

Introduction: Alternatives to Parliamentary Legislation

INDIA'S OTHER PARLIAMENT

The legislative process in India's parliamentary system, like elsewhere, is a shared exercise: the executive and the legislature partake in it. Ordinarily, proposals for legislation originate in the cabinet. If the cabinet decides that a law is necessary, a bill is drafted, on occasions, with external inputs. After it is introduced in the two houses, the bill goes through several 'readings', committee hearings and amendments. The final draft is debated and voted on. If a bill secures the requisite majority in both houses of parliament, it is sent to the president for assent, upon which the bill becomes an Act.¹ Parliament, in this formal view, is central to the legislative process, and legislation are products of – amongst other things – a rational-legal scrutiny and vote.²

In practice, parliament is less than central; the legislative process rarely confirms to the constitutional-ideal type. Take, for example, political parties and their influence on the legislative process. The party to which a

¹ For a description of the legal process, A. R. Mukherjee, *Parliamentary Procedure in India* 232–276 (Oxford University Press, New Delhi, 1983). Subhas Kashyap, *Our Parliament* (National Book Trust, New Delhi, 2004).

² Constitution of India, Article 107(2) ('... a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses'). The suggestion that legislation are products of 'rational-legal' scrutiny must be understood in a normative sense. I take the view that all public officials including legislators *should* assess the constitutionality (or legality) of their actions, and not make decisions merely because it is politically expedient to do so. In other words, the question of constitutionality is not for judges only. Even though the latter are supposed to have special expertise in dealing with questions of constitutionality, it is not their exclusive province. Parliamentarians too, in my view, are required to take the Constitution seriously.

government belongs can have a disproportionate say in policy and legislative matters. Indeed, depending on the personalities involved, legislative proposals may even originate and take shape in party headquarters.³ Or consider a coalition government. A cabinet's decision to introduce a bill may be evidence of compulsion, not necessity. It may be a price for keeping the coalition together or a political manoeuvring to secure new allies.⁴ Also, consider the influence of non-representative actors and their ability to direct legislative proposals. A cabinet's decision to introduce a bill may be a grudging response to a populist outcry or a concession to a caste, religious or trade lobby.⁵ In each of these situations, 'cabinet', 'parliament' and 'voting' are less central than in the Constitution's idealised process. The party chief may matter more than the prime minister. Debates occur, but rarely in parliament. And backroom deals rather than the formal vote may decide the fate of legislative proposals. Coupled with the general decline in members' interest and performance, these surrogates diminish, to a large extent, parliament's representative – and deliberative – relevance to the legislative process in India.⁶

³ The National Advisory Council (NAC) is obviously the most recent example of this phenomenon. Set up by an order of the Union Cabinet in 2004 (No. 631/2/1/2004-Cab) and later reconstituted in 2010, the NAC often drafts legislation to be 'considered' by the cabinet. See Anon, 'Sonia as NAC Head Is Pseudo-Constitutional Power Centre: BJP' *Indian Express*, 30 March 2010. For an early, but contrary, view on the matter, see W. H. Morris-Jones, *Parliament in India* 166–185 (Longmans, Green and Co., London, 1957). Based on his analysis of the relationship between the former Indian National Congress and the cabinet led by Jawaharlal Nehru, Morris-Jones came to the 'unmistakable' conclusion that 'for the parties, for political life as a whole, parliament [had] become the focus of attention'. *Id.* at 185. For an account of the changing relationship between prime ministers and the parties to which they belonged, especially the Congress Party, see Robin Jeffrey, 'The Prime Minister and the Ruling Party' in James Manor (ed.), *Nehru to the Nineties: The Changing Office of Prime Minister in India* 161–185 (Hurst and Co., London, 1994).

⁴ Arun Shourie, *The Parliamentary System* 36–49 (ASA Rupa, New Delhi, 2007); V. Ramkrishnan, 'All for Survival' *Frontline*, 15(8), (11–24 April) 1998; Sukumar Muralidharan, 'BJP and Friends' *Frontline*, 15(1), (10–23 January) 1998. For an overview of coalitions and coalition-building in India, see Bidyut Chakrabarty, *Forging Power: Coalition Politics in India* 19–63 (Oxford University Press, New Delhi, 2006).

⁵ See Asghar Ali Engineer, *The Shah Bano Controversy* (Ajanta Publishers, Delhi, 1987); Prem Shankar Jha, 'Coalition Politics and Economic Decision-Making' in Mahendra Prasad Singh and Anil Mishra (eds.), *Coalition Politics in India: Problems and Prospects* 285–292 (Manohar, New Delhi, 2004). See also, *id.* Shourie, at 58–63.

⁶ For assessments of India's parliament, see Vernon Hewitt and Shirin M. Rai, 'Parliament' in Niraja Jayal and Pratap Mehta (eds.), *Oxford Companion to Politics in India* 28–42 (Oxford University Press, New Delhi, 2010); Arun Agarwal, 'The Indian Parliament' in Devesh Kapur and Pratap Mehta (eds.), *Public Institution in India*, 77–104 (Oxford University Press, New Delhi, 2007); Gail Omvedt, 'Parliamentary System in India: Issues and Suggestions', 33(3–4) *Indian Journal of Political Science* 4–16 (1999); Nand Lal and Urmila Lal, 'Decline of Indian

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Although these political surrogates compromise parliament's prominence, they are 'non-institutional' in nature; they can complicate but not derogate from the constitutional requirements. The real work behind legislation may happen elsewhere rather than in the two houses, and it may be done by people other than parliamentarians. However, cabinet, parliament and voting are nonetheless present: they matter, even if in form only.

However, articulated in India's Constitution is a legislative process that compromises parliament and voting both in form *and* substance. This is because the Constitution authorises the president, under certain circumstances, to enact legislation without parliamentary involvement. With such legislation, or 'ordinances', parliament does not matter even in form; initially, the president surrogates for it. This book is an empirical and analytical account of ordinances – a form of institutionalised surrogacy that reduces the legislative process to a 'private' affair.⁷ The book grapples with three broad sets of questions: Where did this mechanism originate, and how did it become part of India's legislative design? How has it been used thus far? What do judicial opinions tell us about the law and practice of federal ordinances in India?

ORDINANCES: THE BASICS

Article 123(1) provides for ordinances at the federal level: '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

Parliament: How and Why It Has Happened?' in K. S. Saxena and Anil Gupta (eds.), *Indian Democracy: Recent Trends and Issues 192–201* (Anmol Publications, New Delhi, 1985). See also Surya Prakash, *What Ails India's Parliament* (Harper Collins, New Delhi, 1995). For assessments of parliament's performance in terms of debates and utilization of time, PRS Legislative Research offers the best data. See, e.g., Anon, 'Utilisation of Time by Parliament: Monsoon Session 2007' *available at*: <http://www.prsindia.org/administrator/uploads/general/1241757849~~Vital%20Stats%20Monsoon%202007.pdf> (visited on 22 April 2012); Anon, 'Legislative Activity in Parliament' *available at*: <http://www.prsindia.org/administrator/uploads/general/1241757164~~Legislative%20activity%20in%20Parliament.pdf> (visited on 23 April 2012).

⁷ The claim that ordinances are 'private affairs' can only be understood in the light of arguments in Chapter 3. For the sake of clarity, let me mention three ways in which the reference should be understood here. First, ordinances are private in the sense that *reasons* for promulgating them are usually not made public. Second, they are private in the sense that ordinances, by definition, exclude the possibility of parliamentary involvement initially. Third, and perhaps most egregiously, ordinances are private in the sense that, under current law, they take effect even before being made available to the public.

immediate action, he may promulgate such ordinances as the circumstances appear to him to require'. Article 213(1) confers similar powers on governors at the state level: 'If at any time, except when the Legislative Assembly of a State is in session . . . the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require'. Even though some additional limitations apply to ordinances at the state level, by and large, they are structurally similar. First, the power to promulgate ordinances, in practice, is exercised by the relevant council of ministers. The council of ministers decides if an ordinance is necessary and the president (or governor) gives assent to it. The latter has some discretion in the matter, but the scope of that discretion remains untested. Second, ordinances, at the national level, for example, may be promulgated 'except when *both* Houses of Parliament are in session'. That is, it may be done even if either the Lower House or the Upper House is still in session. Similar rules apply to state legislative chambers. Third, the maximum duration of ordinances is not directly provided for. Under both Articles 123 and 213, ordinances remain in force until the expiry of six weeks from the commencement of the next legislative session. Ordinarily, this means that ordinances may be in force for a period of little more than seven months. This is because the Constitution requires both houses at the federal level, for example, to meet at least once every six months.⁸ Also, because ordinances require approval after they come into effect, legislative chambers have no *ex ante* control over ordinances. Objections, if any, may be recorded only after promulgation. Fourth, ordinances are like parliamentary legislation; they have the 'same force and effect'. They are not rules, orders, by-laws or delegated legislation of some other kind commonly associated with the exercise of executive power. Rather, they are legislation proper. When presidents and governors promulgate them, they act as legislative surrogates; they are to ordinances what both houses of parliament or state assemblies are to legislation. Fifth, and most importantly, ordinances are, at least textually, limited to circumstances when it is necessary to take 'immediate action'. They are predicated on some form of legislative urgency and, unlike Acts, require additional justifications. Taken together, these features make ordinances an exceptional arrangement. They authorise a non-deliberative, non-majoritarian and 'private'

⁸ Constitution of India, Article 85(1) ('The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session').

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legislative method – one that reduces legislation to fiats. And this heightened executive ownership of legislation calls into question, not without reason, India's parliamentary credentials.⁹

Although constitutionally limited to circumstances when it is necessary to take immediate action, ordinances, in practice, have an expansive presence in India's parliamentary annals. After six decades, they are neither exceptional nor limited. Rather, they are a convenient and – distressingly at times – the *preferred* legislative method.¹⁰ Take, for example, two ordinance-related controversies – experiences that are emblematic of this widespread 'preferential' attitude. In October 2001, the Vajpayee-led National Democratic Alliance (NDA) government promulgated the Prevention of Terrorism Ordinance, 2001 (POTO) to deal with what it claimed were Indian modules of a global terror network.¹¹ Introduced just weeks before the winter session of parliament, both the ordinance and the method of bringing it into existence, the Indian National Congress-led opposition argued, were undemocratic.¹² The cabinet had neither majority support for the law nor any interest in its public scrutiny. It was, the opposition felt, designed to undermine parliament. Some coalition partners of the NDA government also shared the opposition's scepticism: The 'draconian' provisions and the potential targeting of minority communities worried them.¹³ None of this mattered to members of Vajpayee's cabinet. To them, ordinances were a constitutional alternative to ordinary legislation, including those that did not enjoy majority support in parliament.¹⁴ POTO, incidentally, was only one of the thirty-three

⁹ For a defence of India's parliamentary credentials, B. L. Shankar and Valerian Rodrigues, *The Indian Parliament: A Democracy at Work* 371–386 (Oxford University Press, New Delhi, 2011).

¹⁰ I should point out that 'preference' here does not refer to numbers. It is not to suggest that there are more ordinances than legislation in India. Rather, the word must be understood in its *qualitative* sense. To say that ordinances have become the 'preferred' method is to suggest that cabinets prefer to promulgate ordinances even in situations when legislation is entirely possible. The claim can be fully understood only in the light of the empirical analysis in Chapter 2.

¹¹ Anon, 'Police Get Sweeping Powers to Fight Terror' *Times of India*, 17 October 2001.

¹² Kapil Sibal, 'Politics of POTO: Nothing Anti-national about Dissent' *Times of India*, 16 November 2001.

¹³ Sidharth Varadarajan, 'Reject POTO in Toto' *Times of India*, 14 November 2001.

¹⁴ Arun Jaitley, 'POTO Pin-Up' *Times of India*, 13 December 2001. It must be added that the ordinance lapsed, and was re-promulgated for a second time. Eventually it was formally enacted into law an extraordinary procedure provided for in Article 108 in the Constitution. Anon, 'Govt. Powers POTO through Joint Session' *Times of India*, 27 March 2002.

ordinances promulgated into law by the Vajpayee cabinet between October 1999 and May 2004.

In March 2006, the ordinance controversy returned, but this time the roles were reversed. The NDA-led opposition started an agitation against Mrs Sonia Gandhi, the leader of the Congress Party, and her alleged ‘office of profit’ – something, they argued, disqualified her from the membership to the Lower House.¹⁵ Parliament was in session at that point. But the Congress-led United Progressive Alliance (UPA) government decided to put a lid on the controversy through an ordinance. A plan was secretly drawn up to adjourn the two houses sine die. That would have provided the cabinet with an excuse to promulgate an ordinance removing Mrs Gandhi’s disqualification under the relevant legislation. An alert piece of reporting in the *Indian Express* made the plan public.¹⁶ This time it was the NDA that was up in arms. The proposed ordinance was a gross abuse of power, some NDA delegates argued. Parliament was in session and the government sought to undermine it by creating a situation of ‘legislative emergency’ so as to make an ordinance nominally possible.¹⁷ Interestingly, Dr Manmohan Singh’s cabinet said little in its defence. The Congress Party, in particular, vacillated between denying and defending the proposed ordinance.¹⁸ Because they, too, would have benefitted from it, the opposition’s agitation, it claimed, was opportunistic. The implication was obvious: the ordinance route was justified so long as its spoils were equitably distributed. The public outcry over the leaked plan forced the Manmohan Singh cabinet to abandon its proposed ordinance. But in the five years between May 2004 and May 2009, the cabinet promulgated as many as thirty-six ordinances.¹⁹

¹⁵ Anon, ‘Sonia Resigns from Lok Sabha, NAC’ *Business Line*, 24 March 2006. See Constitution of India, Article 102 (1)(a) (‘A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder’).

¹⁶ R. Venkataraman, ‘To Stop Office-of-Profit Axe, UPA Gets Ordinance’ *Indian Express*, 21 March 2006. Anon, ‘Uproar in Parliament over Ordinance “Shielding” Sonia’ *Hindustan Times*, 22 March 2006.

¹⁷ Anon, ‘Govt. Ordinance: NDA Lodges Protest with Kalam’ *Rediff News*, 23 March 2006, available at: <http://www.rediff.com/news/2006/mar/22profit1.htm> (accessed 23 April 2012).

¹⁸ Anon, ‘No Discussion on Ordinance in Cabinet’ *Times of India*, 23 March 2006.

¹⁹ Although plans for the ordinance were shelved, it was later enacted into law by parliament. The Parliament (Prevention of Disqualification) Amendment Act, 2006 (31 of 2006).

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As these examples suggest, the story of ordinances in India's Constitution is, in effect, a story about how an extraordinary constitutional arrangement has come to be normalized into everyday governance and the ways in which it, to borrow Dr D. C. Wadhwa's phrase, 'endangers constitutionalism' in India.²⁰ Between 1952 and 2009, 615 ordinances have been promulgated at the national level. That comes to about 10.6 ordinances each year for nearly 60 years.²¹ In other words, on ten or more occasions every year, presidents came to the conclusion that circumstances required them to take 'immediate action' that was in lieu of parliamentary legislation. These numbers are unacceptably high. They are equally disappointing in percentage terms; 615 ordinances amount to approximately 17.7 per cent of the 3,467 pieces of legislation parliament enacted into law during the same period. In other words, around one-sixth of all legislation at the national level originated as ordinances. Although there are variances in the numbers over the decades, the trend towards greater reliance on ordinances since the 1970s is unmistakable.

Two introductory observations can be made at this point. Attitudinally speaking, the distrust of ordinances when in opposition – and their convenient use when in power – enjoys support across the political spectrum. Parties of all hues have resorted to them. Further data would be required to make this point in detail. But the spread of ordinances over sixty years makes it safe to suggest that no political party is immune from ordinance-related excesses. By way of introduction, it may be sufficient to note the record of two coalition governments between June 1996 and March 1998, led by H. D. Deve Gowda and Inder K. Gujral, respectively. Both prime ministers belonged to the so-called United Front – a motley coalition of regional parties that claimed to represent the non-Congress, non-Bharatiya Janata Party (BJP) space in India's national politics. Between June 1996 and April 1997, the almost dysfunctional Deve Gowda cabinet promulgated as many as twenty-three ordinances. Not to be outdone, the Gujral cabinet promulgated another twenty-three ordinances between April 1997 and March 1998. These figures suggest that there is a hyper-consensus about the acceptability of ordinances as a

²⁰ D. C. Wadhwa, *Endangered Constitutionalism: Documents from a Supreme Court Case* (Gokhale Institute of Politics and Economics, Pune, 2008).

²¹ Ordinance figures in this chapter and subsequently are based on a handbook published by the government of India. See *Statistical Handbook* (Ministry of Parliamentary Affairs, Govt. of India, New Delhi, 2010).

‘parallel’ legislative mechanism that cuts across party lines. It may be one of India’s little noticed parliamentary features.

Substantively speaking, ordinances have been pressed in the service of both important and controversial policies on one hand and some mundane ones on the other hand. As I will later argue in detail, many of India’s important national policies were ‘legislated’ through ordinances – matters that require careful deliberation rather than hasty enactment. But ordinances have also been used to legislate on routine issues – matters that cannot conceivably be said to require ‘immediate action’. Attitudinally and substantively, therefore, the consequence of this expansive reliance on ordinances has been the same: The normalisation of a process that effectively outsources legislation to a small, ‘select’ group.

None of this should come as a surprise. Even before the Constitution was inaugurated in 1950, G. V. Mavalankar, later India’s first speaker of the Lower House, warned about the perils of ordinances. At the Presiding Officers’ Conference in 1947, he expressed concerns about their potential misuse. Ordinances were intended only for emergency circumstances, and relaxing that constraint, he predicted, may encourage governments to resort to them when faced with ‘inconvenient legislation’.²² In 1950, he wrote to Prime Minister Jawaharlal Nehru underlining the perils of relying on ordinances to carry out the government’s legislative agenda. Apart from being ‘inherently undemocratic’, their effect on the legislative psyche worried Mavalankar.²³ ‘The house’, he regretfully noted, ‘carries a sense of being ignored, and, the Central Secretariat perhaps gets into the habit of slackness’, neither of which ‘was conducive to the development of the best parliamentary traditions’.²⁴ He persisted against ordinances, once again reminding Nehru in 1954 that they should be limited to cases of ‘extreme urgency or emergency’.²⁵ Acutely aware of the ‘responsibility of laying down traditions’ as the first parliament of the republic, the speaker added: ‘It is not a question of present personnel in the Government, but [one] of precedents’. And if ordinances ‘were not limited by convention only to extreme and very urgent cases’, the result, Mavalankar warned, ‘may be that, in future, the government may go on issuing ordinances giving the Lok Sabha no option, but to rubber-stamp’.²⁶ He was remarkably prescient. After more than sixty years, ordinances are neither

²² *Presidential Ordinances 1950–1996* v (Lok Sabha Secretariat, New Delhi, 1996).

²³ *Ibid.*

²⁴ *Id.* at vi.

²⁵ *Ibid.*

²⁶ *Ibid.*

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exceptional nor limited; they are a somewhat ‘parallel’ method in India’s parliamentary system, and the numbers bear that out.

THE LARGER FRAME: NOTES FROM COMPARATIVE DESIGN

India is not the only jurisdiction where executive lawmaking of the kind described thus far is constitutionally provided for or otherwise practised. Jurisdictions in Eastern and Western Europe, Africa and Latin America frequently endow their presidents – and occasionally, the parliamentary head – with a range of legislative powers. And there is, unlike in India, a rather large body of sophisticated literature that both describes and analyses the exercise of such powers.²⁷ John Carey and Matthew Shugart’s edited volume on decree authority is perhaps the most comprehensive comparative treatment of the subject.²⁸ Ten contributors assessed the evolution and exercise of such powers in eight jurisdictions, and in the process tested a set of hypotheses offered by the editors. Four of those jurisdictions were Latin American (Argentina, Brazil, Peru and Venezuela) and two were West European (Italy and France); Russia and the United States made up the remaining two. With the exception of Italy and France, the countries are thoroughly presidential systems, and that fact coloured the prism through which contributors presented and evaluated their arguments. Contesting the consensus in the literature at the time, Carey and Shugart argued that unilateral presidential actions do not necessarily imply an usurpation of legislative powers.²⁹ Parliamentary motives are complex, and legislators may tolerate – even encourage – such action if it is in their (political) interests.³⁰ Built into this argument

²⁷ For an introductory overview of decree powers as is it commonly referred to, see José Antonio Cheibub and Fernando Limongi, ‘Legislative-executive relations’, in Tom Ginsburg and Rosalind Dixon (eds.), *Comparative Constitution Law* 211, 226–229 (Edward Elgar Publishing, Cheltenham, 2011); Matthew S. Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* 131–147 (Cambridge University Press, New York, 1992). See also John M. Carey, ‘Presidential versus Parliamentary Government’, in C. M’énard and M. M. Shirley (eds.), *Handbook of New Institutional Economics* 91, 103–107 (Springer, Dordrecht, 2005).

²⁸ John M. Carey and Matthew S. Shugart (eds.), *Executive Decree Authority* (Cambridge University Press, Cambridge, 1998). For empirical notes on decree power, see José Antonio Cheibub, Zachary Elkins and Tom Ginsburg, ‘Beyond Presidentialism and Parliamentarism’ *British Journal of Political Science* (2013) (forthcoming).

²⁹ John M. Carey and Matthew Soberg Shugart, ‘Calling Out the Tanks or Filling Out the Forms?’ in John M. Carey and Matthew S. Shugart (eds.), *Executive Decree Authority* 1–29, 3 (Cambridge University Press, Cambridge, 1998).

³⁰ *Ibid.*

is the obvious assumption that a president's interests and those of the legislators are distinct, and unilateral action may amount to usurpation only if they clash. When interests align, such action may imply something else.³¹

Carey and Shugart offer a 2×2 matrix to explain how presidential decree authority can be constitutionally entrenched.³² They focus on two aspects: permanence and timing. Are decrees permanent? Do they come into effect immediately? These two variables generate four possibilities. Russia, Peru, Colombia and Chile, they argue, are examples of the strongest possibility.³³ Presidential decrees in these jurisdictions are permanent, and they enjoy immediate effect – the prototypical decree authority. Because they are permanent, decrees can be undone only through contrary legislation in parliament. And immediate effect means that legislative chambers have no influence over them prior to their promulgation; parliamentary response, if any, is always *ex post*. But such powers often come with some additional limits. Article 90 in Russia's Constitution, for example, authorises the president to issue 'edicts and regulations' provided they do 'not conflict with the Constitution of the Russian Federation *and* federal laws'.³⁴ Similarly, in Peru, the president can exercise such power only 'on economic and financial matters, when so required by the national interest'.³⁵ Even though prototypical decree authority means that there are two distinct paths to primary legislation, parliament and president do not always enjoy similar legislative standing.

A second – and somewhat less strong – possibility is what Carey and Shugart refer to as provisional decree authority, whereby decrees take immediate effect but lapse after some designated period unless ratified by the legislature.³⁶ Article 62 in Brazil's Constitution, for example, provides that presidential decrees shall lapse after sixty days unless 'converted into

³¹ The idea here is that legislators may delegate (formally through a piece of legislation, or simply by inaction) certain legislative decisions to a president for a variety of reasons. These may include partisan support for individual president, collective action problems within the legislature or electoral incentives of individual legislators.

³² Carey and Shugart, *supra* n. 29, p. 10. ³³ *Ibid.*

³⁴ Constitution of the Russian Federation 1993, Article 90 (3) ('Edicts and regulations of the President of the Russian Federation must not conflict with the Constitution of the Russian Federation and federal laws') (emphasis added).

³⁵ Constitution of Peru 1993, Article 118(9) ('It is the duty of the President . . . to promulgate special measures in economic and financial subject, through emergency decree with force of law, as required by national interest and reporting to Congress. Such emergency decrees may be modified or repealed by Congress').

³⁶ Carey and Shugart, *supra* n. 29, p. 11.