is judicial reviewable.

This argument is misleading; it does not resolve the matter. It does not do so because the *nature* of presidential satisfaction in Article 123(1) is qualitatively different from what the Supreme Court has previously dealt with. The syllogism misleadingly assumes a kind of homogeneity; it is as if satisfaction under Article 123(1) is similar to the kind of satisfaction under Article 356(1). When the President acts on the advice of the Union Council of Ministers under Article 356(1), he acts as the executive head of the

[216] (1994) 3 SCC 1 para 374 (per Jeevan Reddy J.) (emphasis in the original)
[217] (2006) 2 SCC 1
[218] (2006) 2 SCC 1 para 147 (per Sabharwal C. J.)
[219] (1977) 3 SCC 592.
[220] (1994) 3 SCC 1 para 375 (per Jeevan Reddy J.) ("It is necessary to reiterate that the court must be conscious while examining the validity of the Proclamation that it is a power vested in the highest constitutional functionary of the Nation. The court will not lightly presume abuse or misuse. The court would, as it should, tread wearily, making allowance for the fact that the President and the Union Council of Ministers are the best judges of the situation, that they alone are in possession of information and material – sensitive in nature sometimes – and that the Constitution has trusted their judgment in the matter.")

State. In contrast, when the President acts under Article 123(1), she acts as a substitute for Parliament, and does so in her original *legislative* capacity: It is as if the President (represented by the Union Council of Ministers) morphs into the Parliament. While the conceptual boundaries between executive and legislative powers are not easy to draw, the Supreme Court in India has emphasized the distinction on a plurality of occasions.[221]

6.2 Its Law: The Legislative Nature of Ordinances

In *R. K. Garg v. Union of India*,[222] Chief Justice Chandrachud explained the nature of Article 123(1): "It will be noticed that under this Article legislature power is conferred on the President exercisable when both Houses of Parliament are not in session."[223] Though not a parallel power of legislation, "legislative power [had] been conferred on the executive by the Constitution makers for a necessary purpose ..."[224] In *A. K. Roy v Union of India*,[225] he made the point more forcefully. The heading in Chapter III of Part V ("Legislative Power of the President"), the text of Article 123(2) that confers an Ordinance with "the same force and effect as an Act of Parliament" and the text of Article 13(3) that enumerates law as "including ... Ordinances" firmly point to the conclusion that Ordinances are a product of legislative power, he said.[226] And Article 367(2) was sufficient to take care of any lingering doubts: "Any reference in this Constitution to Acts or laws of, or made by, Parliament, … shall be construed as including a reference to an Ordinance made by the President ..." Taken together, the provisions, Chief Justice Chandrachud wrote, are a compelling reason to conclude that "the Constitution makes no distinction in principle between a law made by the legislature and an ordinance issued by the President. Both, equally, are products of the exercise of legislative power and, therefore, both are equally subject to the limitations which the Constitution has placed upon that power."[227]

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[221] On the point of distinction between executive and legislative action see
[222] [1982] 1 SCR 947.
[223] Para 6
[224] Para 6
[225] AIR 1982 SC 710.
[226] Para 12-13
[227] Para 14

Thus far, I have laid out two easily recognizable points. Presidential satisfaction, as an exercise of executive power, the Supreme Court has said, is judicially reviewable on limited grounds. Secondly, when the President promulgates an Ordinance under Article 123(1), she acts in exercise of her original legislative power. While both situations involve satisfaction, they do so in different capacities. For that reason, the earlier syllogism, I suggested was misleading. But it still doesn't explain why the difference matters. Or, to put it interrogatively: why does it matter that the nature of satisfaction involved is different? If presidential satisfaction as an exercise of executive power is subject to judicial review, does it not lend us to the argument that presidential satisfaction of legislative power is also judicially reviewable? Deductively put, the argument goes like this.

1. Presidential satisfaction, as an exercise of executive power, is subject to judicial review on grounds of bad faith, malafide or arbitrariness.
2. Therefore, presidential satisfaction, in exercise of legislative power, *should* be subject to judicial review on similar grounds.

This sort of deductive reasoning, however, is problematic. Working back from a point of concession might best explain why that is so.

6.3 Exclusive Club: The Challenge of Reviewing "Legislative" Satisfaction

So let us assume that presidential satisfaction as an exercise of legislative power is subject to judicial review. And that it is subject to review on grounds similar to those of executive power, i.e. on grounds of irrationality, illegality or malafide exercise of power. Two roadblocks follow.

First, the assumption undoes a series of decisions wherein the Supreme Court has consistently held that the exercise of legislative power in Indian Constitution is subject to two conditions *only*. In *Indira Nehru Gandhi v. Raj Narain*,[228] Chandrachud J. (as he was then) explained the tests for legislative validity. "Ordinary laws have to answer two tests

[228] AIR 1975 SC 1590

for their validity," he said.[229] "(1) The law must be within the legislative competence of the legislature as defined and specified in Chapter I, Part XI of the Constitution, and (2) it must not offend against the provisions of Article 13(1) and (2) of the Constitution."[230] This view has found support on a number of occasions. In *State of Andhra Pradesh v. McDowell & Co.*,[231] Chief Justice Ahmadi reiterated the idea that the power of the Parliament or for that matter, the State Legislatures, is restricted in two ways: "A law made by the Parliament or the Legislature can be struck down by Courts on two grounds *and two grounds alone* (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the constitution or of any other constitutional provision."[232] There is no third ground, he insisted.[233] And as recently as 2006, the Supreme Court in *Kuldip Nayar v. Union of India* confirmed the same.[234] Herein lies the first difficulty of making presidential satisfaction as an exercise of legislative power subject to judicial review.

But there is a second hurdle too. Even assuming that these decisions can be cast aside and new grounds added, the *nature* of the grounds in question is severely problematic. Can an Ordinance be challenged on the ground that the President was motivated by animus towards a person or group of persons? Or, can an Ordinance be challenged on the ground that the President did not apply her mind in promulgating it? A long series of judicial decisions and scholarly commentary, both in India and elsewhere, suggest that the answer is in the negative.

Take, for example, English public law. In *The Proprietors of the Edinburgh & Dalkeith Railway Company v John Wauchope*,[235] Lord Campbell strongly objected to the idea that courts may enquire into the proceedings of an Act. "All that a Court of Justice can do," he said, "is to look to the Parliamentary roll."[236] But "no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done

[229] Para 691
[230] Para 691.
[231] AIR 1996 SC 1627.
[232] Para 45 (emphasis added)
[233] Para 45. See also Public Services Tribunal Bar Association v State of U.P. and Another AIR 2003 SC 1115.
[234] AIR 2006 SC 3127.
[235] (1842) VIII Clark & Finnelly 710.
[236] (1842) VIII Clark & Finnelly 710, 725.

previous to its introduction, *or what passed in Parliament during its progress in its various stages through both Houses*."[237] That is to say, if an Act of Parliament is obtained improperly (for reasons of motive, non-application of mind or otherwise), it is for the legislature to correct it by repealing it.[238] Nor is the position any different in cases where a legislature is deceived, and there is proof to that effect: "If a mistake has been made, the legislature alone can correct it."[239] In *Hollinshead v Hazleton*,[240] Lord Atkinson asserted the point more firmly. "The motives which influence the Legislature in passing any particular enactment, or the purposes or objects it desired to effect, can only be legitimately ascertained from the language of the enactment itself viewed through the light of the circumstances in reference to which that language was used."[241] Motive, if any, must be located in the text. And, therefore, when "these [other] motives, purposes, or objects are not, expressly or impliedly, revealed in language of … [a] statute, … it is," Lord Atkinson wrote, "wholly illegitimate to surmise or conjecture what those unrevealed motives, purposes, or objects may have been …"[242] *Halsbury's Laws of England* puts the point even more emphatically: "If a Bill has been agreed to by both Houses of Parliament, and has received the Royal Assent, it cannot be impeached in the courts on the ground that its introduction or passage through Parliament, was attended by any irregularity or even on the ground that it was obtained by fraud."[243] In that sense, while irregularity or fraud may be good reasons to review executive acts, it is relatively irrelevant in reviewing the exercise of legislative power.

Similar views have found favor in US constitutional law as well. In *Amy v Watertown*,[244] Bradley J. explained the (ir)relevance of motive in scrutinizing legislation:

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[237] (1842) VIII Clark & Finnelly 710, 725. (emphasis added)
[238] See Lee v The Bude and Torrington Junction Railway Company (1870-71) L.R. 6 C.P. 576, 582. (Willes J.)
[239] Labrador Co. v. The Queen [1893] A.C. 104, 123. (per Lord Hannen) See also British Railways Board Appellants v Pickin [1974] A.C. 765.
[240] [1916] 1 A.C. 428. See also River Wear Commissioners v. William Adamson (1877) 2 App. Cas. 743.
[241] [1916] 1 A.C. 428, 438.
[242] [1916] 1 A.C. 428, 438. See also Hoani Te Heuheu Tukino v. Aotea District Maori Land Board [1941] A.C. 308. ("It is not open to the court to go behind what has been enacted by the legislature, and to inquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it. The court must accept the enactment as the law unless and until the legislature itself alters such enactment, on being persuaded of its error.") *Id*. at 322.
[243] Halsbury's Laws of England, Vol. 36 para. 560 (3rd ed., 1961).
[244] 130 U.S. 301.

"With motives we have nothing to do."[245] While individual may be actuated by improper motives, the same "cannot be attributed to a state legislature in the passage of any laws for the government of the State."[246] In *United States v Des Moines Navigation and Railway Company*,[247] Brewer J. proposed a conclusive presumption of good faith: "The knowledge and good faith of a legislature are not open to question. It is conclusively presumed that a legislature acts with full knowledge, and in good faith."[248] And the relatively stability of the concept allowed Brandeis J. in *Hamilton v Kentucky Distilleries & Warehouse Company*[249] to conclude that "no principle of [US] constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress."[250]

The Supreme Court of India, on more than one occasion, has applied these principles. In *K.C. Gajapati Narayan Deo v. State of Orissa*,[251] discussing the doctrine of colorable legislation, the Court made it amply clear that legislative competence "does not involve any question of bona fides or mala fides on the part of the legislature."[252] In *Dharam Dutt v Union of India*,[253] Chief Justice K. G. Balakrishnan assessing the validity of a law appropriating private property reiterated the *Narayan Deo* view: "If the

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[245] 130 U.S. 301, 319.
[246] 130 U.S. 301, 319
[247] 142 U.S. 510. See also See also Fletcher v. Peck, 6 Cranch, 87; Ex parte McCardle, 7 Wall. 506; Doyle v. Continental Insurance Co., 94 U.S. 535; Powell v. Pennsylvania, 127 U.S. 678.
[248] 142 U.S. 510, 544.
[249] 251 U.S. 146
[250] 251 U.S. 146. 161. See also McCray v. United States, 195 U.S. 27, 53-59; Weber v. Freed, 239 U.S. 325, 330; Dakota Central Telephone Co. v. South Dakota, 250 U.S. 163, 184. See also Thomas Cooley, CONSTITUTIONAL LIMITATIONS 186 (1st ed., 1868, 1999) ("From what examination has been given to this subject, it appears that whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished and the mode of enacting it, has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative, the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the special act, it would seem that the passage of the act itself might be held to be equivalent to such finding. And, although it has sometimes been urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon.")
[251] [1954] 1 SCR 1.
[252] [1954] 1 SCR 1.
[253] AIR 2004 SC 1295. See also Board of Trustees, Aurvedic and Unani Tibla College, Delhi v. State of Delhi (Now Delhi Administration) AIR1962SC458; State of Kerala v. Peoples Union for Civil Liberties, Kerala State Unit (2009) 8 SCC 46 para 65-71.

legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant."[254] And, "if the legislature lacks competence, the question of motive does not arise at all."[255] In *S. R. Bommai*, and later in *Rameshwar Prasad* too, the Supreme Court impliedly accepted the argument that only presidential satisfaction in its executive capacity may be challenged on grounds of mala fide, unreasonable or irrational exercise of power.[256]

In *Rameshwar Prasad*, it was "urged that the power under Article 356 is legislative in character and, therefore, the parameters relevant for examining the validity of a legislative action alone are required to be considered."[257] That is to say that the concept of malafide, generally understood in the context of executive action, is unavailable in assessing the validity of legislative action.[258] Chief Justice Sabharwal agreed. Nonetheless, he invalidated the President's satisfaction on the view that presidential satisfaction under Article 356(1) was *not* an exercise of legislative power.[259] And herein lies the second difficulty in making presidential satisfaction as an exercise of legislative power subject to judicial review. Bringing Article 123(1) within the scope of judicial review requires an expansion of grounds; it especially requires expansion into questionable grounds. To that extent, the foregoing discussion is instructive in reminding us that Article 356(1) is an inadequate template for assessing the reviewability of presidential satisfaction in Article 123(1).

6.4 The Way Out: Three Strategies for Judicial Review

Given these challenges, what strategies are meaningfully open to someone interested in pursuing the point of judicial review. Let us consider, once again, the text of Article 123(1): "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to

[254] AIR 2004 SC 1295 para 16.
[255] AIR 2004 SC 1295 para 16.
[256] See S. R. Bommai v Union of India (1994) 3 SCC 1 para 377 (per Jeevan Reddy J.)
[257] (2006) 2 SCC 1 para 144.
[258] (2006) 2 SCC 1 para 144.
[259] (2006) 2 SCC 1 para 145.

him to require."[260] The exercise of legislative power in this instance, it appears, is based on three conditions: (a) either House of Parliament is not in session (b) circumstances exists which render immediate action necessary and (c) President is satisfied to that effect. Provided these conditions are satisfied, the President may promulgate an Ordinance.

This *conditional* exercise of legislative power in Article 123(1) is significantly different from the provision in Article 245(1) that confers ordinary legislative power to Parliament: "Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State." The latter, as should be obvious, is subject to one condition only, namely that the exercise of legislative power be "subject to the provisions of the Constitution." To the extent that the exercise of legislative power under Article 245(1) is also conditional, it is misleading to emphasize "conditionality" as the distinguishing feature of Article 123(1). Therefore, recasting Article 123(1) as a *circumstantially* conditional exercise of legislative power may be a more apt description. While Article 123(1) specifies the particular circumstances in which legislative power is exercisable, Article 245(1) is silent on the matter; it leaves it to the discretion of Parliament. Bearing in mind the differences between circumstantially conditional and ordinarily conditional legislative power, we may turn to the question of strategies for judicial review.

Possibly, three competing strategies are available to deal with the question of judicial review. The first strategy might be to *equate* judicial review of Ordinances (i.e. circumstantially conditional exercise of legislative power) with those of Acts (i.e. conditional exercise of legislative power) while arguing that both are reviewable on identical grounds. We know Acts cannot be reviewed based on motive. Therefore, Ordinances too cannot be reviewed based on motive. Adopting this strategy, however, requires a specific manoeuvre. It emphasises the legislative nature of the power while underplaying its conditionalities. That is to say the fact that the powers are premised on distinct conditions are relatively immaterial (or inconsequential) in assessing the

[260] Article 123(1) (emphasis added)

permissibility of judicial review. Rather, it turns on the admittedly legislative nature of the power involved.

The second strategy – especially for those inclined to favour judicial review– might be to *disassociate* the review of Ordinances from Acts, by emphasizing the circumstantial conditionalities that distinguish the former. Here differences are highlighted rather than underplayed. And it may be put in the following form. While both Ordinances and Acts are products of legislative power, they are prefaced by different conditions thus making them distinct categories of legislative power. Therefore, Ordinances are justiciable on grounds including motive, normally inapplicable to legislation. That both share the narration of legislative power is relatively immaterial (or inconsequential). Rather, judicial review turns on the admittedly distinct conditionalities that preface the exercise of such power. This strategy impliedly works on a category of what may be called *intermediate* legislative power, one that is neither fully executive (e.g. Article 356) nor legislative (e.g. Article 245): It is mostly, though not entirely, legislative.

The third strategy might be to equate Ordinances with Acts, while arguing that the entire body of precedents prohibiting judicial review of legislation based on malafide be done away with. The argument goes like this. Thus far courts have erred in refusing to review the constitutionality of Acts based on legislative motives. If unjustifiably vitiated by animus towards a person or group of persons, a law *should be* invalidated on that ground. For that reason, an Ordinance too should be invalidated if presidential satisfaction in promulgating an Ordinance is vitiated by motives. In that sense, the third strategy is a hybrid: it equates Ordinances with Acts (as in the first instance) but argues in favour of judicial review (as in the second instance). And because it wants to reorganize the category of legislative power, emphasise or otherwise on conditionalities is irrelevant. Unlike the second, this strategy does not rely on any intermediate category but is far-reaching to the extent that it unsettles parts of accepted review principles. The second strategy, on this consideration, is relatively modest: Applicable principles are left untouched while expelling Ordinances from its purview.

6.5 Locating the Strategies: Are Choices Equally Arbitrary?

Bearing in mind these alternatives, we might briefly explore how these have played into judicial decisions and scholarly literature. The Supreme Court of India has, for the most part, remained strongly anchored to the first strategy. In *Nagaraj v State of Andhra Pradesh*,[261] Chief Justice Chandrachud made the point emphatically: "It is impossible to accept the submission that [a] Ordinance can be invalidated on the ground of non-application of mind."[262] The power to issue an Ordinance, he reminded us, was "not an executive power but [a] power of the executive to legislate."[263] Therefore, an Ordinance could not be "declared invalid for the reason of non-application of mind, any more than any other law [could] be."[264] Even assuming that the Executive, in a given case, had an ulterior motive in introducing a piece of legislation, that motive could not render the passing of the law mala fide.[265] This kind of "transferred malice," Chief Justice Chandrachud wrote, is unknown in the field of legislation.[266]

The Chief Justice reiterated his view in *T. Venkata Reddy v State of Andhra Pradesh*,[267] where the validity of Andhra Pradesh Abolition of Posts of Part-time Village Officers Ordinance, 1984 was under challenge.[268] Armed with an elaborate discussion on the "legislative" nature of the power involved,[269] he parroted the obvious conclusion: "While the courts can declare a statute unconstitutional when it transgresses constitutional limits, they are precluded from inquiring into the propriety of the exercise of the legislative power."[270] It has to be *assumed* that the legislative discretion is properly exercised, he wrote.[271] True to the constituents of the first strategy, Chief Justice

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[261] AIR 1985 SC 551. See also S.K.G. Sugar Ltd. v State of Bihar AIR 1974 SC 1533 (**"**It is however well-settled that the necessity of immediate action and of promulgating an Ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole Judge as to the existence of the circumstances necessitating the making of an Ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on ground of error of judgment or otherwise in court."); State of Punjab v Sat Pal Dang AIR 1969 SC 903.
[262] AIR 1985 SC 551, para 31.
[263] Para 31
[264] Para 31
[265] Para 36
[266] Para 36
[267] AIR 1985 SC 724
[268] Ordinance No. 1 of 1984
[269] See e.g. R. K. Garg v Union of India [1982] 1 SCR 947 Para 6 (Bhagwati J.)
[270] AIR 1985 SC 724 Para 14
[271] Para 14

Chandrachud worked out the possibility of judicial review with an exclusive focus on the legislative nature of the power. That the same was prefaced by distinct conditionalities almost did not matter.[272]

For the sake of completeness, it should be pointed out that on a prior occasion, the Supreme Court hinted contrary to the *Nagaraj*, *Reddy* and *D. C. Wadhwa* narrative. In *A. K. Roy v Union of India*,[273] the constitutional validity of the National Security Ordinance was challenged, *inter alia* on the ground that presidential satisfaction in Article 123(1) was conditional and, therefore, justiciable.[274] The Supreme Court avoided the argument. The Ordinance had already been enacted into an Act. Therefore, the point of presidential satisfaction had become moot.[275] And Chief Justice Chandrachud had doubts about the proper rules of evidence governing such matters: "We are not sure whether a question like the one before us would be governed by the rule of burden of proof contained in Section 106 of the Evidence Act ...," he wondered.[276] Formally speaking, *Roy* did not resolve the question of judicial review, returning the matter "unanswered."

Nonetheless, some observations therein suggests that the Court was at least open to a contrary narrative. First, unlike in *State of Rajasthan v Union of India*,[277] it hesitated in lamely weaving the "doctrine of political question" into Article 123.[278] Second, the (potential) significance of the deleted "finality clause" mentioned earlier was not lost: "It is arguable that the 44th Constitution Amendment Act leaves no doubt that judicial review is not totally excluded..."[279] And then, there was the discussion of evidentiary burden. The burden of establishing the existence of relevant circumstances, A. K. Roy argued, was on the Union of India: "When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him."[280] Without outrightly rejecting the standard, Chief Justice Chandrachud – as mentioned earlier – doubted the applicability of the Evidence Act to the matter. "We are not sure whether a question like

[272] See also D. C. Wadhwa v State of Bihar AIR 1987 SC 579 para 6 (per Bhagwati C.J.)
[273] AIR 1982 SC 710
[274] Ordinance 2 of 1980.
[275] AIR 1982 SC 710 Para 28
[276] Para 29
[277] AIR 1977 SC 1361
[278] Para 26
[279] Para 27
[280] Indian Evidence Act, 1872. (Act 1 of 1872) § 106

the one before us would be governed by the rule of burden of proof contained in Section 106 of the Evidence Act, though we are prepared to proceed on the basis," he said.[281] The remarks were promising, for those enthusiastic about the prospects of judicial review. After all, a discussion on evidentiary burden is relevant only if the first hurdle of judicial review is met with success.

This blip, notwithstanding, the first strategy in *Nagaraj*, *Reddy* and *D. C. Wadhwa* remains paradigmatic of the Supreme Court. In some ways, the doubts in *Roy* stand overruled: *Nagaraj*, *Reddy* and *D. C. Wadhwa* were decided later in point of time. But *Roy* does show that the "legislative" nature of the satisfaction in Article 123(1) does not necessarily exhaust the potential for judicial review.

In *Krishna Kumar Singh v State of Bihar*,[282] Sujata Manohar J. mostly adopted the second strategy in invalidating gubernatorial satisfaction under Article 213 – the only occasion when the Supreme Court has taken such a view. In December 1989, the State of Bihar took over the management and control of non-governmental schools through the Bihar Non-Government Sanskrit Schools (Taking Over Management and Control) Ordinance, 1989.[283] The Ordinance in substantially same terms was re-promulgated seven times.[284]Finally, it lapsed on 30th April, 1992 – nearly 40 months after it was first promulgated.[285] *All* Ordinances (including the original and re-repromulgated versions), Manohar J. wrote, were invalid.[286] Consistent with the maneuvers in the second strategy, she presents her analysis in three steps.

To begin with, Manohar J. is careful in dissociating Ordinances from Acts. While both are products of legislative power, she is quick to insist on the conditionalities that make the former exceptional: "Article 213 … gives to the Governor who acts on the aid and advice of the Executive, the legislative power to promulgate an Ordinance when the Governor is satisfied that immediate action is required at a time when both the Houses of the State Legislature … are not in session."[287] And since "this is an exception to the normal rule that laws must be enacted by the Legislature," Article 213(2), she reminds us,

[281] Para 29
[282] AIR 1998 SC 2288.
[283] Bihar Ordinance 32 of 1989.
[284] AIR 1998 SC 2288 para 15.
[285] Para 15.
[286] Para 25.
[287] Para 20.

has certain safeguards.[288] Ordinances so promulgated must be laid before both the Houses when they reassemble, and is also of a "limited duration:" It ceases to operate at the expiration of six weeks from the re-assembly of the Legislature.[289] With the exceptional criteria firmly outlined, Manohar J. turned to the question of judicial review.

> The manner in which a series of Ordinances have been promulgated in the present case by the State of Bihar also clearly shows misuse by the Executive of Article 213. It is a fraud on the Constitution. *The State of Bihar has not even averred that any immediate action was required when the 1st ordinance was promulgated.* It has not stated when the Legislative Assembly was convened after the first Ordinance or any of the subsequent Ordinances, how long it was in session, whether the ordinance in force was placed before it or why for a period of two years and four months proper legislation could not be passed.[290]

She adds:

> The constitutional scheme does not permit this kind of Ordinance Raj. In my view all the ordinances form a part of a chain of executive acts designed to nullify the scheme of Article 213 … All are unconstitutional and invalid *particularly when there is no basis shown for the exercise of power under Article 213.* There is also no explanation offered for promulgating one Ordinance after another. If the entire exercise is a fraud on the power conferred by Article 213, with no intention of placing any Ordinance before the legislature, it is difficult to hold that first Ordinance is valid, even though all others may be invalid.[291]

In finding that the Governor's satisfaction was fraudulent, Manohar J. seemed to rely on two observations. The State of Bihar did not justify the need for immediate action, i.e. for the need to invoke its legislative powers under Article 213. And secondly, it "had no intention of placing any Ordinance before the legislature." Both those premises helped her to the conclusion that the Governor's satisfaction was motivated by fraud.

This finding is remarkable; never before had the Supreme Court invalidated presidential satisfaction based on motive. Extending grounds of review – ordinarily reserved for executive power – to Ordinances is decidedly novel, and Manohar J. was careful to circumscribe her principles to *circumstantially* conditional legislative power (in

[288] Para 20.
[289] Para 21.
[290] Para 25. (emphasis added)
[291] Para 25. (emphasis added)

Article 123) only. There was no suggestion in her opinion that Manohar J. was willing to review the exercise of ordinarily conditional legislative power (in Article 245) on similar grounds. To that extent, she impliedly assumed an intermediate legislative category suggested earlier; one that is neither fully executive nor fully legislative. Nonetheless this view did not achieve any finality. In his separate opinion in the same matter, Wadhwa J. differed with his colleague on the reviewability of presidential satisfaction: Such subjective satisfaction, he thought, was not reviewable.[292] Therefore, given intractable differences, the matter was referred to a larger bench for consideration.[293]

Finally, the third strategy has relatively few advocates. But they are not unheard of. In the US context, for example, Jeffrey Shaman has argued for doing away with the principle that the exercise of legislative power cannot be reviewed on grounds of motive.[294] Following his survey of legislative motive in US constitutional law, Shaman concludes that "although the Supreme Court has long professed that legislative motive is irrelevant to determining a law's constitutionality, the Court has honoured that tenet more in its breach than its observance."[295] And given how frequently the Court does consider legislative motive, "it is more accurate to say that in actual practice legislative motive is relevant to a law's constitutionality and may be taken into account in reviewing a law."[296] There are no good reasons, Shaman concludes, why legislative motive should be ignored in deciding the constitutionality of a law.[297] Similar arguments are easily adaptable to the Indian context. In line with the third strategy, the argument for motive might just as easily proceed from Acts to Ordinances, as it might from Ordinances to Acts.

Having laid out the various approaches and its application in judicial decisions and scholarly literature, we may briefly return to the question. Is presidential satisfaction in Article 123(1) subject to judicial review? The answer to that question – as I have tried to suggest earlier – depends on the interpretative strategy one adopts; the text is relatively unhelpful on this point. The first strategy would generate a negative answer, while the second and the third have the potential for an affirmative response, though not without

[292] Para 70
[293] Para 75
[294] See JEFFREY SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 143-172 (2001)
[295] Id. at 166
[296] Id. at 166
[297] Id. at 166

unsettling accepted features of legislative review principles. Therefore, it depends on what one chooses to emphasise (or deemphasise) in the text. But that is something a passive piece of text cannot guide the reader about: The choice must be that of the *reader*.

And this raises a key question: Are all three strategies equally valid? Two reasons tend me towards an affirmative response. First, the reference to "validity" assumes that there is some higher principle that can help arbitrate between these competing strategies. I am sceptical: These so-called higher principles do not inspire much confidence in me. Second, internally, the strategies engage in a form that is easily recognizable as "legal arguments." They have a structure and arrangement that satisfy (conventional?) features of "arguments." It is unclear if there is some other meta-anvil on which these arguments might be tested.[298]

Be that as it may, any affirmative answer to the substantive question of judicial review is not the end of the matter. To the contrary, it raises a host of other challenging questions. On what grounds – other than motive – is the President's satisfaction reviewable? Equally importantly, who has the burden to establish that the President's satisfaction is vitiated by motive? Does it lie on the petitioner challenging the satisfaction? Or, does it lie on the Union of India to establish that the President's satisfaction was not improperly vitiated by motive? A fuller account of judicial review in Article 123(1), subject to an affirmative conclusion, would require analysis of these questions as well.

VII. SUBSTANTIVE LIMITS: IS THERE ANY SUCH THING AS A "ROGUE" ORDINANCE?

7.1 The "Substantive" Question: Ordinances and Subject-matter Limitations

Finally, in relation to the text of Article 123, there is the question of "substance." Do Ordinances have *substantive* limits? Or, to put it differently, are some subject matters excluded from the scope of Ordinances? An Ordinance, originating as it does from the

[298] For an introduction to the concept of "argument-bytes" in legal reasoning, see *A Semiotics of Legal Argument* in DUNCAN KENNEDY, LEGAL REASONING: COLLECTED ESSAYS 87 – 152 (The Davies Group, 2008).

exercise of executive power, cannot be classified as "law."[299] That, we have already seen, was the argument in *A.K. Roy v Union of India*.[300] Denying an Ordinance the status of law, it was further argued, had important implications for its content. Specific actions under the Constitution – e.g. restricting fundamental rights guaranteed in Part III – requires the sanction of law. To the extent that Ordinances weren't law, using them to limit fundamental rights is unconstitutional. Conversely, rights in the Constitution would be reduced to a "dead letter," the argument went, if the powers of the executive were read in a manner validating the restriction on fundamental rights without formal legislative support.[301] Either way, the upshot was simple: Specific subject matters – at least those relating to fundamental rights – were excluded from the scope of Ordinances. These (specific) arguments seeking to limit the substantive scope of Ordinances were at best weak. A majority in *A.K. Roy* rejected them and, rightly so.

For one, there is a fallacy that gnaws at the entire argument. The fear of executive intrusion into fundamental rights is unfounded to that extent that Ordinances, like Acts of Parliament, are subject to the same substantive and jurisdictional limits. If an Ordinance unreasonably infringes upon fundamental rights, or regulates a subject matter outside Parliament's legislative competence, when challenged, courts would be well within their authority to strike it down as unconstitutional, just as they would do in the case of an Act. An Ordinance cannot do (or achieve) anything that an Act of Parliament could not do: "If and so far as an Ordinance … makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void."[302]

In addition, there is a preponderance of texts that challenge the argument.[303] Article 13(2) provides that the State shall not make any law that takes away or abridges the rights conferred by Part III (i.e. Part guaranteeing fundamental rights) and any law made in contravention of this provision shall, to the extent of the contravention, be void. Article 13(3) clarifies that "law" includes, *inter alia*, an ordinance, unless the context otherwise requires.[304] Article 367, the "Interpretation" clause of the Constitution, affirms

[299] Para 5
[300] AIR 1982 SC 710
[301] Para 5
[302] Article 123(3)
[303] Para 13-14
[304] A K Roy – para 13

the conclusion. "Any reference in this Constitution to Acts or laws of, or made by, Parliament, or to Acts or laws of, or made by, the Legislature of a State, shall be construed as including a reference to an Ordinance made by the President or, to an Ordinance made by a Governor, as the case may be."[305] Taken together, both Articles 13(2) and 367(2) establish a high textual barrier that must be overcome for anyone desiring to suggest that the Constitution substantively limits the scope of Ordinances.

Gupta J. made one such effort. In his partly dissenting opinion in *A.K. Roy*, he turned to the very description of Ordinances in Article 123: "An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament …"[306] For him, it was obvious "that when something is said to have the force and effect of an Act of Parliament, that is because *it is not really an Act of Parliament*."[307] To explain the significance of the distinction as he saw it, Gupta J. turned to Articles 356 and 357 of the Constitution. Article 356(1) provides that "if the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation - (a) assume to himself all or any of the functions of the Government of the State … other than the Legislature of the State; …"[308] When such a Proclamation is in operation, under Article 357(1) it shall be "competent for Parliament to confer on the President the power of the Legislature of the State to make laws …"[309] Such laws, whether made by Parliament or the President, continue to remain

[305] Article 367(2)
[306] Article 123(2)
[307] Para 120 (emphasis added)
[308] Article 356(1) (1) If the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation -
(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State;
(b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.
[309] Article 357 provides:
(1) Where by a Proclamation issued under Clause (1) of Article 356, it has been declared that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament, it shall be competent-
(a) for Parliament to confer on the President the power of the Legislature of the State to make laws, and to authorise the President to delegate, subject to such conditions as he may think fit to impose, the power so conferred to any other authority to be specified by him in that behalf;

in force, even after the proclamation has ceased to exist, until altered or repealed or amended by a competent Legislature or other authority.[310] The differences in the nature of laws the President may make under Article 123 and under Article 357, for Gupta J., pointed to the conclusion that Ordinances have subject matter limitations.

> It will appear that whereas an ordinance issued under Article 123 has the same force and effect as an Act of Parliament, under Article 357(1)(a) Parliament can confer on the President the power of the legislature of the State to make laws. Thus, where the President is required to make laws, the Constitution has provided for it. The difference in the nature of the power exercised by the President under Article 123 and under Article 357 is clear and cannot be ignored.[311]

He added:

> Under Article 21 no person can be deprived of life and liberty except according to procedure established by law … An ordinance which has to be laid before both Houses of Parliament and ceases to operate at the expiration of six weeks from the reassembly of Parliament, … can hardly be said to have that "firmness" and "permanence" that the word "established" implies. It is not the temporary duration of an ordinance that is relevant in the present context, an Act of Parliament may also be temporary; what is relevant is its provisional and tentative character which is apparent from Article 123(2)(a).[312]

This attempt to find subject matter limitations in Article 123, I would argue, fails and for at least two reasons. The starting point itself is problematic. Ordinances are not Acts of Parliament; no one argues they are. It is precisely because they are not Acts that the Constitution introduces the fiction of "same force and effect." So nothing can be gained from reiterating a distinction the Constitution already accepts. Next, direct comparisons between the nature and scope of presidential legislative powers in Article 123 and Article 357(1) are untenable. Article 123 deals with cases of *legislative* emergency in non-emergency times. When used in good faith, it is intended to remedy situations where a

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(b) for Parliament, or for the President or other authority in whom such power to make laws is vested under Sub-clause (a), to make laws conferring powers and imposing duties, or authorising the conferring of powers and the imposition of duties, upon the Union or officers and authorities thereof;

[310] Article 357(2) (2) Any law made in exercise of the power of the Legislature of the State by Parliament or the President or other authority referred to in Sub-clause (a) of Clause (1) which Parliament or the President or such other authority would not, but for the issue of a proclamation under Article 356, have been competent to make shall, after the Proclamation has ceased to operate, continue in force until altered or repealed or amended by a competent Legislature or other authority.

[311] Para 120

[312] Para 120

sudden need for a particular legislation arises and Parliament is not in session. In contrast, Article 357(1) deals with cases of *overall* constitutional breakdown. When used in good faith, it refers to situations where the President is satisfied that the governance in a State cannot be carried out in accordance with the Constitution and must be taken over by the Union Cabinet. Also, Article 123 is an original power to legislate: The Constitution itself says that the President may promulgate Ordinances. The power to legislate under Article 357(1), however, is a delegated one. The President may do so if and only if Parliament authorises such a form of lawmaking. Therefore, arguments based on a comparative reading of the two provisions are misleading. The two provisions deal with different circumstances, are based on different sources of power and aspire to achieve different goals. To say that Article 123 is different from Article 357 gets us nowhere. They *are* different.

Nonetheless, if successful, arguments limiting the substantive scope of Ordinances have a high payback and are probably worth pursuing. So, what does one need to make out a reasonably tenable case that the Constitution imposes subject matter constraints on Ordinances? Such limits on Ordinances, it appears to me, would be valid only if three conditions are satisfied. First, it must be located as an implied limitation, originating in the "scheme" or "fabric" of the Constitution. Second, original intent, howsoever defined, must be shown to be inconsequential. Earlier, we have already seen that an effort to draft a "rights' limitation" into Article 123 was categorically rejected by the Constituent Assembly. Finally, we need a mechanism by which to account for the fairly straightforward Act-Ordinance equivalence in at least three provisions. That is a very high order and I am skeptical about the possibility of an argument that coherently satisfies all three conditions.

7.2 Tax Ordinance and the a Subject-Matter Challenge in Pakistan

An attempt to read in subject matter limitation was made in Pakistan recently. In June 2009, Pakistan's National Parliament approved a budgetary proposal imposing a "carbon

surcharge" on crude oil, effectively raising oil prices by 10.5%.[313] Intended to raise revenues to the tune of USD 1.5 billion, the proposal was motivated by a supposed necessity to avoid a balance of payment crisis under the IMF's loan program.[314] In July 2009, the Supreme Court invalidated the price hike. Chief Justice Iftikhar Chaudhry, in a temporary order, doubted the necessity (and effectiveness) of the hike.[315]

> Having gone through the amendment in the Petroleum Products (Petroleum Development Levy) Ordinance, 1961 as introduced by the Finance Act, 2009, *prima facie*, we are of the view that there was no justification for imposition of carbon surcharge in place of PDL because such a tax could be imposed subject to certain conditions, such as provision of petroleum products free of lead or carbon dioxide and consequential pollution free atmosphere to all citizens.[316]

Next day, President Zardari responded by promulgating the Petroleum Development Levy (Amendment) Ordinance.[317] It imposed a petrol tax, effectively nullifying the Supreme Court order.[318] Not surprisingly, the Ordinance was promptly challenged. Advocate Shoaib Shahid argued that the Ordinance vitiated numerous provisions of the Constitution including Articles 2-A (Objectives Resolution to form part of substantive provisions), 4 (rights of individual to be dealt with in accordance with the law), 5 (loyalty to state and obedience to Constitution), 8 (laws inconsistent with fundamental rights to be void), 9 (security of person), 25 (equality of citizens), 37 (promotion of social justice and eradication of social evils), 38 (promotion of social and economic well-being of the people), 77 (tax to be levied by law only) and 89 (powers of president to promulgate ordinance).[319]

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[313] http://in.reuters.com/article/southAsiaNews/idINIndia-40872220090707; http://www.bloomberg.com/apps/news?pid=20601091&sid=a9SQkKQk.N8Q; http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/business/11-supreme-court-suspends-carbon-tax--il--01

[314] http://in.reuters.com/article/southAsiaNews/idINIndia-40872220090707;

[315] Civil Miscellaneous Application No. 2080 of 2009 http://www.supremecourt.gov.pk/web/user_files/File/CONST.P.33-34-2005.pdf

[316] Para 7. For a comment on institutional competence see http://www.dailytimes.com.pk/default.asp?page=2009\07\12\story_12-7-2009_pg3_2

[317] Ordinance No. XV of 2009. http://news.bbc.co.uk/2/hi/south_asia/8143692.stm

[318] http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/19-petroleum-development-levy-ordinance-challenged-by-sc-fi-02

[319] http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/19-petroleum-development-levy-ordinance-challenged-by-sc-fi-02

At its core, Shahid's argument was simple. Ordinances cannot be used for certain purposes; imposing new taxes is one such prohibited purpose.[320] To put it differently, while Acts and Ordinances are generally at par, there is an implicit hierarchy that restricts the substantive scope of Ordinances.[321] Akin to the strategy in *R. C. Cooper*, the Supreme Court of Pakistan refused to be drawn into the matter immediately.[322] The petitioner had no *locus standi* and the Supreme Court was not the proper forum to agitate it, the Court said.[323] The High Court, it suggested, was a better forum. It remains to be seen if this argument will succeed, when it is eventually heard. Interestingly, President Zardari reissued the Ordinance in November 2009 – now titled the Petroleum Products (Petroleum Development Levy) (Amendment) Ordinance, 2009 – barely a week before it was stated to lapse in accordance with the provisions of Article 89.[324] And this repromulgation, in many ways, takes us back to our earlier discussion in *D. C. Wadhwa*[325] and its Pakistani counterpart, *Collector of Customs*.[326] It is unlikely that the November 2009 repromulgation satisfies the high bar of "adequate reasons" suggested in both decisions.

VIII. CONCLUSION

Where does all this leave us? I began with a specific objective: Working on the premise that Ordinances are an aberration in a parliamentary democracy, I set out to articulate reasons for restricting their constitutional scope. Clearly, Ordinances have a pervasive presence, both in India and Pakistan. When resorted to without sufficient cause, they undermine the democratic mechanisms in a parliamentary system. Their use is particularly egregious when purposefully designed to avoid legislative scrutiny through ordinary procedures. While both Supreme Courts – in India and Pakistan – have an

[320] http://news.bbc.co.uk/2/hi/south_asia/8143692.stm
[321] http://www.dailytimes.com.pk/default.asp?page=2009\07\11\story_11-7-2009_pg1_4
[322] http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/12-sc+returns+petition+against+ord+on+oil+price--bi-08
[323] http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/12-sc+returns+petition+against+ord+on+oil+price--bi-08; http://www.dailytimes.com.pk/default.asp?page=2009\07\16\story_16-7-2009_pg7_5
[324] http://www.geo.tv/11-1-2009/52154.htm
[325] AIR 1987 SC 579
[326] PLD 1994 SC 363.

acceptable record in some interpretative aspects (e.g. in developing some limits on repromulgation), they have performed less admirably in other areas. Particularly, in the case of the Supreme Court of India, it has failed to critically evaluate the rules surrounding the validity of legal effects brought about by lapsed Ordinances and on issues surrounding the reviewability of presidential satisfaction prior to promulgation. In contrast, Pakistan's challenges, in both matters, may lie more with the constitutional text than with the judicial exegesis that has grown around it. To that extent, it is hard to assess the utility of so-called textual arguments in general terms. What the foregoing analysis suggests is that textual arguments are relatively unhelpful in assessing the limits of re-promulgation and judicial review of presidential satisfaction. In contrast, some – but not all – issues concerning tenure and substantive limits on Ordinances at least have an appearance of argumentative inevitability. Given the texts, contrary augments seem to enjoy less promise and a high interpretative barrier.

While this discussion concludes my analysis of "substitutive" executive control, two areas remain untouched. In my follow-up Article, I propose to explore the practice of presidential (and gubernatorial) *influence* on primary legislation, and the Union Council of Minister's control over state legislation. The facts described in the introductory section directly relate to the latter sort of "influence." Even when Presidents and Governors do not "enact" Ordinances, they enjoy considerable influence over primary legislation. And this is particularly so in cases where the President (or a Governor) is not in cahoots with the Council of Ministers. On occasions, she is required to act independently, applying her mind to the specific circumstances. These (somewhat) peripheral powers of influence, as we shall see, can delay or even determine the sorts of legislation that are signed into law.