CONSTITUTIONAL FIAT: PRESIDENTIAL LEGISLATION IN INDIA'S PARLIAMENTARY DEMOCRACY

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Abstract

India and Pakistan are parliamentary democracies. The governments of both have a lawmaking feature at odds with parliamentary norms: presidential legislation. The President, acting through the Council of Ministers, is authorized to enact legislation in the form of "ordinances" without input from Parliament. In a sense, ordinances are constitutional fiat, or legislation without legislature. This article will explore this anomalous feature in India and Pakistan, arguing that use of ordinances violates fundamental tenets of parliamentary democracy. As the judiciaries of the two nations address challenges to ordinances by interpreting the constitutional provisions mustered in their support, they must consider the interaction between ordinances and the principles on which the parliamentary system of government is founded.

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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 Bill), to deal with the growing frequency 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, the Constitution 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 interception of communication be deleted.[3] The provisions on interception of communication, the Union Cabinet thought, encroached on 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 resolutions in the State Assembly and other fora, the calls to expedite the bill 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

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[1] Prevention of Terrorism Act, 2002, No. 15 of 2002, INDIA CODE (2002), *available at* http://indiacode.nic.in/, *repealed by* Prevention of Terrorism (Repeal) Act, 2004, No. 26 of 2004, INDIA CODE (2004), *available at* http://indiacode.nic.in/.

[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 in the Union and Concurrent lists, while the state legislature may enact laws on items in the State and Concurrent lists. However, if Union legislation on an item in the Concurrent list is already in force, and the state legislature enacts legislation that is 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. art. 254, § 2.

[3] *Tone Down Terror in Gujcoc: Centre*, DNA INDIA (June 20, 2009), http://www.dnaindia.com/india/report_tone-down-terror-in-gujcoc-centre_1266723.

[4] The Union Cabinet of the NDA Government, which was in power at the time, 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 as are already in force in the neighboring state of Maharashtra, rejecting arguments that the law violated privacy rights in the Constitution. *See* Maharashtra v. Bharat Shah, (2008) 12 S.C.A.L.E. 167.

[5] *Alternative to POTA: Assembly Passes Bill*, HINDU (June 3, 2004), http://www.hindu.com/2004/06/03/stories/2004060310151100.htm.

[6] Syed Khalique Ahmed, *Bitter Bill?: GUJCOC Divides Legal Fraternity*, INDIAN EXPRESS (Sept. 28, 2008), http://www.indianexpress.com/news/bitter-bill-gujcoc-divides-legal-fraternity/366886/0.

clear. The Union Home Minister spoke of inconsistencies and the need for refinement.[7] Interestingly, a law with identical provisions, having received presidential assent earlier, was already on the books in the neighboring state of Maharashtra.[8] What of the Gujarati bill, then? It would appear that the Union Cabinet had a veto power over the State Assembly despite the legislative competence of the latter. Is executive control over legislative proceedings appropriate?[9]

A parliament, in a representative democracy, is the principal legislative body. Statutes it enacts enjoy presumptive legitimacy 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, taking place within Parliament.[10] However, it is not uncommon for constitutions, especially in South Asian parliamentary democracies like India and Pakistan, to recognize conditions under which ordinary legislative controls may be entirely bypassed or, for limited purposes, placed with executive offices. For example, presidents, governors, and councils of ministers often enjoy "original" legislative or review powers which, depending on the scope of such powers, may contravene a fundamental principle of parliamentary democracy: that a statute comes into being when and only when some majority of elected members have voted affirmatively for it.

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[7] Vishwa Mohan, *Centre Asks Gujarat to Change Anti-Terror Bill*, TIMES OF INDIA (June 20, 2009), http://timesofindia.indiatimes.com/india/Centre-asks-Gujarat-to-change-anti-terror-Bill-/articleshow/4676534.cms. For a critical comment on the Cabinet's stand, see Vinay Sitapati, *Legal Experts Counter Shivraj's Stand on Rejecting GUJCOCA*, INDIAN EXPRESS (Oct. 29, 2008), http://www.indianexpress.com/news/legal-experts-counter-shivrajs-stand-on-rejecting-gujcoca/379438/0. The nature of justifications given for rejecting the Bill has important ramifications for our understanding of this aspect of center-state relationship. For a critical analysis of related issues, see *infra* Part II.

[8] Maharashtra Control of Organized Crime Act, No. 30 of 1999, *available at* http://indlaw.com.

[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. *Gujarat Passes Anti-Terror Bill, Rejects President's Suggestions*, TIMES OF INDIA (July 28, 2009), http://timesofindia.indiatimes.com/articleshow/4829638.cms. In February 2010, the Union Cabinet once again recommended to the President that she refuse assent to the Bill. Maneesh Chhibber, *UPA to President: Block Gujarat Crime Law*, INDIAN EXPRESS (Feb. 2, 2010), http://www.indianexpress.com/news/upa-to-president-block-gujarat-crime-law/574389/.

[10] To be sure, the "internal" metaphor is unhelpful, if pushed too far. Under Article 79, the President is a constituent 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. art. 79.

This article, the first in a two-part series, evaluates the nature and scope of executive control over primary legislation in India and Pakistan. Three forms of control are in play in the Indian Constitution. The strongest form occurs when executive offices under specified conditions intervene by entirely substituting their choices for the outcome of the legislative procedure. The discussion in this article shall be limited to this form, which is labeled "substitutive" control. The second form of control involves proposals by executive offices for changes to statutes already validly enacted. Finally, executive offices utilizing the third form of control can officially determine that there is a need for a particular piece of legislation under specific circumstances. The second and third forms are less in the realm of control and conceptually closer to "influence." In India, the President, governors, and Councils of Ministers exercise these forms of control or influence to varying degrees at both the federal and the state level. With symmetry of sorts, they simultaneously exercise control and are subject to control. The Union Council of Ministers, for example, has control over state legislatures on specific matters[11] but is also subject to control by the President.[12] Similarly, the State Council of Ministers at times controls state legislative matters but is also subject to control by the governor or the Union Council of Ministers.

In describing these forms of control, this article shall work from the premise that executive control of legislative proceedings is a constitutional aberration and therefore must be limited. In legislation, parliamentary acts are the norm, and they are qualitatively superior—both because they satisfy procedural conditions and because of the deliberative process they undergo. This article will articulate a rationale for limiting the scope of substitutive executive control without restricting the constitutional space afforded to it. To do so, it 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 balance substitutive control. Parliamentary democracies can and do function well without such executive influence. Second, the Supreme Courts of India and Pakistan have mixed records, performing acceptably in some aspects of substitutive control but not in others. Third, textual arguments are unhelpful in assessing the limits of constitutional impermissibility. In assessing the space for ordinances, we would be better off evaluating policy considerations than laboring under textual arguments. This article will develop these arguments over the course of six sections. Sections I and II introduce readers to the basics and the legacy of substitutive control. Sections III, IV, V, and VI discuss, in comparative perspective, four distinct questions that the texts raise. The issues discussed in these sections pose challenges to substitutive control that, while important to address, do not destroy the constitutional validity of substitutive control.

Three caveats are necessary. First, the discussion in this article and the follow-up article is limited to executive control of *primary* legislation. The

[11] *See id.* at art. 254, § 2.

[12] *See id.* at art. 111. I shall critically evaluate both these aspects of influence in a forthcoming article.

article makes no reference to constitutional offices such as the Chief Justice and the Chief Election Commissioner that exercise certain important legislative powers conceptually closer to delegated, rather than primary, legislation. Second, the discussion is limited to executive control over primary legislation in ordinary times. The constitutions of both India and Pakistan provide for significant executive control over legislative processes in times of emergency.[13] Those issues are not discussed here. Finally, while used to provide context, the facts surrounding the special terrorism law enacted by the state of Gujarat shall not be the subject of discussion here. The article should not be read as a normative assessment of Gujarat's Chief Minister Narendra Modi or a judgment about the need for or efficacy of the law on terrorism. The setting is intended to be generic and may have resonance in progressive contexts as well. The facts relate to the third kind of control outlined above, the control of the Union Council of Ministers over state legislation, and will be the subject of a fuller treatment in a companion article.

I. 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, or "ordinances." An ordinance is similar to an act of Parliament except that it is not subject to any form of parliamentary control prior to promulgation. Article 123 of the Indian Constitution empowers the President to promulgate ordinances during parliamentary recess provided that "circumstances exist which render it necessary for him to take immediate action."[14] This constitutional language appears to give the President carte blanche, but, in classic parliamentary tradition, it is the Councils of Ministers who must be "satisfied" as to the circumstances.[15] Ordinances do not go through ordinary legislative review; by definition, they are temporary *executive* measures intended to tide the country over through "contingent" (i.e., exigent) circumstances. They have the "same force and effect" as acts. Unless enacted into law, ordinances promulgated during recess expire either if they are withdrawn or six weeks after Parliament's reassembly, whichever date is first.[16] Because Parliament must assemble at least once every six months,[17] an ordinance has a maximum life of seven and one-half months under ordinary conditions. Similarly, under Article

[13] *See, e.g., id.* at art. 357, § 1.

[14] *Id.* at art. 123, § 1.

[15] *Id.* at art. 74, § 1.

[16] *Id.* at art. 123, § 2(a). For a description of the procedure for tabling an ordinance, see MINISTRY OF PARLIAMENTARY AFFAIRS, HANDBOOK ON THE WORKING OF THE MINISTRY OF PARLIAMENTARY AFFAIRS 41–43 (V.K. Agnihotri ed., 2004).

[17] INDIA CONST. art. 85, § 1.

213, governors are authorized to issue ordinances at the state level that are valid for a period not exceeding seven and one-half months.[18]

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

This validity period is not inflexible. The Supreme Court's opinion in the case *In the Matter of Special Reference No. 1 of 2002* is useful in explaining this.[19] Recall that each House of Parliament must meet every six months, or in the words of Article 85, Section 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, Section 2 limits the tenure of the Lower House of Parliament to five years, unless dissolved sooner.[20] What is the effect of reading Article 85, Section 1 into Article 82, Section 2? Does Article 85, Section 1 operate as an implied limitation on Article 82, Section 1? The following set of hypothetical facts may clarify the issue.

Assume that the House of the People holds its first sitting in June 2000. Ordinarily, its tenure lasts until May 2005, but it adjourns after meeting in January 2004. Article 85, Section 1 mandates that it must reconvene no later than July 2004. Now assume that an ordinance is promulgated in February 2004. Under Article 123, Section 2, this ordinance is valid until no later than six weeks after the House reassembles. By implication, the ordinance is valid till mid-September 2004. Now also assume that the President dissolves the House in June 2004 and calls for fresh elections. Article 85, Section 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 to not run afoul of Article 85, Section 1? In 2002, then-President A.P.J. Kalam turned to the Supreme Court for advice on that very point.[21]

The six-month clause in Article 85, Section 1, it turns out, might be understood in at least two ways. The House of the People (*Lok Sabha*), the lower House of Parliament, ordinarily has a five-year tenure after which the House is newly populated based on fresh electoral results. The first reading of Article 85, Section 1 leads to only *intra*-House applicability—that is to say, the

[18] *Id.* at art. 213, § 1.

[19] (2002) 8 S.C.C. 237.

[20] *See* INDIA CONST. art. 83, § 2.

[21] (2002) 8 S.C.C. 237. The case before the Supreme Court arose from a notable course of events. 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 in March 2002. Under Article 174, Section 1, six months must not intervene between two sessions of an Assembly. Accordingly, it was required that the new Assembly be in session no later than October 2002. Despite acknowledging that Article 174, Section 1 is mandatory, the Election Commission claimed inability to complete electoral formalities by the due date. The President, in exercise of the powers conferred under Article 143, Section 1, then referred the matter to the Supreme Court for advice.

six-month clause only applies to a particular five-year session of the House. The second reading creates *inter*-House applicability: after a session of the House of the People is dissolved, the next session of the House must meet within six months. The Supreme Court concluded that the six-month clause applies to *intra*-House sessions only: Article 85, Section 1 "is mandatory in nature and relates to *an existing and functional* [Parliament or] Legislative Assembly and not to a dissolved Assembly whose life has come to an end and ceased to exist."[22] This is similar to Article 174, Section 1, the corresponding provision at the state level. Therefore, to return to our hypothetical facts, the July 2004 deadline does not apply to the constitution of a new House.

The six-month limit affects the lifespan of ordinances as well. Ordinances are valid until six weeks after the reassembly of Parliament, which ordinarily must meet at least every six months. That limitation, we now know, does not apply to a dissolved Parliament. If elections are not held due to an "act of God" or other reasons, a new House of the People cannot be formed. As the Supreme Court itself acknowledged, there is no constitutional deadline by which that elections must take place: "Obviously . . . the Constitution . . . [does not prescribe] any time limit for the conduct of election after the term of the Assembly is over either by premature dissolution or otherwise."[23] The implication of this hypothetical is if Parliament is dissolved and elections cannot be conducted for an extended period of time, an ordinance, once promulgated, may remain valid for a period well over seven and one-half months. But ordinances raise uncomfortable questions. Their freestanding nature untethered from legislative restraints and time limits privilege executive edict over primary legislation in troubling ways.

B. 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.[24] In the eight years between 2000 and 2007, the federal government issued fifty-five ordinances.[25] Of these, forty-one were duly enacted into law. Of the remaining fourteen, ten are still pending or have lapsed, and four were never introduced. These numbers are relatively small, but constant. Other than 1963, ordinances have been promulgated every year since 1950.[26] In 1993, thirty-four ordinances were promulgated, the most for a single year. That decade also saw the largest

[22] In the Matter of Special Reference No. 1 of 2002, (2002) 8 S.C.C. 237, para. 85 (emphasis added).

[23] *Id.* para. 106 (Balakrishnan, J.).

[24] For a comment on its gradual intrusion into democratic practices, see Romesh Thapar, *Law or Ordinance?*, 9 ECON. & POL. WKLY. 1930 (1974).

[25] MINISTRY OF PARLIAMENTARY AFFAIRS, STATISTICAL HANDBOOK 56 (P.J. Thomas ed., 2009).

[26] *Id.*

number of ordinances enacted: 196 in all. The following table shows the numbers of ordinances promulgated by the Union Government, organized by decade.[27]

Table 1. Number of ordinances promulgated by the Union Government by decade

Time Period	Number of Ordinances Promulgated
1952–1959	57
1960–1969	67
1970–1979	133
1980–1989	84
1990–1999	196
2000–2009	72

In neighboring Pakistan, ordinances arguably have a more egregious record. Between 2000 and 2007 alone, the federal government promulgated at least 380 ordinances.[28] Of these, 297 were promulgated between 2000 and 2003, 42 between 2004 and 2006, and at least 41 in 2007.[29] Direct statistical comparisons, though, are inappropriate. Pakistan's record of parliamentary democracy is littered with extended periods of martial detours, and this is particularly true of the period between 2000 and 2009. General Pervez Musharraf was first the so-called chief executive officer and later the President of Pakistan for the better part of that decade.[30] Also, spikes in the rate of ordinances directly correlate with periods in which Parliament was under suspension. There was no Parliament to speak of between 2000 and 2002, and ordinances were probably the only way to "legislate" while retaining a semblance of legality. The data do not show how many of these ordinances were eventually enacted into law.[31]

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[27] *Id.*; *see also* V.K. Agnihotri, *The Ordinance: Legislation by the Executive in India When the Parliament is Not in Session*, ASSOCIATION OF SECRETARIES GENERAL OF PARLIAMENTS, ADDIS ABABA SESSION, April 2009, *available at* http://www.asgp.info/Resources/Data/Documents/DSGLUMISWZXMFHMSMGKEQORWKOMYXW.doc.

[28] These figures are available at PAKISTAN LAWSITE, http://www.pakistanlawsite.com.

[29] These figures do not include the vast numbers of "orders" that were also promulgated during this time period. The count includes pieces of legislation that self-identified as "ordinances" but refers to federal ordinances only. Provinces in Pakistan also "enacted" vast numbers of ordinances during the same period; these are not included in this chart.

[30] For an introduction to the constitutional takeover and the early years of this period, see generally STEPHEN COHEN, THE IDEA OF PAKISTAN (2004).

[31] In recent years, legislators have expended more effort in this respect. In 2009, for example, at least fifty-three ordinances went before Parliament for formal approval. *See* NATIONAL ASSEMBLY OF PAKISTAN, ORDINANCES LAID, http://www.na.gov.pk/ord_laid.html (last visited Nov. 10, 2010).

Three points are relevant here. First, most ordinances do little to spell out the contingent circumstances that made them necessary except to recite the relevant constitutional provision. For example, the Banking Regulation (Amendment) Ordinance, 2007 explained its rationale this way:

> 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.[32]

This sort of explanation, if it can be called that, is the norm; rarely do ordinances describe circumstances more substantively. Second, ordinances issued in this decade cover an eclectic mix of subject matter ranging from the mundane (administrative changes to laws relating to passports, minor revisions to the law on bonuses, and so forth) to what may be regarded as highly important pieces of legislation (major amendments to the patent law, the introduction of a special law on terrorism).[33] The ordinance introducing changes to the Patents Act, 1970,[34] for example, was highly controversial, seeking to alter critical aspects of the patent regime in India.[35] Third, it is possible that some of these important pieces of legislation will not command a majority in Parliament. Indeed, that may be the primary motivation for introducing the legislation as an ordinance. The Prevention of Terrorism Ordinance, for example, was promulgated in October 2001. The ordinance was allowed to lapse because it lacked majority support, was re-promulgated with some modifications,[36] and was eventually enacted into law through an

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[32] Banking Regulation (Amendment) Ordinance, 2007, No. 1 of 2007, *available at* http://www.indiacode.nic.in/.

[33] *See, e.g.*, Passport (Amendment) Second Ordinance, No. 11 of 2001, *available at* http://www.manupatra.com; Payment of Bonuses (Amendment) Ordinance, No. 8 of 2007, *available at* http://www.manupatra.com; Patents (Amendment) Ordinance, No. 7 of 2004, *available at* http://www.manupatra.com; Prevention of Terrorism (Second) Ordinance, No. 12 of 2001, *available at* http://www.manupatra.com.

[34] No. 39 of 1970, *available at* http://www.indiacode.nic.in/.

[35] *See* Patents (Amendment) Ordinance, No. 7 of 2004, *available at* http://www.manupatra.com. For a critical review of the ordinance, see Rajendra Sachar, *Wrong Medicine: Patent Ordinance to Drive Up Drug Prices*, TIMES OF INDIA (Jan. 5, 2005), http://timesofindia.indiatimes.com/Opinion/Editorial/THELEADER-ARTICLE-WrongMedicine-Patent-Ordinance-to-Drive-Up-Drug-Prices/articleshow/980623.cms; *see also* Prabhu Ram, *India's New "Trips-Compliant" Patent Regime: Between Drug Patents and the Right to Health*, 5 CHI.-KENT J. INTELL. PROP. 195 (2006); Shamnad Basheer, *India's Tryst with TRIPS: The Patents (Amendment) Act, 2005*, 1 INDIAN J.L. & TECH. 15 (2005).

[36] *See* Prevention of Terrorism Ordinance, No. 9 of 2001, *available at* http://www.indlaw.com; Prevention of Terrorism (Second) Ordinance, No. 12 of 2001, *available at* http://www.manupatra.com.

extraordinary procedure.[37] The history of this ordinance shows the remarkable power of this form of legislation: compelling obedience to laws that may not enjoy widespread parliamentary support.

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

Where did this practice come from? India, or, more accurately, British India, has had a long history of ordinances. The provisions of the Government of India Act, 1935[38] (1935 Act) inspired Article 123, but the origins of the practice trace back to at least 1773.[39] For our purposes, it will be sufficient to consider the 1935 Act and the related deliberations in the Constituent Assembly.

A. The Governor General Under the Government of India Act, 1935

The Governor General under the Government of India Act, 1935 had extensive original legislative powers. That should come as no surprise, since the Act did not create a fully responsible parliamentary system.[40] At most, it introduced a limited degree of self-representation into Indian politics.[41] The Act authorized the Governor General to "enact" three kinds of ordinances. First, Section 42, the textual precursor to Article 123, provided for ordinances in their 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."[42] Second, Section 43 authorized him[43] to promulgate ordinances under circumstances that

[37] While bills in India must ordinarily be voted in by a majority in *each* of the two Houses of Parliament, Article 108 allows bills to be enacted through a majority vote of the 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 eventually was enacted into legislation. *See* INDIA CONST. art. 108, § 1.

[38] 1935, 25 & 26 Geo. 5, c. 42 (Eng.).

[39] *See* East India Company Act, 1773, 13 Geo. 3, c. 63, § 36 (Eng.); Indian Councils Act, 1861, 24 & 25 Vict., c. 67, § 23 (Eng.); Government of India Act, 1915, 5 & 6 Geo. 5, c. 61, § 72 (Eng.). For commentary, see D.C. WADHWA, RE-PROMULGATION OF ORDINANCES: A FRAUD ON THE CONSTITUTION OF INDIA 49–59 (1983).

[40] *See generally* JOHN PERCY EDDY, INDIA'S NEW CONSTITUTION: A SURVEY OF THE GOVERNMENT OF INDIA ACT, 1935 (1935).

[41] *See generally* H.K SAHARAY, A LEGAL STUDY OF CONSTITUTIONAL DEVELOPMENT OF INDIA (1970).

[42] Government of India Act, 1935 § 42.

[43] All Governors General appointed by the Crown were men.

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."[44] Finally, Section 44 provided for a new type of legislation, the Governor General's Act, which facilitated the Governor General's capability to perform his discretionary duties under the 1935 Act.[45]

The power to promulgate ordinances under Section 42 was crucially different from that under Sections 43 and 44 of the 1935 Act. Under Section 42, the Governor General was ordinarily required to act in accordance with the advice of his Council of Ministers, and ordinances he promulgated had a life of six months unless enacted into law by the federal legislature.[46] In contrast, Section 43 authorized him to issue ordinances in situations where immediate action was needed to satisfactorily discharge *his* functions under the Act. He had independent responsibility on certain matters: "The functions of the Governor-General with respect to defense 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."[47] 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 interests of minorities . . . and [protecting] the rights of any Indian State and the rights and dignity of the Ruler thereof."[48] Initially valid for six months, such ordinances were extendable for a further period not to exceed six months.[49] Importantly, the federal legislature had no control over such ordinances; they only had to be laid before both Houses of Parliament in Westminster.[50]

Finally, the provision for a Governor General's Act in Section 44 was truly an independent or parallel source of legislative power. As with Section 43, the power in Section 44 concerned the satisfactory discharge of his discretionary functions or those requiring the exercise of his individual judgment. However, Section 44 was not conditioned on the necessity for any "immediate action"; he could "legislate" whenever he wanted to, after explaining "to both Chambers of the Legislature . . . the circumstances which in his opinion [rendered] legislation essential."[51] Also, unlike Section 43, a Governor General's Act was permanent. It had the same force and effect of that of an act. In terms

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[44] Government of India Act, 1935 § 44.

[45] *Id.*

[46] *Id.* § 42(2)(a).

[47] *Id.* § 11(1).

[48] *Id.* § 12(1).

[49] *Id.* § 43(2).

[50] *Id.* § 43(3).

[51] *Id.* § 43(1).

of circumventing normal legislative procedures, the Governor General's Act was the most egregious of the three mechanisms. In true dictatorial style, it vested original legislative authority in a single unrepresentative office. An ordinance under Section 42 was subject to some legislative control after enactment, and a Section 43 ordinance faced temporal limits, but a Governor General's Act under Section 44 was subject to neither.

Nor did it help that the courts broadly interpreted the provisions. The Judicial Committee in *Singh v. King-Emperor* [52] interpreted analogous provisions of the Government of India Act, 1915 to exclude from judicial review the Governor General's assessment of "emergency."[53] 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.[54] That someone "must be the Governor-General, and he *alone*."[55] 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."[56]

The exclusionary rule quickly became standard reasoning. In *King-Emperor v. Benoari Lal Sharma*,[57] 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."[58] This wide latitude made life easy for ordinances, and they became the principal vehicle for general administration in India, though their frequent use disappointed the nationalist leadership.[59]

B. Objections Forgotten: Ordinances in the Constituent Assembly

These nationalist objections were largely forgotten in the Constituent Assembly, the group indirectly elected to draft the Constitution of India. No one brought serious, sustained challenge to the President's legislative powers.

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[52] (1931) 55 I.A. 169.

[53] Government of India Act, 1915, 5 & 6 Geo. 5, c. 61, § 72 (Eng.).

[54] *Bhagat Singh*, 55 I.A. at 172.

[55] *Id.* (emphasis added).

[56] *Id.*

[57] (1945) 72 I.A. 57.

[58] *Benoari Lal Sharma*, 72 I.A. at 64; *see also* Hubli Electricity Co. Ltd. v. Bombay, (1944) 76 I.A. 57; Das v. Bihar, (1949) F.C.R. 693.

[59] In his presidential speech to the Lucknow session of the Indian National Congress in 1936, Jawaharlal Nehru condemned the practice in strong words. The "humiliation of ordinances," he said, was a reminder that the Government of India Act, 1935 had done little to introduce self-governance in India. For a reference to the speech, see Roy v. India, (1982) 2 S.C.R. 272, para. 7. *See also* H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 18–19 (1st ed. 1968).

Dissent was limited both in the drafting committees and in the Constituent Assembly. Constitutional advisor B.N. Rau set the justificatory tone in his memo to the Union Constitution Committee:

> 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.[60]

In the Assembly, some members expressed a distrust of the proper use of the ordinance. Professor K.T. Shah was the most articulate voice against ordinances, but even he tacitly conceded that there may be exigent circumstances demanding emergency executive action.[61]

> 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.[62]

The focus in the Assembly was not on *whether* but on the *extent* to which ordinances were necessary. Some legislators were concerned about the use of ordinances for illegitimate purposes. For example, Pocker Sahib, who was troubled by the practices under the Government of India Act, 1935, sought to include a proviso in the 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."[63] Sahib provided the following justification for the suggested proviso:

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[60] B.N. Rau, *Memorandum on the Union Constitution*, *in* THE FRAMING OF INDIA'S CONSTITUTION 486 (B. Shiva Rao ed., 2006).

[61] 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, *supra* note 60, at 469, 469.

[62] 6 CONSTITUENT ASSEMBLY DEBATES 208 (1949).

[63] *Id.* at 203.

> 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 . . . 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.[64]

In reply, both P.S. Deskmukh and B.R. Ambedkar dismissed the proposal on the basis that the draft Article 123, Section 3 already addressed these 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."[65] In other words, the President's authority to enact ordinances was no greater than that of Parliament to pass acts. For the purposes of competence, force, and effect, both ordinances and acts stood on the same footing. Whatever was out of bounds for ordinary legislation was also out of bounds for an ordinance.

This assumption of equivalence is misleading and could not have adequately satisfied Sahib's objection. The following is the text of Sahib's 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."[66] A person may be deprived of his 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.[67] Given these possibilities, how does Article 123, Section 3 account for Sahib's concerns? The simple answer 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. If the President does so, a person may be deprived of his personal liberty without trial by a competent court of law. Was that not the core of Sahib's concern? In rejecting Sahib's proposal, the Constituent Assembly actually rejected the idea of *substantive* limits on ordinances. This rejection, we shall see later, matters for interpretive purposes.

There were other concerns about the illegitimate use of ordinances. H.V. Kamath, H.N. Kunzru, and Professor K.T. Shah argued that the draft form of Article 123, Section 3 did not sufficiently limit the tenure of ordinances. For

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[64] *Id.*

[65] *Id.* at 211.

[66] *Id.* at 203.

[67] INDIA CONST. art. 22, § 4, cl. 4, *amended by* Constitution (Forty-fourth Amendment) Act, 1978, § 3 (not yet in force).

Kamath, seven and one-half months was too long.[68] Worried that a President inclined to dictatorship might take advantage of the possible length an ordinance could be in effect, Kamath proposed requiring every ordinance to be "laid before both Houses of Parliament within four weeks of its promulgation."[69] H.N. Kunzru proposed a still shorter tenure: no more than thirty days.[70] According to him, extending the tenure of validity to six weeks from the reassembly of Parliament was unjustifiably long.[71] Professor K.T. Shah would not even tolerate six weeks. He proposed that ordinances end *immediately* on reassembly of Parliament: "Every such Ordinance shall be laid before both Houses of Parliament immediately after each House assembles, and unless approved by either House of Parliament by specific Resolution, shall cease to operate forthwith."[72]

Dr. Ambedkar resisted the proposals because, in his view, extended tenure was justified. Responding to Kamath and Shah, he looked back to the provisions of the Government of India Act, 1935. His interpretation led him to believe that unlike Sections 42 and 43, the draft provisions in the (then proposed) Constitution, the proposals did not provide any parallel or independent power of legislation to the executive because the executive was not able to pass ordinances while the legislature was in session.[73] The extraordinary power was limited to cases of legislative emergency, and even then, only when Parliament was not in session. This exception, he thought, was defensible on the following basis:

> 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 arisen, which it must deal with *ex hypothesi* it has not got the power to deal with that 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.[74]

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[68] CONSTITUENT ASSEMBLY DEBATES, *supra* note 62, at 203.

[69] *Id.* at 204.

[70] *Id.* at 206.

[71] *Id.* at 207.

[72] *Id.* at 208.

[73] *Id.* at 213.

[74] *Id.* at 214.

C. Assessing Two Arguments: Does India Need Ordinances?

The "necessary evil" argument is weaker than Dr. Ambedkar suggests for three reasons. First, while some jurisdictions have adopted the concept of legislative emergency in non-emergency times, others have functioned rather well without such powers. Some South Asian jurisdictions, including Pakistan,[75] Bangladesh,[76] and Nepal[77] have adopted similar executive ordinance provisions. Sri Lanka[78] and Malaysia[79] also have provided for ordinances, but these powers are conceptually closer to the "emergency provisions" under the Indian Constitution.[80] The latter two countries do not have provisions for dealing with so-called cases of legislative emergency in non-emergency times despite the fact that the Sri Lankan Constitution, for example, only requires that Parliament meet, at minimum, once per year.[81]

Second, the practices of 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.[82] These powers, however, are predicated on *specific* cases of emergency. In the United Kingdom, a senior minister of the Crown may make regulations[83] 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."[84] For the purposes of that act, "emergency" means "[a]n event or situation which threatens serious damage to human welfare . . . [or] threatens serious damage to the environment . . . , or [] war, or terrorism, which threatens serious damage to the security of the United Kingdom."[85] Such regulations have a maximum tenure of thirty days and are subject to parliamentary scrutiny within a relatively short period of

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[75] PAKISTAN CONST. art. 89.

[76] BANGLADESH CONST. art. 93, § 1.

[77] NEPAL INTERIM CONST. art. 88, § 1, *amended by* Interim Constitution of Nepal (Fourth Amendment) Act, 2008.

[78] SRI LANKA CONST. art. 155. *See* Public Security Ordinance, No. 25 of 1947.

[79] MALAYSIA CONST. art. 150, § 2(b).

[80] INDIA CONST. art. 352–360.

[81] SRI LANKA CONST. art. 70, § 2.

[82] *See* Civil Contingencies Act, 2004, c. 36 (U.K.). For commentary on this Act, see CLIVE WALKER & JAMES BRODERICK, THE CIVIL CONTINGENCIES ACT, 2004 (2006). *See also* Emergencies Act, R.S.C. 1985, c. 22 (4th Supp.) (Can.). Emergency legislation in Australia varies in the provinces. *See, e.g.*, Victoria State Emergency Act 2005, No. 51 of 2005 (Vic.) (Austl.).

[83] Civil Contingencies Act, 2004, c. 36, § 20(2).

[84] *Id.* § 21(3).

[85] *Id.* § 19.

time.[86] As with Sri Lanka and Malaysia, the emergency powers in these Commonwealth jurisdictions are closer to the "emergency provisions" in the Indian Constitution. Third, none of the fifty-five ordinances promulgated between 2000 and 2007 satisfy Dr. Ambedkar's test of "deficiency in existing law" or "immediate need for new law."[87] In some cases, there was no emergency to speak of, and in other cases, need for new legislation was entirely predictable.

H.M. Seervai apparently anticipated this sort of objection. He defended the practice less on grounds of governmental necessity and more through the lens of judicial review.[88] Articles 123 and 213 "have secured considerable flexibility both to the 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 reason 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 at least robust procedures akin to judicial review, and ordinances must go together. If one exists, the other is necessary. This argument is somewhat distinct from that of legislative necessity; it suggests that the very workings of the Constitution through the application of judicial review may generate cases of legislative emergency. The argument, however, is belied by the experience of countries like Sri Lanka, Malaysia, and South Africa, among others, which utilize judicial review without any provision for ordinances.[91]

Even so, what about the specific decision that Seervai cited in making his argument: the Bombay High Court's decision in *United Motors India Ltd. v. Bombay*,[92] which invalidated the Bombay Sales Tax Act, 1952?[93] In that case, the Bombay High Court concluded that the "Act as passed by the State Legislature [was] ultra vires," since the broad definition of "sale" in the Act was beyond the Bombay legislature's competence.[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] In situations like that in *United Motors*, Seervai feared that the

[86] *Id.* § 26.

[87] *See* MINISTRY OF PARLIAMENTARY AFFAIRS, STATISTICAL HANDBOOK, *supra* note 25, at 56.

[88] *See* H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 19 (1st ed. 1967).

[89] *Id.*

[90] *Id.*

[91] *See* MALAYSIA CONST. art. 4, § 1; S. AFR. CONST. 1996. art. 2; SRI LANKA CONST. art. 120.

[92] (1953) 4 S.T.C. (Bombay H.C.) 10.

[93] Act XXIV of 1952.2.

[94] *United Motors*, 4 S.T.C. at 25.

[95] *Id.*

"gravest public inconvenience" would be unavoidable without an immediately available alternative legislative avenue.[96] Presumably, in the absence of a new law, state agencies could not charge sales tax and would suffer revenue losses for the duration of the legislative void. Beyond this, it is unclear what Seervai meant by "gravest public inconvenience."[97] 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 resulted in the catastrophic consequences that Seervai suggests.[98]

Seervai appears to miss the larger point. The Constitution, as we have already seen, requires that the Parliament and state legislatures meet at least once every six months.[99] This is a minimum; the constitutional expectation unequivocally favors frequent meetings. In reality, Parliament and state legislatures have a less than inspiring record. In the last five years, Parliament has met, on average, 67.8 days per year;[100] between 2005 and 2009, Parliament has only been in session one out of every five days. Government statistics show that the lower House met for eighty-five days in 2005, seventy-seven days in 2006, sixty-six days in 2007, forty-six days in 2008, and sixty-four days in 2009.[101] Moreover, legislative performance is on a downward spiral. Until 1974, Parliament regularly sat for 100 days or more annually, sitting as many as 151 days in a single year. After 1975, with the exception of five years (1978, 1981, 1985, 1987, and 1988), Parliament has never been in session for more than 100 days in a year.[102] Furthermore, on at least eight occasions since 1990, the lower House has been in session for seventy days or fewer. Based on these statistics, Upendra Baxi is surely correct in saying, "Indian legislatures far too disproportionately dedicate their precious time to purposes other than making laws and public policies, mandated by Indian constitutionalism."[103] Given this

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[96] SEERVAI, *supra* note 88, at 19.

[97] *Id.*

[98] In fairness, one must point out that the sales tax revenues are a substantial part of the State's overall tax revenues. While this portion of the budget has gradually decreased in the last few years, it remains an important source of revenue. For some recent government statistics on sales tax from the state of Maharashtra, see *Sales Tax Revenue Budget Share in State Tax Revenue Budget*, DEPARTMENT OF SALES TAX, GOVERNMENT OF MAHARASHTRA, http://www.mahavat.gov.in/Mahavat/index.jsp (under the "About Us" menu, click "Statistics," then "Comparative Statements," then "Sales Tax Share in State Budget").

[99] INDIA CONST. art. 85, § 1.

[100] MINISTRY OF PARLIAMENTARY AFFAIRS, STATISTICAL HANDBOOK, *supra* note 25, at 52.

[101] *Id.*

[102] *Id.*

[103] Upendra Baxi, *Introduction* to D.C. WADHWA, ENDANGERED CONSTITUTIONALISM: DOCUMENTS OF A SUPREME COURT CASE lxxix, lxxxix (2009). *See also Parliament Should Have 100 Sittings a Year: Speaker*, IBNPOLITICS (Aug. 26, 2009), http://ibnlive.in.com/news/parliament-should-have-100-sittings-a-year-speaker/100001-37.html?from=search-relatedstories.

poor record, frequent legislative emergencies—even genuine cases of legislative emergencies in non-emergency times—should not be surprising.[104] But the solution to this problem is not to promote parallel legislative mechanisms. Seervai's concern for public inconvenience is justifiable, but better legislative performance could resolve much of the issue.

Arguments based on legislative emergencies and judicial review are inadequate to support the need for ordinances. How, then, does one explain Dr. Ambedkar's conviction that the power to enact ordinances is necessary? Kamath, Kunzru, and Professor Shah viewed potential future political leadership with suspicion. Kamath, for example, raised the hypothetical 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 might take unfair advantage of this article and refrain from summoning Parliament within a reasonable period.[105]

Professor Shah expressed similar worries:

> [I]t 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. [Even so, I do not want to] leave it to the exigencies, or to the possibilities of party politics, to see that such

[104] This might also explain why in some years, the difference between the volume of legislation enacted and the volume of ordinances promulgated was relatively small. The following table is a comparison between the volume of legislation and ordinances for the period from 1990 to 1998. *See generally* Agnihotri, *supra* note 27.

Year	Number of bills passed by both Houses of Parliament	Number of ordinances promulgated	Percent of ordinances of all 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%

As the table shows, much of the legislative business throughout the nineties was transacted through ordinances. In some years, the number of ordinances almost equaled the number of bills enacted into law.

[105] CONSTITUENT ASSEMBLY DEBATES, *supra* note 62, at 205.

> extraordinary powers are exercised at any time or for any time, and that is why [I] would require, under the constitution and by the constitution, that a maximum period is prescribed to the life of an ordinance.[106]

Dr. Ambedkar disagreed. With his more charitable view of future political leadership and parliamentary function, he saw 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 regard 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.*[107]

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

III. TEXTUAL STRUGGLES: THE CONSTITUTIONALITY OF RE-PROMULGATION

A. Continuity of Form: The Questionable Permissibility of Re-Promulgation

First, the text of Article 123 prompts a question regarding continuity of form. Article 123 (and its state equivalent, Article 213) provides that an ordinance "shall cease to operate at the expiration of six weeks from the reassembly of Parliament."[108] Can an ordinance be *re*-promulgated? If so, are there limits to the number of times it can be re-promulgated? Between 1967 and 1981, the state of Bihar promulgated 256 ordinances that "were kept alive for periods ranging between one and fourteen years by re-promulgation from time to time."[109] Re-promulgating the ordinances mechanically and strategically, the authorities breathed life into ordinances after their

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[106] *Id.* at 209.

[107] *Id.* at 215 (emphasis added); *see also* Amal Ray, *From a Constitutional to an Authoritarian System of Government: Interactions between Politics and the Constitution in India*, 25 J. COMMONWEALTH & COMP. POL. 275, 275-91 (1987).

[108] INDIA CONST. art. 123, § 2(a).

[109] Wadhwa v. Bihar, (1987) S.C.R. 798, 806.

legislatively-prescribed lifespans had passed.[110] In *Wadhwa v. Bihar*,[111] the Supreme Court held that this practice was unconstitutional.[112] The majority relied on four factors in reaching its conclusion: (1) the lawmaking function in the Constitution is entrusted to the legislature; (2) it is contrary to democratic norms for the executive to have the power to make law; (3) the power to issue ordinances to tide the state over in emergencies is exceptional and should be limited in duration; and (4) a contrary result is inconsistent with India's "constitutional scheme."[113] These factors pay too little attention to the text of Article 123 and its state counterpart and rely too heavily on the "norms" and "schemes" in which the provisions are embedded.

Though defensible, *Wadhwa*'s rejection of re-promulgation is far from universal. On two separate occasions, the Patna High Court interpreted Article 213 in favor of the power to re-promulgate.[114] Judge Singh believed judicial remedy to be inappropriate. Referring to the permissibility of re-promulgation, he concluded as follows in *Singh v. Bihar*:

> The Constitution . . . vested the Governor with power to promulgate Ordinance [*sic*] when Legislature is not in session and such an Ordinance is given the same force and effect as an Act of Legislature . . . it [was] not for the Court to declare such an Ordinance ultra vires on this score. . . . 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

[110] For a copy of a circular letter advising repromulgation, see *Wadhwa*, *supra* note 109, at 813. For a detailed description of the assiduous manner in which legislative sessions were timed, and their implications for keeping ordinances alive, see WADHWA, *supra* note 39, at 8–17.

[111] A.I.R. 1987 S.C. 579. The case has an interesting history. Agrarian economist Dr. D.C. Wadhwa is India's most well-known expert on ordinances. In 1982, while researching land reforms in the state of Bihar, he stumbled upon the practice of re-promulgating ordinances in Bihar. Over the next few years, he painstakingly put together the necessary documents from governmental archives to make the case against re-promulgation under the Indian Constitution. *See generally* WADHWA, *supra* note 39. For selected reviews, see Ashok H. Desai, *Government by Ordinances*, 19 ECON. & POL. WKLY. 2076 (1984); Jill Cottrell, Book Review, 33 INT'L & COMP. L.Q. 503 (1984); Craig Baxter, Book Review, 477 ANNALS AM. ACAD. POL. & SOC. SCI. 158 (1985). In 1984, Dr. Wadhwa engaged in "public interest litigation," petitioning the Supreme Court for a stay on the practice and a declaration that the practice was unconstitutional. The Supreme Court decision in *Wadhwa* was the outcome of that writ petition.

[112] In 2009, Dr. Wadhwa published a collection of documents describing the trajectory of the case in the Supreme Court. For a detailed account of the hearings and orders leading to the decision, see WADHWA, *supra* note 39, at xvii–lxxviii.

[113] *Wadhwa*, A.I.R. 1987 S.C. at 800–01.

[114] *See* Singh v. Bihar, A.I.R. 1975 (Patna H.C.) 295; Biri v. Bihar, (1973) 32 S.T.C. (Patna H.C.) 573.

> 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 reasoning, finding the legislature to be the proper forum to work change. Referring to Dr. 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 legislature and the legislature alone should have corrected it and reprimanded the government."[116] Dr. 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.[117]

Where, then, did Wadhwa and Sathe disagree? 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 is impermissible. However, Wadhwa believed that the wrong had a *judicial* remedy, and Sathe believed it did not:

> 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 this particular case, Sathe's arguments carry less weight for petitioners who are more closely tied to or more directly affected by the legislative practice.[119] Under those facts, Sathe might be forced to agree with Wadhwa that judicial remedy is indeed appropriate.

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[115] A.I.R. 1975 (Patna H.C.) 295, para. 16.

[116] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 124 (2002).

[117] WADHWA, *supra* note 39, at 33.

[118] SATHE, *supra* note 116, at 33.

[119] Beyond that, there are other avenues through which the matter may have been "appropriately" decided. For example, the Supreme Court could have exercised its appellate powers to hear 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 broader than that of the Supreme Court under Article 32. *See* INDIA CONST. art. 226, § 1.

B. Re-Promulgation Exceptions: Are All Re-Promulgations Invalid?

Two facets of *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. Chief Justice Bhagwati was scathing in his criticism of re-promulgation. He considered the "enormity of the situation . . . startling"[120] at one point; elsewhere, he denounced 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] But this litany of linguistic censure did not translate into judicial stricture. Except for invalidating one of the three ordinances specifically challenged in the petition, the Court settled for "hope and trust that such practice shall not be continued in the future."[126] It neither said nor did anything about the 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 "hope and trust" order:

> [B]oth "hope" and "trust" are singularly misplaced in a context where a state has usurped unconstitutionally the power of the elected representatives of the people. . . . It is abundantly clear that the exceedingly brief judgment in this case altogether surrenders the pedagogic function of social action litigation and jurisprudence. Their Lordships denounce, rightly, a pattern of ordinance-prone behaviour of the State of Bihar. But they make no visible attempt to understand let alone explain its originary epidemiological dimensions.[127]

Secondly, the Court's ruling that re-promulgation is unconstitutional leaves certain questions unanswered. For example, is re-promulgation *per se* unconstitutional? That is unlikely. Chief Justice Bhagwati listed circumstances in which the executive may be compelled to re-promulgate an ordinance:

> Of course, there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the Ordinance, because the Legislature may have too much legislative business . . . or the time at

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[120] Wadhwa v. Bihar, (1987) S.C.R. 798, 806.

[121] *Id.* at 816.

[122] *Id.*

[123] *Id.* at 817.

[124] *Id.* at 818.

[125] *Id.* at 816.

[126] *Id.* at 818.

[127] BAXI, *supra* note 103, at lxxxvi-lxxxvii.

> 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.[128]

Note that there is nothing in the four steps outlined earlier that requires or validates this exception. 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 application of mind, not just clerical rubberstamping. If the exigent conditions remain, and there are adequate reasons that the legislature failed to convert the ordinance into law, re-promulgation may be valid. This distinction sets re-promulgation apart from promulgation.

C. Assessing Exceptions: Text, Policy and "Justifiable Reasons"

Our focus now turns to defining "adequate reasons" that would justify re-promulgation. Chief Justice Bhagwati pointed to two. First, if the volume of legislative business in the intervening session prevented the government from passing a bill, re-promulgation would be acceptable.[129] Second, if an intervening session were too short to enact an ordinance into law, re-promulgation could be also be permitted.[130] Both these options, to some extent, violate the fundamental requirement that an "emergent situation" (i.e., unexpected exigent circumstances) is a prerequisite for re-promulgation. If a legislative emergency sufficient to justify a make-do ordinance persists, why should such a matter should be treated with low priority? If the legislature declines to handle ordinance-related matters because of volume of work or brevity of time, that itself may be a reason to doubt the existence of emergent conditions.

Unsurprisingly, Justice Bhagwati's exceptions to the rule against re-promulgation were greeted with skepticism. A.G. Noorani was personal in his criticism: "When Justice P.N. Bhagwati retired as 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."[131] The exceptions carved out by Chief Justice Bhagwati, Noorani thought, were "wholly gratuitous and [robbed] the judgment of merit and value."[132] For him, "[i]t was a case of interpretation and the exception, based on pure legislative convenience, [derived] no sanction from Article 213."[133] It was, as he put it,

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[128] Wadhwa v. Bihar, (1987) S.C.R. 798, 816.

[129] *Id.*

[130] *Id.*

[131] A.G. Noorani, *Supreme Court and Ordinances*, 22 ECON. & POL. WKLY. 357, 357–58 (1987).

[132] *Id.*

[133] *Id.*

"devoid of any justification."[134] Anil Nauriya, in his more measured analysis, pointed out the incoherence of the propositions.[135] Given that the decision outlawed "only *successive* repromulgations, indulged in as a practice," Nauriya argued the following:

> [The Court has] upheld three contradictory and inconsistent propositions ... 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.[136]

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 *Wadhwa*.[137] For him, the incoherence is obvious, since the propositions do not add up. But this incoherence, or what he refers to as "judicial creativity combined with judicial coyishness," is not totally useless.[138] Lest his analysis be 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."[139]

Noorani's view is different. Adamant that the exceptions are unjustified, he wants *all* re-promulgations to be invalidated, not just mechanical ones. Unlike Nauriya, he has no time for "artistry," "creativity," or "coyishness." For all his conclusory belligerence, Noorani's arguments are remarkably empty. He gives no reason for opposing all forms of re-promulgation except for his banal point that "the exception ... derives no sanction from Article 213."[140] It is one thing to state that the exceptions do not adequately engage with the text. It is entirely something else to rest one's critique solely on the ground that a piece of text does or does not "include" something. Texts are more malleable than Noorani is willing to admit. It is unclear how much of Indian constitutional law will survive if we take seriously Noorani's textual standards, whatever they are. Is the "reasonableness doctrine" of equality borne out by the text of Article

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[134] *Id. See also* Jill Cottrell, *Re-Promulgation of Ordinances in India: A Note*, 37 INT'L & COMP. L.Q. 1044, 1044-45 (1988).

[135] *See generally* Anil Nauriya, *Indian Judicial Renascence: The Lines Not Crossed*, 22 ECON. & POL. WKLY. 239 (1987).

[136] *Id.* at 241 (emphasis in original).

[137] *See infra* Part V discussing the issues relating to judicial review.

[138] Nauriya, *supra* note 135, at 241.

[139] *Id.*

[140] Noorani, *supra* note 131, at 357.

14?[141] Is the Constitution's expansive array of fundamental rights supported by the phrase "life and personal liberty" in Article 21?[142] Can the doctrine of "basic structure" be founded exclusively upon the text of Article 368, Section 1?[143] These examples are only the tip of the iceberg.

But as Dr. Wadhwa's recent analysis suggests, textualism's clarity remains attractive.[144] A host of English and Indian decisions on statutory interpretation[145] helped him to the conclusion "that courts cannot add words into a Statute if the language of the Statute is clear and unambiguous."[146] The language of Article 213, he felt, was "very clear and unambiguous" and did not mention re-promulgation. A re-promulgation exception, therefore, had no textual basis.[147] These textual arguments are unhelpful; clarity or ambiguity of the text depends heavily 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 this undemocratic practice. Even without his textual theories, Dr. Wadhwa does have credible arguments against re-promulgation. He responded to the twin exceptions based on brevity of the legislative session and high volume of legislative business carved out by Chief Justice Bhagwati with the following words:

> 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.[148]

This may be the strongest argument yet against the specific exceptions carved out in *Wadhwa*.

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[141] For a judicial exposition of the "reasonableness doctrine" in Article 14, see Hasia v. Mujib, (1981) 1 S.C.C 722; Gandhi v. India, (1978) 1 S.C.C. 248; Royappa v. Nadu, (1974) 4 S.C.C. 3. For commentary, see M.P. Singh, *The Constitutional Principle of Reasonableness*, 3 SUP. CT. CASES 31 (1987).

[142] For commentary, see generally S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 124 (2002).

[143] For a judicial exposition of the doctrine of "basic structure" in Article 368, see Bommai v. India, (1994) 3 S.C.C. 1; Rao v. India, (1981) 2 S.C.C. 362; Minerva Mills Ltd. v. India, (1980) 3 S.C.C. 625; Bharati v. Kerala, (1973) 4 S.C.C. 225. For analysis, see generally SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA (2009).

[144] WADHWA, *supra* note 103, at 259–62.

[145] *E.g.*, Ramnarain v. Pradesh, A.I.R. 1959 S.C. 459; Narain v. Bombay, A.I.R. 1957 S.C. 18; Bose v. Nath, A.I.R 1945 P.C. 108; Vickers, Sons & Maxim Ltd. v. Evans, (1910) A.C. 444 (H.L.); Magor & St. Mellons Rural Dist. Council v. Newport Corp., (1951) 2 All E.R. 839.

[146] WADHWA, *supra* note 103, at 262.

[147] *Id.*

[148] *Id.* at 263.

If the Supreme Court is to insist on allowing a limited set of exceptions to the rule against re-promulgation, what other reasons apart from the two in *Wadhwa* might validate 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 National Democratic Alliance Government initiated the Prevention of Terrorism Ordinance, 2001 (POTO).[149] Promulgated barely five weeks before the winter session of Parliament, the ordinance sparked outrage.[150] 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 the ordinance, and the government lacked the numerical support, particularly in the upper House of Parliament, to get the law passed.[151] With the lower House eventually adjourned *sine die*, the Vajpayee government decided to re-promulgate the ordinance, with some changes, as the Prevention of Terrorism (Second) Ordinance, 2001.[152] 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. In deciding whether lack of legislative support constitutes an "adequate reason" to re-promulgate an ordinance depends in part on how expansively "adequate reasons" is defined. *Wadhwa* provides no guidelines for this decision, and it is unclear if Chief Justice Bhagwati's two exceptions should be read as a closed set.[153]

D. Experience from Across the Border: Re-Promulgation in Pakistan

Interestingly, in *Collector of Customs, Karachi v. New Electronics Limited*, the Supreme Court of Pakistan invoked exceptions similar to those in *Wadhwa* when deciding the legality of re-promulgation in Pakistan.[154] Under Article 89,

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[149] For contrasting views about the need and efficacy of such an ordinance, compare Rajeev Dhavan, *POTO: An Assault on Democracy*, HINDU (Nov. 16, 2001), *available at* http://www.hindu.com/2001/11/16/stories/ 05162523.htm with R.K. Raghavan, *Old Wine in a New Bottle?*, 18 FRONTLINE 22 (2001), *available at* http://www. flonnet.com/fl1822/ 18221140.htm.

[150] *See* Dhavan, *supra* note 149.

[151] V. Venkatesan, *POTO and a Stand-Off*, 18 FRONTLINE 26 (2001), *available at* http://www.hinduonnet.com/fline/fl1826/18260190.htm.

[152] Tribune News Service, *POTO Promulgated with Amendments*, TRIBUNE (Dec. 31, 2001), *available at* http://www.tribuneindia.com/2002/20020101/nation.htm#3.

[153] For a less-than-persuasive argument that re-promulgation in this case was unconstitutional, see D. Nagasaila & V. Suresh, *Re-Promulgation of POTO: Is It Legal?*, 37 ECON. & POL. WKLY. 371–72 (2002); *see also* Era Sezhiyan, *Perverting the Constitution*, 18 FRONTLINE 25 (2002), *available at* http://www.hinduonnet.com/fline/fl1825/18251010.htm.

[154] 1994 P.L.D. (S.C.) 363 (Pak.).

Section 1 of the Pakistan 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."[155] Such ordinance, unless withdrawn by the President or disapproved by the National Assembly earlier, "shall stand repealed at the expiration of four months."[156]

In *Collector of Customs*, a finance ordinance containing provisions identical to those of a previously promulgated ordinance was reissued at the expiration of four months.[157] The National Assembly was not in session. Adjudicating a challenge to the ordinance, Justices Ajmal Mian and Sajjad Ali Shah, writing for the majority, concluded that the re-promulgation was valid. They reasoned that the underlying philosophy of Article 89 was to ensure that the legislative power remains with the legislative bodies and is not usurped by the executive. That justification was not applicable, they said, in cases where the "Assembly [stood] dissolved and for a justifiable reason, [had] not been reconstituted."[158] Their rationale is as follows:

> 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[?][159]

While Justices Mian and Shah did not lay down a test for determining when re-promulgation was valid, their hypothetical scenario may be another instance that Chief Justice Bhagwati would approve of as an exception to the general rule against re-promulgation. As in *Wadhwa*, the focus in *Collector of Customs* was on "adequate reasons." Justices Mian and Shah did not make an exception for all cases of failed reconstitution; they limited their exception to cases of failed reconstitution with "justifiable reasons."

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

With regards to the Indian Constitution, *Wadhwa*'s insistence on adequate reasons point to a higher burden for re-promulgation. It raises an additional question: when is an ordinance "the" ordinance, or the same ordinance as was promulgated in the past? Consider, once again, both versions of POTO. Three

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[155] PAKISTAN CONST. art. 89, § 1.

[156] *Id.* at art. 89, § 2(a).

[157] Finance Ordinance, 1988, Ordinance No. 12 of 1988.

[158] *Collector of Customs*, 1994 P.L.D. (S.C.) 363 (Pak.).

[159] *Id.*

provisions in the first ordinance were objectionable to many political parties: a five-year sunset clause,[160] a provision mandating disclosure of journalists' sources of information regarding terrorist activities,[161] and forfeiture clause of terrorists' property.[162] When promulgating it for the second time, the Vajpayee government deleted the provision mandating disclosure of journalists' sources, reduced the sunset clause to three years, and provided a judicial mechanism governing forfeiture of property belonging to convicted terrorists.[163] These amendments raise the "difference" question: how different must the revised ordinance be to pull out of the shadows of the first? Or, as I put it before, when is an ordinance no longer "the" ordinance? If mechanical, automatic re-promulgation is constitutionally impermissible, we need a standard to distinguish between contiguous or related ordinances to determine whether the second ordinance is a new ordinance or merely a re-promulgation of the first. The two terrorism-related ordinances did not raise this issue because the government admitted that it was re-promulgating the earlier ordinance. But what of a situation in which 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?

Contiguous ordinances fall within a spectrum. At one end of the spectrum are ordinances with nearly identical texts whose changes are no more than cosmetic. These changes may be intended to create the appearance of change rather than meaningfully revise the ordinance. At the opposite end of the spectrum are ordinances whose entire structure is different. The new ordinance may define itself differently, establish different bodies, propose different remedies, and impose different punishments. The paradigmatic new ordinance results when the government, based on input concerning the initial ordinance, seeks to promulgate an ordinance responding to the same circumstances in a way genuinely different from the first. Incidentally, the 256 ordinances promulgated by the state of Bihar do not fall within this spectrum, since the government did not even make cosmetic changes. If the court finds good reason to believe that the ordinance is genuinely a new one rather than a re-promulgation of the prior text, it may decide the government has overcome the *Wadhwa* objections to "mechanical" re-promulgation.[164] Most cases of re-promulgation are likely to fall somewhere in between these two extremes. As occurred with POTO, if the government makes important changes to the

[160] Prevention of Terrorism Ordinance, No. 9 of 2001, § 1(6), *available at* http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTO.htm.

[161] *Id.* § 3(8).

[162] *Id.* § 6(2).

[163] Despite the changes and the efforts to mollify political allies, the Vajpayee Government could not gain a majority consensus in both Houses of Parliament and, therefore, opted to re-promulgate the ordinance.

[164] Note that we may still have to deal with situations when 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.

existing text, its claim that it is engaging in fresh promulgation rather than re-promulgation may receive judicial affirmation.

Will textual comparisons help us settle these questions? Perhaps a test is needed to measure continuity and change to decide whether an old ordinance has been transformed into a new one.[165] Dr. Wadhwa's recent suggestion for a constitutional amendment, though valuable, is not particularly helpful for interpretative purposes.[166] 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 Ordinance reproducing substantially the provisions of the repealed or lapsed Ordinance shall be promulgated by him under any circumstances."[167] Though this proposed amendment is a good start, I doubt its ultimate utility. After all, "substantial similarity" is precisely the point of contention. Instead of comparing text, we might be better off looking at the legislative *entry* in which a given promulgation or its avatar is situated.

IV. THE CONTINUITY OF EFFECT: HOW LONG IS SEVEN AND ONE-HALF MONTHS?

A. Separating the Continuities of "Tenure" and "Validity"

A question about continuity of effect remains with regards to the text of Article 123. As mentioned earlier, Article 123 ordinarily limits the legal effect of ordinances to seven months and two weeks unless they are enacted into law. The significance of this length of time is not clear. Do actions initiated under an ordinance have legal effect after the ordinance ceases to exist, even though legislation repealing the ordinance does not specifically say so? Should they? The answer to this question depends on the definitions of "tenure" and "validity" and the ways in which they bear upon the text of Article 123, Section 1.

A hypothetical is useful to illustrate these issues. An ordinance is promulgated and enacted into law with identical provisions. After the new act comes into effect, a person is prosecuted for an offense allegedly committed while the ordinance was in force. Do the provisions of the now repealed ordinance carry over to the new act, generating *de facto* continuing legal validity? The Supreme Court confronted this question in *Punjab v. Singh*.[168] The respondent was prosecuted for providing false information under Act 12 of 1948, a piece of legislation that was not in force when the offense was committed. At the time of commission, Ordinance 7 of 1948 was in force; the

[165] I am skeptical about utility of such a test. Tests are rarely controlling, and, at best, provide a form in which to couch one's legal arguments. They are useful to the extent that that their requirements limit the arguments of counsel and judges.

[166] Baxi, *supra* note 103, at 292–93.

[167] *Id.* at 293.

[168] A.I.R. 1955 S.C. 84.

Ordinance was subsequently repealed and replaced with the Act. In short, the effect of repeal of an ordinance was in question.

In deciding the matter, the High Court turned to the General Clauses Act, 1897.[169] Under Section 6 of the Act, 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."[170] 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*, abrogating the existing law without saying anything more. Broadly construed, "repeal" could include situations in which the existing law is repealed and replaced with a new law, as in *Mohar Singh*. The High Court concluded that the application of Section 6 of the Act (that is, the continuing validity of right, privilege, obligation, liability) is limited only to cases of narrow repeal.[171] Why?

Cases of narrow repeal, 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 of the Act would apply. But no such inadvertence may be presumed in cases of broad repeal. If the new Act does not deal with the matter, it may be presumed that the legislature did not see fit to keep alive the liability incurred under the old law.[172] 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 of the Act, Justice Mukherjea wrote, applied in both cases of repeal, narrow and broad. 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."[173] 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.

B. Distinguishing Six Possibilities of Repeal

The point of law raised in *Mohar Singh* pertains primarily to statutory interpretation, but it does have an interesting and important application to

[169] No. 10 of 1897.

[170] *Id.* § 6.

[171] *Singh*, A.I.R. 1955 S.C. 84, para. 10.

[172] *Id.*

[173] *Id.*

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 the case of (B), when one 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 given our earlier discussion regarding the continuity of form. To repeal an existing ordinance and mechanically replace it with a "substantially similar" ordinance would fall afoul of Article 123. However, (C) and (D) are somewhat problematic. If the Supreme Court was correct in its interpretation of the repeal provision, it would follow that a validly enacted piece of legislation that repeals an ordinance, as in (D), would continue to provide legal cover for all actions executed under the prior ordinance, even when it does not unequivocally say so.

It would follow that an ordinance that repeals and replaces an existing act, as in (C), cannot invalidate actions carried out 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 outcome in (D). For the High Court, the converse would be true. 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, as in (D), would not provide legal basis 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, as in (C), can make illegal actions 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 (C).

The symmetrical effect of Section 6 of the Act on acts and ordinances suggests that neither interpretation is superior. Regardless of where the presumption falls, 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 when an ordinance repeals an existing act, all prior rights, privileges, and obligations survive unless there is manifest intention to destroy them. Conversely, when an act repeals an existing ordinance, all prior rights, privileges, and obligations are wiped out unless there is a clear statement to the contrary. If we accepted the High Court's interpretation of the presumption, the arguments would be reversed. This distinction, attractive as

it may be, appears unconstitutional. Article 123, Section 2 states 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, Section 2.

This discussion on the continuity of effect of ordinances points to two things. First, there is likely no interpretation that would never privilege ordinances. Nonetheless, empirically speaking, ordinances have generally been used to introduce legislation that is subsequently transformed into acts and rarely to repeal existing legislation that was validly enacted earlier. Therefore, if the sole purpose of interpreting Section 6 of the Act was to constrain the extraordinary legislative powers of the Executive, the High Court's interpretation favoring a narrow reading of "repeal" is better. That view would require that for prior rights, privileges, and obligations under a repealed ordinance to survive in newly enacted legislation, Parliament must clearly authorize it.

C. The Difference Quotient: Why is an Ordinance Not an Act?

Our discussion also focuses light on an aspect of the 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 by a separate Act or by the terms of the Act itself. Of course, an Act may fall into disuse, but a state of disuse is not the same as legal invalidity. In contrast, an ordinance ceases to have effect, the equivalent of "lapsing," six weeks after the date Parliament reassembles unless both Houses of Parliament enact the ordinance 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 legal force and effect from valid legislation. 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 will. Lapse of a bill or ordinance, on the other hand, signifies a *failure* to secure such an approval.

The distinction is important insofar as the General Clauses Act, 1897[174] provides for the continuity of rights, privileges, and obligations *only* in cases of repeal.[175] 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 re-promulgate the Prevention of Terrorism (Second) Ordinance, 2001 with some changes. Section 64(1) of the Ordinance specified that "the Prevention of Terrorism Ordinance, 2001 is hereby repealed." Section 64(1) additionally indicated that "notwithstanding such

[174] No. 10 of 1897.

[175] *See id.* §§ 6, 6(A).

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 took effect. Attorneys were correct in insisting that prosecutions initiated against accused persons during the term of the first ordinance had continued validity.[176] This validity, however, depended not on any abstract principles but on Section 64 of the latter ordinance.

Now consider a situation in which the first ordinance simply lapses and is not superseded by any other coterminous ordinance or act. Would actions initiated during the term of the ordinance enjoy continuing validity? Section 6 of the General Clauses Act, 1897 would *not* apply because this is not a case of repeal. Indeed, there is nothing in the General Clauses Act, 1897 that could be construed to determine the continuing validity of actions initiated under a lapsed ordinance. It is misleading to suggest that actions initiated under a lapsed ordinance can never be wiped out retrospectively. Rather, prior rights, privileges, and obligations under a lapsed ordinance *always* are wiped out retrospectively unless superseded by a "repeal" act or ordinance, which in turn would have to be legislatively validated.[177] In other words, for actions under a lapsed, or "failed," ordinance to enjoy continuing validity, at least its repeal must be legislatively enacted.

D. Judicial Narratives: Three Reasons Why the Supreme Court Is Wrong

The foregoing argument suggests that the Supreme Court erred in *Orissa v. Bose*[178] in upholding the continuing validity of rights created under an ordinance that eventually lapsed. The state of Orissa promulgated an ordinance that sought to nullify a High Court decision invalidating the results of a local municipal election.[179] 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? Justice Gajendragadkar, writing for the Supreme Court, rejected what he called the "inflexible and universal rule" that all rights and obligations cease to have effect upon the expiration of a temporary act.[180] "[W]hat the effect of the expiration of a temporary Act would be must depend

[176] Tripti Nath, *POTO Can't Lapse Retrospectively*, TRIBUNE (Dec. 21, 2001), *available at* http://www.tribuneindia.com/2001/20011221/nation.htm#3.

[177] Therefore, without the second Terrorism Ordinance, all arrests made and prosecutions initiated under the first ordinance during its two-month tenure would have lost legal validity.

[178] Orissa v. Bose, A.I.R. 1962 S.C. 945.

[179] *Id.* para. 1.

[180] *Id.* para. 21.

upon the nature of the right or obligation resulting from the provisions of the temporary Act," he wrote.[181]

> 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.[182]

Therefore, based on what he took to be "the true legal position in the matter," Justice Gajendragadkar concluded that the ordinance provided continuing validity to the municipal elections even after its lapse.[183] This rationale was taken up further in *Reddy v. Andhra Pradesh*,[184] in which the Supreme Court held that the lapse of an ordinance does not revive the government posts abolished under it.[185] To understand *Reddy*, consider the text of Article 213(2):

> (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.[186]

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."[187] Rather, "it shall cease to operate."[188] 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."[189]

Operation or tenure is separate from validity. *Reddy* conflates the two. An ordinance ceases to operate upon its failure to secure legislative approval. This, however, says nothing about the validity of actions previously

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] Reddy v. Andhra Pradesh, A.I.R. 1985 S.C. 724.

[185] *Id.* para. 18.

[186] INDIA CONST. art. 213, § 2 (emphasis added).

[187] Reddy v. Andhra Pradesh, A.I.R. 1985 S.C. 724, para. 19.

[188] *Id.*

[189] *Id.*

undertaken. What makes an ordinance valid? Necessary circumstances and future legislative approval, I would argue, make an ordinance valid. Future legislative approval is built into its *initial* validity. 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 *Reddy* is to be believed, it "can be achieved by passing an express law operating retrospectively to the said effect."[190] 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. All actions, at least within a certain period of time, have permanent validity that a legislature cannot invalidate. A properly enacted law would be needed to undo the effects of an executive act. This is a troubling state of affairs that undermines the fundamental idea that law with permanent effect can only be enacted through a legislative forum.

In reiterating my earlier argument that rights, privileges, and obligations do not survive beyond the life of a lapsed ordinance, I repeat three points. First, *Bhupendra Bose* misreads section 6 of the General Clauses Act, 1897. Second, *Venkata Reddy* misreads Article 213. They fail to distinguish between the repeal of a law and the lapse of an ordinance. 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.[191] Third, *Bhupendra Bose* negatives an important limitation in Article 123, and *Venkata Reddy* does the same 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 Articles 123 or 213, does not *really* cease to operate. For Justice Gajendragadkar, seven and a half months are not really seven and a half months. Seven and a half months could mean one year, five years, ten years, or even an indefinite period of time. If *Bhupendra Bose* were correct, taxes imposed under an ordinance that eventually lapses may be valid indefinitely. There are strong reasons to suggest that such a view is inconsistent with the "cessation" requirement in Article 123. Bearing these infirmities in mind, the rule concerning continuing validity of lapsed ordinances must be exactly what Justice Gajendragadkar said it could not be: inflexible and universal. Lapsed ordinances do *not* have continuing effect; everything done under their authority is 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 with 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 the future will and should

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[190] *Id.*

[191] *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.

weigh heavily in deciding if an ordinance is needed. At the moment, the rule of *de facto* validity invites a cavalier approach. A failed ordinance has no legal cost and is unlikely to promote responsible practices. A legal requirement to undo completed transactions under a failed ordinance will do much to promote responsible governance while dramatically decreasing the number of ordinances promulgated.

In this regard, the separate opinion of Justice Sujata Manohar in *Krishna Kumar Singh v. Bihar* bears careful consideration.[192] The state of Bihar had, by a series of nearly identical ordinances, taken over the management and control of nongovernmental educational institutions, making previous employees government employees under the new management. [193] Eventually, the ordinance and its subsequent avatars failed because the Bihar Legislative Assembly did not enact it into law.[194]

Justice Manohar 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 provide 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 decide whether they are permanent. Every completed event is not necessarily permanent.[195]

Thus, Justice Manohar reminded us that what is done can be undone and any construction can be demolished.[196]

> 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.[197]

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[192] Singh v. Bihar, A.I.R. 1998 S.C. 2288.

[193] *Id.* para. 16.

[194] *Id.* para. 15.

[195] *Id.* para. 31.

[196] *Id.*

[197] *Id.*

Using this interpretive approach, Justice Manohar caused the employees to revert to their previous status. She concluded that the lapsed ordinance did not make the staff permanent government employees.[198]

E. Learning from Neighbors: Pakistan's Struggle with Foundational Concepts

Ordinance-related provisions in the Pakistan Constitution stand in contrast to the argument I have sketched out. Article 89, Section 2 states as follows:

> 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.[199]

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 has been repealed. They are one and the same. Further, Article 264 defines the effect of repeal:

> 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 . . . (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.[200]

Radical implications of the "repeal effect" are not difficult to see. For instance, let us imagine that an ordinance 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, notwithstanding the so-called repeal, all prosecutions initiated during the tenure of the ordinance along with all possible future convictions are legally

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[198] *Id.* para. 37.

[199] PAKISTAN CONST. art. 89, § 2 (emphasis added).

[200] *Id.* at art. 264.

valid. This enforced legality is disturbing, and its justifications are not clear. Penalizing a person (or, for that matter conferring any right, privilege, obligation or liability) under a piece of "legislation" to which a majority of elected members have expressed formal opposition 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? Because of the inability to make a relatively simple distinction between repeal and lapse. Repeal, to reiterate an earlier point, is an affirmative act: where members agree to remove a law from the statute books. Lapse, on the other hand, is about parliamentary *refusal* to adopt a proposed ordinance when members agree that it should not be enacted into law. This is most evident in the case of bills. A bill lapses when the executive, having introduced it in Parliament, fails to secure a majority. No one argues that a bill, whether lapsed or otherwise, should have formal quality in a legal system. The argument is no different for ordinances. In addition, ordinances modify the classic Westminster system in an important way. Unlike in the United Kingdom, the executive in India or Pakistan may promulgate "enactments." The permanence of an enactment promulgated in the exercise of executive power 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. Pakistan has treaded this dangerous slippery slope, and its experience is not worth emulating. There are good reasons for reconsidering *Bhupendra Bose* and *Venkata Reddy*.

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

The 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."[201] 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, Section 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."[202] It must be emphasized that the focus here is on the President's satisfaction as to whether 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 and applicable laws,

[201] INDIA CONST. art. 123, § 3; *see also* Nagaraj v. Andhra Pradesh, A.I.R. 1985 S.C. 551.

[202] INDIA CONST. art. 123 § 1 (emphasis added).

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. The core of our discussion is the judicial review of presidential satisfaction. In other words, 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."[203] Three years later, it was deleted.[204]

A. Judicial Review of Executive Presidential Satisfaction: An Outline

Before we get into the discussion, some matters need be clarified. Presidential satisfaction under the Indian Constitution is now commonly agreed to be subject to judicial review under certain circumstances.[205] 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.[206]

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.[207]

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[203] *Id.* at art. 123, § 2.

[204] *Id.* at art. 123, § 14.

[205] *See* Prasad v. India, (2006) 2 S.C.C. 1; Bommai v. India, (1994) 3 S.C.C. 1; Patwa v. India, 1993 Jab. L.J. 387.

[206] INDIA CONST. art. 352, § 1.

[207] *Id.* at art. 356, § 1.

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."[208] A proclamation of emergency in either situation involves significant transfer of powers to the Union executive, including the authority to "enact" legislation, if delegated by Parliament.[209] While the emergency provision under Article 352 has been invoked three times, it has never been judicially challenged. Article 360 has never been invoked.[210] In contrast, Article 356, Section 1 has been invoked over a hundred times, and the President's satisfaction has been frequently challenged.[211] In *Bommai v. India*,[212] a majority of the Supreme Court concluded that the President's satisfaction under Article 356, Section 1 is judicially reviewable. Justice Sawant defined the President's satisfaction as follows.

> [The President's satisfaction cannot be] the personal whim, wish, view or opinion or the *ipse dixit* of the President . . . but 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.[213]

In his concurring opinion, Justice Jeevan Reddy expressed 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 mala fides takes in inter alia situations where the Proclamation is found to be a clear case of

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[208] *Id.* at art. 360, § 1.

[209] *See id.* at art. 357, § 1.

[210] M.P. SINGH & V.N. SHUKLA, CONSTITUTION OF INDIA 843 (2008).

[211] For a description of some of these "emergencies," see GLANVILLE AUSTIN, WORKING OF A DEMOCRATIC CONSTITUTION 534-45 (1999).

[212] Bommai v. India, (1994) 3 S.C.C. 1.

[213] *Id.* para. 74 (Sawant, J.).

> abuse of power, or what is sometimes called fraud on power—cases where this power is invoked for achieving oblique ends.[214]

In *Prasad v. India,*[215] Chief Justice Sabharwal, for the majority, reiterated the *Bommai* view that presidential satisfaction under Article 356, Section 1 is justiciable: "The existence of satisfaction can be challenged on the ground that it is mala fide or based on wholly extraneous and irrelevant grounds."[216] This view, he thought, was consistent even with the narrow principles of judicial review upheld in *Rajasthan v. India.*[217] To wit, with or without the expanded version in *Bommai*, subjective satisfaction of the President is subject to judicial review. Courts will not lightly attribute bad faith or motive to the President or the Union Council of Ministers on whose advice she acts.[218] But upon a showing of adequate materials, presidential satisfaction can be, and has been, successfully challenged.

Does this argumentative scheme not exhaust the question of judicial review in Article 123, then? After all, Article 123, Section 1 also deals with cases of presidential satisfaction. In syllogism form, the argument is as follows.

1. Presidential satisfaction, such as that in Article 356, Section 1, is judicially reviewable.
2. An ordinance under Article 123, Section 1 involves presidential satisfaction.
3. Therefore, presidential satisfaction in Article 123, Section 1 is judicially 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, Section 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, Section 1 is similar to the kind of satisfaction under Article 356, Section 1. When the President acts on the advice of the Union Council of Ministers under Article 356, Section 1, she acts as the executive head of the State. In contrast, when the President acts under Article 123, Section 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.[219]

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[214] *Id.* para. 374 (Jeevan Reddy, J.).

[215] Prasad v. India, (2006) 2 S.C.C. 1.

[216] *Id.* para. 147 (Sabharwal, C. J.)

[217] (1977) 3 S.C.C. 592.

[218] (1994) 3 S.C.C. 1, para. 375 (Jeevan Reddy, J.).

[219] On the distinction between executive and legislative action, see PETER LEYLAND & GORDON ANTHONY, ADMINISTRATIVE LAW 17–28 (2005).

B. It's Law: The Legislative Nature of Ordinances

In *Garg v. India*,[220] Chief Justice Chandrachud explained the nature of Article 123, Section 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."[221] Though not a parallel power of legislation, "legislative power [had] been conferred on the executive by the Constitution makers for a necessary purpose."[222] In *Roy v. India*,[223] he made the point more forcefully. The heading in Chapter III of Part V ("Legislative Power of the President"), the text of Article 123, Section 2 that confers an ordinance with "the same force and effect as an Act of Parliament" and the text of Article 13, Section 3 that enumerates law as "including . . . Ordinances" firmly point to the conclusion that ordinances are a product of legislative power, he said.[224] And Article 367, Section 2 is 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."[225]

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, Section 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 does not explain why the difference in the nature of satisfaction matters. If presidential satisfaction as an exercise of executive power is subject to judicial review, does it not follow that presidential satisfaction of legislative power is also judicially reviewable? Deductively put, the argument goes as follows:

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

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[220] Garg v. India, (1982) 1 S.C.R. 947.

[221] *Id.* para. 6.

[222] *Id.*

[223] *Roy*, A.I.R. 1982 S.C. 710.

[224] *Id.* para. 12-13.

[225] *Id.* para 14.

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

C. 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: irrationality, illegality, or bad faith 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 the Indian Constitution is subject to two conditions *only*. In *Gandhi v. Raj Narain*,[226] Justice Chandrachud explained the means of determining legislative validity. "Ordinary laws have to answer two tests for their validity," he said.[227] "(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."[228] This view has found support on a number of occasions. In *Andhra Pradesh v. McDowell & Co.*,[229] Chief Justice Ahmadi reiterated the idea that the power of the Parliament and 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."[230] There is no third ground, he insisted.[231] As recently as 2006, the Supreme Court confirmed this.[232] Herein lies the first difficulty of making presidential satisfaction as an exercise of legislative power subject to judicial review.

There is a second hurdle. Even assuming that these decisions can be cast aside and new grounds added, the *nature* of the grounds in question is highly problematic. Can an ordinance be challenged on the ground that the President was motivated by animus towards a person or group of persons? 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.

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[226] Gandhi v. Narain, A.I.R. 1975 S.C. 1590.

[227] *Id.* para. 691.

[228] *Id.*

[229] Andhra Pradesh v. McDowell & Co., A.I.R. 1996 S.C. 1627.

[230] *Id.* para. 45 (emphasis added).

[231] *Id. See also* Pub. Services Tribunal Bar Ass'n v. Uttar Pradesh, A.I.R. 2003 S.C. 1115.

[232] Nayar v. India, A.I.R. 2006 S.C. 3127.

Take, for example, English public law. In *Proprietors of the Edinburgh & Dalkeith Railway Company v. Wauchope*,[233] Lord Campbell strongly objected to the idea that courts may inquire into the proceedings behind an act. "All that a Court of Justice can do," he said, "is to look to the Parliamentary roll."[234] But "no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, *or what passed in Parliament during its progress in its various stages through both Houses*."[235] 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.[236] 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."[237] In *Hollinshead v. Hazleton*,[238] 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."[239] 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."[240] *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."[241] In that sense, while irregularity or fraud may be good reasons to review executive acts, they are irrelevant in reviewing the exercise of legislative power.

Similar views have found favor in American constitutional law as well. In *Amy v. Watertown*,[242] Justice Bradley explained the irrelevance of motive in

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[233] Edinburgh & Dalkeith Ry. Co. v. Wauchope, (1842) 8 Clark & Finnelly 710.

[234] *Id.* para. 725.

[235] *Id.* (emphasis added).

[236] *See* Lee v. Bude & Torrington Junction Ry. Co., (1870-71) 6 L.R.C.P. 576, 582 (Willes, J.).

[237] Labrador Co. v. Queen, (1893) A.C. 104, 123 (Lord Hannen). *See also* British Railways Bd. v. Pickin, (1974) A.C. 765.

[238] Hollinshead v. Hazleton, (1916) 1 A.C. 428. *See also* River Wear Comm'rs v. William Adamson, (1877) 2 App. Cas. 743.

[239] *Hollinshead*, (1916) 1 A.C. at 438.

[240] *Id.*; *see also* Hoani Te Heuheu v. Aotea Dist. Maori Land Bd., (1941) A.C. 308, 322.

[241] HALSBURY'S LAWS OF ENGLAND, Vol. 36, para. 560 (3d ed. 1961).

[242] Amy v. Watertown, 130 U.S. 301 (1889).

scrutinizing legislation: "With motives we have nothing to do."[243] While individuals may be motivated by improper motives, the same "cannot be attributed to a state legislature in the passage of any laws for the government of the State."[244] In *United States v. Des Moines Navigation and Railway Company*, Justice Brewer 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."[245] And the relative stability of the concept allowed Justice Brandeis in *Hamilton v. Kentucky Distilleries & Warehouse Company*[246] to conclude that "no principle of [American] 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."[247]

The Supreme Court of India, on more than one occasion, has applied these principles. In *Deo v. Orissa*,[248] 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."[249] In *Dutt v. India*,[250] Chief Justice K.G. Balakrishnan, assessing the validity of a law appropriating private property, reiterated the *Narayan Deo* view: "If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant."[251] And, "if the legislature lacks competence, the question of motive does not arise at all."[252] In *Bommai*, and later, in *Rameshwar Prasad*, 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.[253]

In *Rameshwar Prasad*, the Court wrote that "the power under Article 356 is legislative in character and, therefore, the parameters relevant for examining

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[243] *Id.* at 319.

[244] *Id.*

[245] United States v. Des Moines Navigation & Ry. Co., 142 U.S. 510, 544 (1892); *see also* Powell v. Pennsylvania, 127 U.S. 678 (1888); Doyle v. Cont'l Ins. Co., 94 U.S. 535 (1876); *Ex parte* McCardle, 74 U.S. 506 (1868); Fletcher v. Peck, 6 Cranch 87 (1810).

[246] Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146 (1919).

[247] *Id.* at 161. *See also* McCray v. United States, 195 U.S. 27, 53-59 (1904); Weber v. Freed, 239 U.S. 325, 330 (1915); Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 184 (1919); THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 186 (1st ed. 1868).

[248] Deo v. Orissa, (1954) 1 S.C.R. 1.

[249] *Id.*

[250] Dutt v. India, A.I.R. 2004 S.C. 1295; *see also* Kerala v. People's Union for Civil Liberties, (2009) 8 S.C.C. 46, para. 65-71; Board of Trustees, Aurvedic & Unani Tibla Coll. v. Delhi, A.I.R. 1962 S.C. 458.

[251] *Dutt*, A.I.R. 2004 S.C. 1295, para. 16.

[252] *Id.*

[253] *See* Bommai v. India, (1994) 3 S.C.C. 1, para. 377 (Jeevan Reddy, J.).

the validity of a legislative action alone are required to be considered."[254] That is to say that the concept of *mala fide*, generally understood in the context of executive action, is unavailable in assessing the validity of legislative action.[255] Chief Justice Sabharwal agreed. Nonetheless, he invalidated the President's satisfaction on the view that presidential satisfaction under Article 356, Section 1 was not an exercise of legislative power.[256] And herein lies the second difficulty in making presidential satisfaction as an exercise of legislative power subject to judicial review. Bringing Article 123, Section 1 within the scope of judicial review requires an expansion of grounds. The foregoing discussion is instructive in reminding us that Article 356, Section 1 is an inadequate template for assessing the reviewability of presidential satisfaction in Article 123, Section 1.

D. 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, Section 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."[257] 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) the 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, Section 1 is significantly different from the provision in Article 245, Section 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: 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, Section 1 is also conditional, it is misleading to emphasize "conditionality" as the distinguishing feature of Article 123, Section 1. Therefore, recasting Article 123, Section 1 as a *circumstantially* conditional exercise of legislative power may be a more apt description. While Article 123, Section 1 specifies the particular circumstances in which legislative power is exercisable, Article 245, Section 1 is silent on the matter; it leaves it to the

[254] *Prasad*, (2006) 2 S.C.C. 1, para. 144.

[255] *Id.*

[256] *Id.* para. 145.

[257] INDIA CONST. art. 123, § 1 (emphasis added).

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.

Three competing strategies may be available to deal with the question of judicial review. The first strategy might be to *equate* judicial review of ordinances (circumstantially conditional exercise of legislative power) with those of acts (conditional exercise of legislative power) while arguing that both are reviewable on identical grounds. We know acts cannot be reviewed for motive. Therefore, ordinances too cannot be reviewed based on motive. Adopting this strategy, however, requires a specific maneuver. It emphasizes 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 inconsequential in assessing the permissibility of judicial review. Rather, the inquiry turns on the admittedly legislative nature of the power involved.

The second strategy, especially for those inclined to favor judicial review, might be to *disassociate* the review of ordinances from acts, by emphasizing the circumstantial conditions that distinguish the former. Differences are highlighted rather than downplayed. 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 normally inapplicable to legislation, including motive. That both share the narration of legislative power is relatively immaterial (or inconsequential). Rather, judicial review turns on the admittedly distinct conditions 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 (Article 356) nor legislative (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 bad faith be eradicated. Such an approach would argue that thus far courts have erred in refusing to review the constitutionality of acts based on legislative motives. If motivated by animus towards a person or group of persons, a law *should be* invalidated. For that reason, an ordinance should also be invalidated if presidential satisfaction in promulgating an ordinance is vitiated by improper motive. In that sense, the third strategy is a hybrid: it equates ordinances with acts, as in the first argument described, but argues in favor of judicial review, as in the second argument described. Because it wants to reorganize the category of legislative power, emphasis on conditionalities is irrelevant. Unlike the second, this strategy does not rely on any intermediate category but is far-reaching in that it unsettles parts of accepted review principles. The second strategy, in comparison, is relatively modest: applicable principles are left untouched while expelling ordinances from its purview.

E. Locating the Strategies: Are Choices Equally Arbitrary?

Bearing in mind these alternatives, we can 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. Andhra Pradesh*,[258] Chief Justice Chandrachud made the point emphatically: "It is impossible to accept the submission that [an] Ordinance can be invalidated on the ground of non-application of mind."[259] The power to issue an ordinance, he reminded us, was "not an executive power but [a] power of the executive to legislate."[260] Therefore, an ordinance could not be "declared invalid for the reason of non-application of mind, any more than any other law [could] be."[261] 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 in *mala fide*.[262] This kind of "transferred malice," Chief Justice Chandrachud wrote, is unknown in the field of legislation.[263]

The Chief Justice reiterated his view in *Reddy v. Andhra Pradesh*,[264] in which the Andhra Pradesh Abolition of Posts of Part-time Village Officers Ordinance, 1984 was under challenge.[265] Armed with an elaborate discussion on the "legislative" nature of the power involved,[266] the Chief Justice 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."[267] It has to be *assumed* that the legislative discretion is properly exercised, he wrote.[268] True to the first strategy, Chief Justice Chandrachud worked out the possibility of judicial review with an exclusive focus on the legislative nature of the power. That it was prefaced by distinct conditionalities almost did not matter.[269]

For the sake of completeness, it should be pointed out that on a prior occasion, the Supreme Court leaned the other way in the *Nagaraj*, *Reddy*, and *Wadhwa* narrative. In *Roy v. India*,[270] the constitutional validity of the National Security Ordinance was challenged on the ground, *inter alia*, that presidential satisfaction in Article 123, Section 1 was conditional and therefore justiciable.[271]

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[258] *Nagaraj*, A.I.R. 1985 S.C. 551; *see also* Sugar Ltd. v. Bihar, A.I.R. 1974 S.C. 1533; Punjab v. Dang, A.I.R. 1969 S.C. 903.

[259] *Nagaraj*, A.I.R. 1985 S.C. 551, para. 31.

[260] *Id.*

[261] *Id.*

[262] *Id.* para. 36.

[263] *Id.*

[264] Reddy v. Andhra Pradesh, A.I.R. 1985 S.C. 724.

[265] *Id.*

[266] *See, e.g.*, Garg v. India, (1981) 1 S.C.R. 947, para. 6 (Bhagwati, J.).

[267] *Reddy*, A.I.R. 1985 S.C. 724, para. 14.

[268] *Id.*

[269] *See also* Wadhwa v. Bihar, A.I.R. 1987 S.C. 579, para. 6 (Bhagwati, C.J.).

[270] Roy v. India, A.I.R. 1982 S.C. 710.

[271] *Id.*

The Supreme Court avoided the argument. The ordinance had already been enacted into an act, mooting the question of presidential satisfaction.[272] 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."[273] *Roy* did not formally resolve the question of judicial review.

Nonetheless, some observations suggest that the Court was open to a contrary narrative. First, unlike in *Rajasthan v. India*,[274] it hesitated in halfheartedly weaving the "doctrine of political question" into Article 123.[275] 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."[276] 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."[277] Without rejecting the standard outright, Chief Justice Chandrachud doubted the applicability of the Evidence Act to the matter. "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, though we are prepared to proceed on the basis," he said.[278] The remarks held promise for those enthusiastic about the prospects of judicial review. After all, a discussion on evidentiary burden is relevant only after leaping the first hurdle of judicial review.

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

In *Singh v. Bihar*,[279] Justice Sujata Manohar 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

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[272] *Id.* para. 28.

[273] *Id.* para. 29.

[274] Rajasthan v. India, A.I.R. 1977 S.C. 1361.

[275] *Id.* para. 26.

[276] *Id.* para. 27.

[277] Indian Evidence Act of 1872, Act 1 of 1872, § 106, *available at* http://chddistrictcourts.gov.in/THE%20INDIAN%20EVIDENCE%20ACT.pdf.

[278] Roy v. India, A.I.R. 1982 S.C. 710, para. 29.

[279] Singh v. Bihar, A.I.R. 1998 S.C. 2288.

Management and Control) Ordinance, 1989.[280] The Ordinance was re-promulgated seven times with substantially the same terms.[281] Finally, it lapsed on April 30, 1992, nearly forty months after its initial promulgation.[282] All ordinances, including the original and re-promulgated versions, Justice Manohar wrote, were invalid.[283] Executing the maneuvers in the second strategy of ordinance analysis, she presented her analysis in three steps.

To begin with, Justice Manohar is careful in dissociating ordinances from acts. While recognizing both as 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.[284]

Article 213, Section 2, she reminds us, has certain safeguards.[285] Ordinances promulgated this way must pass before both the Houses when they reassemble. They are also of a limited duration, ceasing to have effect six weeks after the reassembly of the legislature.[286] With the exceptions firmly outlined, Justice Manohar 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 had not even averred that any immediate action was required when the 1st ordinance was promulgate[d].* It has not stated when the Legislative assembly was convened after the first Ordinance or an[y] 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.[287]

She continued as follows:

> 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

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[280] *Id.*

[281] *Id.* para. 15.

[282] *Id.*

[283] *Id.* para. 25.

[284] *Id.* para. 20.

[285] *Id.*

[286] *Id.* para. 21.

[287] *Id.* para. 25 (emphasis added).

> 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.[288]

In finding that the Governor's satisfaction was fraudulent, Justice Manohar seemed to rely on two observations. First, the state of Bihar did not justify the need for immediate action—that is, for the need to invoke its legislative powers under Article 213. And second, it acted "with no intention of placing any Ordinance before the legislature."[289] 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 bases of review ordinarily reserved for executive power to ordinances is decidedly novel, and Justice Manohar was careful to circumscribe her principles to *circumstantially* conditional legislative power under Article 123 only. She did not suggest that she was willing to review the exercise of ordinarily conditional legislative power under Article 245 on similar grounds, but she impliedly assumed an intermediate legislative category described earlier, one that is neither fully executive nor fully legislative. Nonetheless, this view did not achieve finality. In his separate opinion in the same matter, Justice Wadhwa differed with his colleague on the reviewability of presidential satisfaction: Such subjective satisfaction, he thought, was not reviewable.[290] With intractable differences among the Justices, the matter went to a larger bench for consideration.[291]

The third strategy has relatively few advocates, but it does have some. In the United States, for example, Jeffrey Shaman has argued for doing away with the principle that legislative acts cannot be reviewed for motive.[292] In his

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[288] *Id.* para. 25 (emphasis added).

[289] *Id.*

[290] *Id.* para. 70.

[291] *Id.* para. 75.

[292] *See* JEFFREY SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 143–72 (2001). Since the 1960s, legislative motive has been central to the analysis of constitutionality of legislation in the United States. *See, e.g.*, John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 SUP. CT. REV. 95, 132–33; Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Eisenburg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Perry, *The Disproportionate Impact Theory of*

survey of legislative motive in United States constitutional law, Shaman concluded that "although the Supreme Court has long professed that legislative motive is irrelevant to determining a law's constitutionality, the Court has honored that tenet more in its breach than its observance."[293] 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."[294] There are no good reasons, Shaman concludes, why legislative motive should be ignored in deciding the constitutionality of a law.[295] Similar arguments are easily adaptable to the Indian context. In line with the third strategy, the argument for examining motive might just as easily proceed from acts to ordinances as it might from ordinances to acts.

Having laid out the various approaches and their applications in judicial decisions and scholarly literature, we return to the question with which we began: is presidential satisfaction in Article 123, Section 1 subject to judicial review? The answer to that question, as I have tried to suggest earlier, depends on the interpretive strategy one adopts, since the text is unhelpful on this point. The first strategy generates a negative answer, while the second and the third have the potential for an affirmative response, though not without unsettling accepted features of legislative review principles. It depends on what one chooses to emphasize or deemphasize in the text. But that is guidance a passive piece of text cannot provide. The choice must be that of the *reader*.

This raises a key question: are all three strategies equally valid? Two factors push me toward an affirmative response. First, the reference to "validity" assumes that there is some higher principle that can help arbitrate

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Racial Discrimination, 125 U. PA. L. REV. 540 (1977); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978); Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376 (1979); Note, *Using Constitutional Zoning to Neutralize Adult Entertainment--Detroit to New York*, 5 FORDHAM URB. L.J. 455 (1977); *Challenging Exclusionary Zoning Practices*, 10 U. RICH. L. REV. 646 (1976); Note, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 YALE L.J. 111 (1983); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328 (1982); Leonard H. Glantz, *Abortion and the Supreme Court: Why Legislative Motive Matters*, 76 AMERICAN JOURNAL OF PUBLIC HEALTH 1452 (1986); Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1 (1988); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 90-91 (2006). The use or otherwise of legislative motive in invalidating statutes has a long, convoluted history in U.S. constitutional law. For an attempt to explain the various phases of the doctrine, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

[293] SHAMAN, *supra* note 292, at 166.

[294] *Id.*

[295] *Id.*

between these competing strategies. I am skeptical that this is true. Second, internally, the strategies engage in a form that is easily recognizable as "legal argument." They have a structure and arrangement that contain conventional features of "arguments." It is unclear if there is some other meta-anvil on which these arguments might be tested.[296]

Be that as it may, any affirmative answer to the substantive question of the availability of judicial review is not the end of the matter. On the contrary, it raises a host of other challenging questions. On what grounds, other than motive, is the President's satisfaction reviewable? And who has the burden to establish motive? Does it lie on the challenger to prove that the President's satisfaction was vitiated by improper motive, or does it lie on the Union of India to establish that the President's motive was proper? A fuller account of judicial review in Article 123, Section 1, subject to an affirmative conclusion, would require analysis of these questions as well.

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

A. 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 areas of subject matter excluded from the scope of ordinances? An ordinance, originating as it does from the exercise of executive power, cannot be classified as "law."[297] That, we have already seen, was the argument in *Roy v. India*.[298] Denying an ordinance the status of law, it was further argued, had important implications for its content. Specific actions under the Constitution, such as restricting the fundamental rights guaranteed in Part III, require the sanction of law. To the extent that ordinances are not law, using them to limit fundamental rights is unconstitutional. Conversely, rights in the Constitution would be reduced to a dead letter if the powers of the executive were read in a manner validating the restriction on fundamental rights without formal legislative support.[299] Either way, the upshot of this minority argument in *Roy* was that certain subject matter, such as that relating to fundamental rights, could not be governed through ordinances. This argument was weak, and the majority in *Roy* rightly rejected them.

For one, there is a fallacy that gnaws at the entire argument. The fear of executive intrusion into fundamental rights is unfounded to the extent that ordinances are subject to the same substantive and jurisdictional limits as acts

[296] For an introduction to the concept of "argument-bytes" in legal reasoning, see Duncan Kennedy, *A Semiotics of Legal Argument*, *in* LEGAL REASONING: COLLECTED ESSAYS 87–152 (2008).

[297] Roy v. India, A.I.R. 1982 S.C. 710, para. 5.

[298] *Id.*

[299] *Id.*

of Parliament. When an ordinance that unreasonably infringes upon fundamental rights or regulates subject matter outside Parliament's legislative competence is challenged, courts are well within their authority to strike it down as unconstitutional, just as they could with an act. An ordinance cannot do or achieve anything that an act of Parliament cannot 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."[300]

In addition, the text itself disarms the argument.[301] Article 13, Section 2 provides that the State shall make no law abridging the fundamental rights that Part III guarantees and that any law made in contravention of this provision shall, to the extent of the contravention, be void. Article 13, Section 3 clarifies that "law" includes ordinances unless context otherwise requires.[302] Article 367, the "interpretation" clause of the Constitution, affirms this reading.

> 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.[303]

Taken together, both Article 13, Section 2 and Article 367, Section 2 establish a high textual barrier that must be overcome for anyone suggesting that the Constitution substantively limits the scope of ordinances.

Justice Gupta made one such effort. In his partial dissent in *Roy*, he turned to the description of ordinances in Article 123: "An Ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament."[304] 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*."[305] To explain the significance of the distinction as he saw it, Justice Gupta turned to Articles 356 and 357 of the Constitution. Article 356, Section 1 provides as follows:

> 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)

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[300] INDIA CONST. art. 123, § 3.

[301] Roy v. India, A.I.R. 1982 S.C. 710, para. 13–14.

[302] *Id.* para. 13.

[303] INDIA CONST. art. 367, § 2.

[304] *Id.* art. 123, § 2.

[305] Roy v. India, A.I.R. 1982 S.C. 710, para. 120 (emphasis added).

> assume to himself all or any of the functions of the Government of the State . . . other than the Legislature of the State."[306]

When a Proclamation is in operation, under Article 357, Section 1 grants Parliament authority "to confer on the President the power of the Legislature of the State to make laws."[307] Such laws, whether made by Parliament or the President, continue to remain in force even after the Proclamation has ceased to exist until altered, repealed, or amended by a competent legislature or other authority.[308] Justice Gupta's reading of the differences in the nature of laws the President is authorized to make under Articles 123 and 357 led him 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.[309]

Justice Gupta continued as follows:

> 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).[310]

Justice Gupta's attempt to find subject matter limitations in Article 123 fails for at least two reasons. First, 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." The argument gains no ground by creating a distinction the Constitution itself already created. Second, direct comparisons between the nature and scope of presidential legislative powers in Article 123 and Article

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[306] INDIA CONST. art. 356, § 1.

[307] *Id.* art. 357.

[308] *Id.* art. 357, § 2.

[309] Roy v. India, A.I.R. 1982 S.C. 710, para. 120.

[310] *Id.*

357, Section 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 sudden need for particular legislation arises and Parliament is not in session. In contrast, Article 357, Section 1 deals with cases of broad constitutional breakdown. When used in good faith, it refers to situations where the President is satisfied that a state cannot govern in accordance with the Constitution, requiring the Union Cabinet to take the reins of control. Also, Article 123 provides original power to legislate. The Constitution itself gives the President authority to promulgate ordinances. The power to legislate under Article 357, Section 1, however, is a delegated power that the President may utilize if and only if Parliament authorizes him to do so. 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 have different goals. To say that Article 123 is different from Article 357 gets us nowhere. They *are* different.

Nonetheless, limitations on the substantive scope of ordinances do have great potential value. What does one need to make out a reasonably tenable case that the Constitution imposes subject matter constraints on ordinances? Three conditions must be satisfied. First, the limitation must originate in the "scheme" or "fabric" of the Constitution. Second, the limitation must be in agreement with original intent. We saw earlier that the Constituent Assembly categorically rejected an effort to draft a "rights limitation" into Article 123. Third, the argument must account for the clear act-ordinance equivalence in at least three provisions of the Constitution. I am skeptical that there could be a coherent argument that satisfies all three conditions.

B. The Tax Ordinance and a Subject Matter Challenge in Pakistan

The Supreme Court of Pakistan recently attempted to read a subject matter limitation into the Pakistan Constitution. In June 2009, Pakistan's National Parliament approved a budget proposal imposing a "carbon surcharge" on crude oil, raising oil prices by 10.5 percent.[311] Intended to raise revenues to the tune of $1.5 billion, the proposal stemmed from a supposed need to avoid a balance-of-payment crisis under the IMF's loan program.[312] In July 2009, the Supreme Court invalidated the price hike. Chief Justice Iftikhar Chaudhry, in a temporary order, doubted the need for and effectiveness of the hike.

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[311] *Pakistani Court Suspends Carbon Surcharge on Petrol,* REUTERS (July 7, 2009), http://in.reuters.com/article/southAsiaNews/idINIndia-40872220090707; *see also* Khalid Qayum, *Pakistan Imposes New Fuel Levy After Court Suspends Carbon Tax,* BLOOMBERG (July 9, 2009), http://www.bloomberg.com/apps/news?pid=20601091&sid=a9SQkKQk.N8Q; Nasir Iqbal, *Supreme Court Puts Carbon Tax on Hold,* DAWN (July 8, 2009), http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/business/11-supreme-court-suspends-carbon-tax--il--01.

[312] *Pakistani Court Suspends Carbon Surcharge on Petrol,* REUTERS (July 7, 2009), http://in.reuters.com/article/southAsiaNews/idINIndia-40872220090707.

> 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.[313]

The next day, President Zardari responded by promulgating the Petroleum Development Levy (Amendment) Ordinance.[314] It imposed a petrol tax, effectively nullifying the Supreme Court order.[315] Not surprisingly, the Ordinance was promptly challenged. Advocate Shoaib Shahid argued that the Ordinance violated numerous provisions of the Pakistan Constitution including Articles 2A (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).[316]

At its core, Shahid's argument was simple: ordinances cannot be used for certain purposes, and imposing new taxes is one such prohibited purpose.[317] To put it differently, while acts and ordinances are generally parallel, there is an implicit hierarchy that restricts the substantive scope of ordinances.[318] Similar to *Cooper*, the Supreme Court of Pakistan refused to be drawn into the matter immediately.[319] The petitioner lacked *locus standi*, and the High Court, not the

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[313] Civil Miscellaneous Application No. 2080 of 2009 and Constitution Petitions No. 33 & 34 of 2005, para. 7, http://www.supremecourt.gov.pk/web/user_files/File/CONST.P.33-34-2005.pdf.

[314] *Pakistan Petrol Tax Row Continues*, BBC NEWS (July 10, 2009), http://news.bbc.co.uk/2/hi/south_asia/8143692.stm.

[315] Nasir Iqbal, *Petroleum Development Levy Ordinance Challenged in SC*, DAWN (July 10, 2009), http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/19-petroleum-development-levy-ordinance-challenged-by-sc-fi-02.

[316] *Id.*

[317] *Pakistan Petrol Tax Row Continues*, BBC NEWS (July 10, 2009), http://news.bbc.co.uk/2/hi/south_asia/8143692.stm.

[318] Masood Rehman, *PDL Ordinance Challenged in Supreme Court*, DAILY TIMES (July 11, 2009), http://www.dailytimes.com.pk/default.asp?page=2009\07\11\story_11-7-2009_pg1_4.

[319] *SC Returns Petition Against Ord on Oil Price*, DAWN (July 16, 2009), http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/news/pakistan/12-sc+returns+petition+against+ord+on+oil+price--bi-08.

Supreme Court, was the proper forum to argue it.[320] It remains to be seen if this argument will succeed when the case is eventually heard. Interestingly, President Zardari reissued the Ordinance in November 2009, now titled "Petroleum Products (Petroleum Development Levy) (Amendment) Ordinance, 2009." This occurred barely a week before it was scheduled to lapse in accordance with the provisions of Article 89.[321] This re-promulgation takes us back to our earlier discussion in *Wadhwa*[322] and its Pakistani counterpart, *Collector of Customs*.[323] It is unlikely that the November 2009 re-promulgation satisfies the high bar of "adequate reasons" suggested in both decisions.

CONCLUSION

Where does all this leave us? This article began from the premise that ordinances are an aberration in a parliamentary democracy and set out reasons to restrict their constitutional scope. Ordinances are common in both India and Pakistan. When the executive resorts to governance-by-ordinance without sufficient cause, it undermines the democratic mechanisms of a parliamentary system. The use of ordinances is particularly egregious when purposefully designed to avoid ordinary legislative scrutiny. While the Supreme Courts of both India and Pakistan have an acceptable record in some aspects of interpretation (for example, developing limits on re-promulgation), they have performed less admirably in other areas. The Supreme Court of India in particular has failed to critically evaluate the rules on whether lapsed ordinances have continuing legal effect and on the reviewability of presidential satisfaction prior to promulgation. In contrast, Pakistan's challenges may lie more with the constitutional text than with the judicial exegesis that has grown around it. For that reason, it is difficult to assess the utility of textual arguments in general terms. The textual language is unhelpful in assessing limits on re-promulgation and judicial review of presidential satisfaction, though it clearly resolves some issues concerning temporal and substantive limits on ordinances.

This discussion concludes my analysis of "substitutive" executive control, but two areas remain untouched. In a follow-up article, I propose to explore presidential and gubernatorial *influence* on primary legislation and control over state legislation by the Union Council of Ministers. The introduction to this article discusses the latter sort of "influence." Even when presidents and governors do not enact ordinances, they enjoy considerable influence over primary legislation, especially when they are not in cahoots with the Council

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[320] *Id. See also SC Returns Petition Against PDL Ordinance*, DAILY TIMES (July 16, 2009), http://www.dailytimes.com.pk/default.asp?page=2009\07\16\story_16-7-2009_pg7_5.

[321] *President Extends Petroleum Levy Ordinance 2009*, GEO TELEVISION NETWORK (Nov. 1, 2009), http://www.geo.tv/11-1-2009/52154.htm.

[322] Wadhwa v. Bihar, A.I.R. 1987 S.C. 579.

[323] Collector of Customs, Karachi v. New Electronics Ltd., P.L.D. 1994 S.C. 363.

of Ministers. Presidents and governors, on such occasions, are required to act independently, applying their minds to specific circumstances. These peripheral powers of influence can delay or even determine the legislation signed into law.