Ordinance Overreach

The Constitution Bench of the Supreme Court, in **Krishna Kumar Singh's case**, has reiterated the principle that re-promulgation of ordinances is a fraud on the Constitution and a subversion of the democratic legislative processes.

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The reason for this dictum is that re-promulgation represents an effort to **overreach the legislative process** which is the primary source of law-making in a parliamentary democracy.

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The Enemy Property (Amendment and Validation) Ordinance:

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- It was first promulgated on January 7, 2016, with the objective of plugging loopholes in the principal act and to ensure that the enemy properties worth thousands of crore do not revert to the legal heirs.
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- The fifth Enemy Property ordinance has been promulgated on the December 22, 2016, to give continued effect to the provisions of the fourth ordinance.
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- The said ordinance has inserted a saving provision vide **Section 22(2) of the fifth ordinance to ensure continuity.**
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- The aspect that requires thoughtful consideration is an attempt by the government to nullify the judgment, decree or order of any Court by inserting **Section 8A (1)** in the ordinance.
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Section 8A (1) empowers the custodian to dispose of "enemy properties" whether by sale or otherwise notwithstanding any judgment, decree or order of any court, tribunal or authority.

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Re-promulgation vs. parliamentary supremacy:

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- The failure of the government to ensure the passing of the Enemy Property Bill, 2016 and using the back door of re-promulgation is a practice condemned by the Supreme Court.
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- **Re-promulgation is fundamentally at odds with the principal of parliamentary supremacy.**
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- Article 123 of the Constitution spells out requirements before resorting to the extraordinary measure of promulgating an ordinance.
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- The government, by re-promulgating the Enemy Property ordinance for a record fifth time, has converted the emergent power under Article 123 into a source of **parallel law-making** that is antithetical to the scheme of the Constitution.
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How the judgements are being nullified?

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- The fifth Enemy Property ordinance substitutes the word “an enemy subject” with “an enemy subject including his legal heir and successor whether or not a citizen of India or the citizen of a country which is not an enemy or the enemy, enemy subject or his legal heir and successor who has changed his nationality”.
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- It is imperative to highlight that the Supreme Court, in **Union of India and Anr. v. Raja Mohd. Amir Mohd. Khan** had held that, “the Respondent who was born in India and his Indian citizenship not being in question cannot by any stretch of imagination be held to be an enemy or enemy subject.”
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- Though it is not illegal per se to remove the basis or the foundation of a judgment by a subsequent enactment that uniformly applies to a class of persons, however, the same will be tested on the basis of Article 14 of the Constitution.
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- This clear attempt by the government to first nullify a judgment and, thereafter, re-promulgate ordinances in the absence of parliamentary approval, is contrary to the intent of our founding fathers and the mandate of the Constitution.

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Does re-promulgation goes along with the vision of founding fathers?

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- The founding fathers were cognisant that the ordinance making power is a “negation of the rule of law” and envisaged that the aid of Article 123 and 213 of the Constitution will be taken in emergent circumstances when the legislature is not in session and extraordinary circumstances warrant the exercise of authority in order to avoid a situation of constitutional vacuum.
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- The Constituent Assembly debates leave no manner of doubt that the said power ought not to be exercised merely to circumvent a failure to muster support in the legislature.
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Way Ahead:

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- The satisfaction of the president at the time of the promulgation of an ordinance is within the purview of judicial review.
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- The government will have to satisfy the Court about whether the satisfaction for re-promulgation was based on some relevant material.
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- In the meantime, it would augur well for the government to strictly abide by the Supreme Court’s ruling in Krishna Kumar’s case or else will run the vice of unconstitutionality.
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- **Parliamentary supremacy** and the **power of judicial review** is the cornerstone of our democratic republic.
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- The Constitution Bench judgment of the Supreme Court is a vindication of the supremacy of Parliament and a reminder to the executive about the threat posed to the sovereignty of the Parliament by re-promulgation of ordinances.
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