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AN INSTITUTIONAL ALCHEMY: INDIA'S TWO PARLIAMENTS IN COMPARATIVE CONTEXT

*Shubhankar Dam**

INTRODUCTION: THE PRESIDENT AS THE SOLE LEGISLATOR

Jyoti Singh Pandey, a twenty-three-year-old physiotherapy intern, was gang raped in New Delhi on December 16, 2012.¹ Six men were involved, one of them a teenager. Their assault left Jyoti with grave injuries to her abdomen, intestines, and genitals.² The teenager was the most ferocious of the six men. He raped his victim twice and “ripped out her intestines with his bare hands.”³ This display of hypersexualized

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1. Raj Shekhar & Dwaipayan Ghosh, *Girl Gang-Raped in Moving Bus in Delhi*, TIMES INDIA (Dec. 17, 2012), http://articles.timesofindia.indiatimes.com/2012-12-17/delhi/35868316_1_bus-mahipalpur-new-delhi; Wieland Wagner, *The Fearless One: Rape Trial Galvanizes India*, DER SPIEGEL (Aug. 20, 2013), <http://www.spiegel.de/international/world/jyoti-singh-pandey-nirbhaya-rape-trial-brings-india-together-a-917401.html>. The four adult defendants were sentenced to death by hanging in September 2013. Ellen Barry, *Many Doubt Death Sentences Will Stem India Sexual Attacks*, N.Y. TIMES (Sept. 13, 2013), <http://www.nytimes.com/2013/09/14/world/asia/4-sentenced-to-death-in-rape-case-that-riveted-india.html>.

2. *Savagery Shames City*, MAIL TODAY (Dec. 18, 2012), available at <http://www.thefreelibrary.com/SAVAGERY+SHAMES+CITY.-a0312332626>.

3. Jatin Anand, *Dehli Rape: Juvenile Raped Woman Twice and Ripped off Her Intestine*, HINDUSTAN TIMES (Jan. 3, 2013), <http://www.hindustantimes.com/india-news/chunk-ht-ui-indiasectionpage-delhigangrape/delhi-rape-juvenile-raped-woman-twice-and-ripped-off-her-intestine/article1-984188.aspx>. He was found guilty in August 2013. *Delhi*

brutality enraged parts of India. Protests erupted.⁴ Thousands descended onto the streets of New Delhi demanding a prompt trial of the accused persons and better protection for women in the capital city.⁵ Prime Minister Dr. Manmohan Singh appealed for calm.⁶ He tasked a committee to recommend legislative changes to sternly deal with incidents of sexual assault.⁷ With the former Chief Justice of India, J. S. Verma, at its helm, the committee promptly produced a report that counseled several changes to criminal law in India.⁸ Partly based on these recommendations, President Pranab Mukherjee promulgated a piece of legislation amending the law against sexual assaults and instituted the death penalty for rape.⁹ How could the president amend the criminal code and introduce new punishments all by himself? This Article is about India's "Alternative Parliament"—an arrangement under which the president may *independently* enact legislation.¹⁰

Gang Rape: Teenager Found Guilty, BBC NEWS (Aug. 31, 2013), <http://www.bbc.co.uk/news/world-asia-india-23908176>.

4. Dean Nelson, *Gang Rape of Indian Woman Sparks Mass Protests*, TELEGRAPH (Dec. 19, 2012), <http://www.telegraph.co.uk/news/worldnews/asia/india/9755913/Gang-rape-of-Indian-woman-sparks-mass-protests.html>.

5. Jason Burke, *Delhi Bus Gang Rape: 'What Is Going Wrong with Our Society?'*, GUARDIAN (Dec. 19, 2012), <http://www.theguardian.com/world/2012/dec/19/delhi-bus-gang-rape>.

6. Jason Burke, *India Gang Rape Protests: Manmohan Singh Appeals for Calm*, GUARDIAN (Dec. 24, 2012), <http://www.theguardian.com/world/2012/dec/24/inadian-gang-rape-protests-manmohan-singh>.

7. *Justice Verma Committee Gets to Work; Seeks Public Comments*, DNA INDIA (Dec. 24, 2012), <http://www.dnaindia.com/india/report-delhi-gang-rape-justice-verma-committee-gets-to-work-seeks-public-comments-1781257>.

8. *Verma Panel for Stiffer Punishment to Rapists but No Death*, NEW INDIAN EXPRESS (Jan. 24, 2013), <http://newindianexpress.com/nation/article1432575.ece>.

9. The Criminal Law (Amendment) Ordinance, 2013 (3 of 2013), available at <http://mha.nic.in/pdfs/criminalLawAmndmt-040213.pdf>; B. Muralidhar Reddy, *Despite Protest, Ordinance on Sexual Offences Promulgated*, HINDU (Feb. 3, 2013), <http://www.thehindu.com/news/national/despite-protest-ordinance-on-sexual-offences-promulgated/article4375214.ece>. The Verma Committee, it should be mentioned, did not recommend the death penalty. In fact, the suggestion was categorically rejected.

10. Formally speaking, India's Parliament is made up of three organs: the president, the Council of States (Upper House), and the House of the People

India has a parliamentary system, but articulated in India's Constitution is a provision that authorizes the president to enact legislation without involving Parliament. Such presidential legislation is called an "ordinance" not an act, and rather than enact, the president "promulgates" it. At the federal level, the mechanism is provided for in Article 123:¹¹

- (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.
- (2) An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance -

(a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and

(b) may be withdrawn at any time by the President.

Explanation: Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause.

- (3) 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.

Five features are worth highlighting. First, ordinances may be promulgated only if at least one House of Parliament is not in session. Second, though nominally granted to the president, the power to promulgate ordinances, in practice, is exercised by the Council of Ministers. The Council of Ministers decides if an ordinance is necessary. It also drafts the ordinance, but the president formally promulgates it into effect. While the president has some discretion in this regard, the scope of that discretion still remains unclear. Third, ordinances are temporary

(Lower House). See INDIA CONST. art. 79. In this Article, Parliament is referred to in its nontechnical sense; that is, to the two Houses of Parliament.

11. At the state level, governors too enjoy similar powers. See INDIA CONST. art. 213.

measures and remain in force until the expiry of six weeks from the commencement of the next legislative session.¹² Fourth, ordinances are like parliamentary legislation: they have the “same force and effect.”¹³ They are not rules, orders, bylaws, or delegated legislation of some other kind. Rather, they are legislation proper. Fifth, and perhaps most importantly, ordinances and acts have similar substantive width.¹⁴ The president may use an ordinance to do all the things Parliament may do through an act.

Ordinances have a large presence in India. Originally a British innovation, they matured into India’s legislative design over time¹⁵ and their prominence has only grown post-independence. Between 1952 and 2009, presidents promulgated 615 ordinances at an average of 10.5 every year.¹⁶ During the same period, Parliament enacted 3467 acts.¹⁷ In other words, approximately 17.7% of all acts originated as ordinances. But their importance goes beyond numbers: some of India’s most controversial policies were initially legislated through ordinances. India’s first Prime Minister, Jawaharlal Nehru, perfected this practice—he nationalized industries and enacted anti-terror legislation using ordinances.¹⁸ His successors zealously followed him in this respect. The mechanism has since been used to introduce legislation in many fields including crime,¹⁹ human rights,²⁰ finance,²¹ national security,²² property,²³ religion,²⁴ and taxation.²⁵

12. INDIA CONST. art. 123(2).

13. *Id.* art. 123(2).

14. *Id.* art. 123(3).

15. For a description of this evolution, see SHUBHANKAR DAM, *PRESIDENTIAL LEGISLATION IN INDIA: THE LAW AND PRACTICE OF ORDINANCES* 27–65 (2014).

16. *See* *PRESIDENTIAL ORDINANCES, 1950–2009* (2011).

17. *STATISTICAL HANDBOOK OF MINISTRY OF PARLIAMENTARY AFFAIRS* 52 (2012), <http://mpa.nic.in/Statbook12.pdf> (India) [hereinafter *STATISTICAL HANDBOOK*].

18. *See, e.g.*, Life Insurance (Emergency Provisions) Ordinance, 1956, No. 1 of 1956, *Gazette of India (Extraordinary)*, section II(1) (Jan. 19, 1956); Armed Forces (Assam & Manipur) Special Powers Ordinance, 1958, No. 1 of 1958, *Gazette of India (Extraordinary)*, section II(1) (May 22, 1958).

19. *See, e.g.*, Unlawful Activities (Prevention) Ordinance, 1966, No. 6 of 1966, *Gazette of India (Extraordinary)*, section II(1) (June 17, 1966).

20. *See, e.g.*, Protection of Human Rights Act, No. 30 of 1993, *INDIA CODE*.

Ordinances are bounded by several “controls.” First, procedurally, they are limited to circumstances when at least one House of Parliament is not in session. Substantively, the president—technically with the approval of the Council of Ministers—must be satisfied that circumstances necessitate immediate action of this kind. A second control applies post-promulgation. Ordinances are temporary in nature. To become permanent, they must be enacted into law within a specified period. Without such formal parliamentary approval, ordinances “cease to exist.”²⁶ This is the third control. These controls taken together suggest that parliamentary legislation and presidential legislation do not stand on the same footing. More importantly, it implies that parliamentary preeminence is still part of India’s legislative design. But that is not so. After sixty years of constitutional practice these controls are redundant; aggressive political conduct and forgiving judicial interpretations made them so. What was exceptional and temporary is now normal and permanent. As a result, India effectively has *two* “Parliaments”—thus, the president acts as an “Alternative Parliament.”²⁷

This Article explains this great Indian alchemy—how and why this transformation occurred, and its implications for India’s parliamentary system. It is divided into four parts. Part I tackles the preconditions essential for an ordinance. It argues

21. See, e.g., Conservation of Foreign Exchange and Prevention of Smuggling Activities (Amendment) Ordinance, 1976, No. 6 of 1976, Gazette of India (Extraordinary), section II(1) (June 16, 1976).

22. See, e.g., Maintenance of Internal Security Ordinance, 1971, No. 5 of 1971, Gazette of India (Extraordinary), section II(1) (May 7, 1971).

23. See, e.g., Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, No. 8 of 1969, Gazette of India (Extraordinary), section II(1) (July 19, 1969).

24. See, e.g., Ram Janma Bhumi-Babri Masjid (Acquisition of Area) Ordinance, 1990, No. 9 of 1990, Gazette of India (Extraordinary), section II(1) (Oct. 19, 1990).

25. See, e.g., Compulsory Deposit Scheme (Income-Tax Payers) Ordinance, 1974, No. 10 of 1974, Gazette of India (Extraordinary), section II(1) (July 17, 1974).

26. INDIA CONST. art. 123(2)(a).

27. The reference to this second Parliament must be understood in a limited sense. Arguably, parliaments do much more than merely legislate. To say that India’s president effectively functions as an alternative Parliament is to suggest that the president *legislates* in the same way that Parliament does.

that without any judicial oversight, these conditions are largely hollow. Part II is about options post-promulgation and offers an overview of how Parliament has responded to the 615 ordinances thus far. It then focuses on the legality of repromulgating ordinances. Part III is an analysis of the final control; namely, the requirement that a failed ordinance “ceases to operate.” It argues that by effectively writing off this requirement, the Supreme Court of India (“Supreme Court”) has completed this institutional metamorphosis. Finally, Part IV draws upon political science literature and comparative experiences from Latin America and Europe to explain how this second Indian Parliament is different from those commonly associated with presidential jurisdictions.

I. KEEPING PARLIAMENT AWAY: THE CONDITIONS THAT MAKE ORDINANCES POSSIBLE

Two—and only two—conditions must be met before the president may promulgate an ordinance. This section discusses both of these conditions, assesses their complexities, and revisits judicial opinions about them. It argues that the Constitution set a low threshold, and the courts lowered it further. As a result, the conditions are, legally speaking, only about form; substantively, they are hollow.

A. Shades of Absence: When Is Parliament “Not in Session”?

Article 123(1) says that the president may promulgate an ordinance except when “both Houses of Parliament are in session.” Notice the emphasis on “both Houses.” It suggests that ordinances are not meant for occasions when legislation is “institutionally” possible. Stated differently, Article 123 does not establish a parallel legislative process. Rather, it empowers the president to enact ordinances when at least one House of Parliament is not in session. But when is Parliament “not in session?” The question, it turns out, is easier than the answer.

The Constitution does not prescribe the periods for which the two Houses should be in session. It merely states that “six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session.”²⁸ Conventionally, the two Houses meet for three sessions

28. INDIA CONST. art. 85(1) (“The President shall from time to time summon each House of Parliament to meet at such time and place as he thinks

annually: the “budget session” runs from February to May; the “monsoon session” runs from July to September, and the “winter session” runs from November to December.²⁹ While Article 85 authorizes the president to “summon each House of Parliament,” in practice, decisions regarding commencement and duration of sessions are made by the Cabinet.³⁰ And once summoned, a House may be brought to a close by several means—it may be adjourned, prorogued, or dissolved.

Adjournment is a break in parliamentary proceedings; it postpones the business of a House to another time or date in the same session.³¹ Such breaks may range from short periods—including just a few hours—to several weeks. In India, presiding officers often adjourn Houses when members are disruptive, or ordinary business cannot be transacted.³² A notice of adjournment usually includes a statement of the date and time when a House will reassemble, unless it is *sine die*, in which case there is no assurance that the House will meet again during that session.³³ In contrast, prorogation is a break in parliamentary proceedings that signals the end of a session.³⁴ It may occur at any time either after adjournment or while a House is in session. The decision to prorogue is generally made by the Cabinet and notified by the president.³⁵ Once prorogued,

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.”)

29. LOK SABHA SECRETARIAT, *Composition, Business, and Procedure, in HANDBOOK FOR MEMBERS OF LOK SABHA 2* (15th ed. 2009), available at <http://164.100.47.132/LssNew/Members/handbook.aspx> [hereinafter LOK SABHA HANDBOOK]; see also V.K. AGNIHOTRI, HANDBOOK ON THE WORKING OF MINISTRY OF PARLIAMENTARY AFFAIRS 17–18 (2004).

30. For a description of the procedure, see AGNIHOTRI, *supra* note 29, at 17, 19–22.

31. In the Matter of Special Reference No. 1 of 2002, (2002) 8 S.C.C. 237, ¶ 52 (India) [hereinafter Reference by President].

32. Unfortunately, this pattern is all too common. See, e.g., *Parliament Paralyzed for Third Consecutive Day*, NDTV NEWS (Nov. 24, 2011, 3:56 PM), <http://www.ndtv.com/article/india/Parliament-paralyzed-for-third-consecutive-day-152607>; *Houses Adjourned over Nandigram Deadlock*, INDIAN EXPRESS (Nov. 20, 2007, 12:56 AM), <http://www.indianexpress.com/news/houses-adjourned-over-nandigram-deadlock/241115/>.

33. LOK SABHA HANDBOOK, *supra* note 29, at 28, 77.

34. *Id.* at 76.

35. See generally A.R. MUKHERJEA, PARLIAMENTARY PROCEDURE IN INDIA 61–65 (1983).

only the president may recall a House back to session; a speaker or chairperson of a House is not authorized to do so. This is a key difference. If adjourned *sine die*, a House is still in session and the presiding officer may bring it back into session.³⁶ It is not so if a House has been prorogued.

But adjournment and prorogation are similar in one respect. Neither adjournment nor prorogation precludes the possibility of future sessions and, therefore, unfinished business from a prorogued session does not lapse.³⁷ A prorogued House, in other words, is inactive but "alive."³⁸ Finally, dissolution signals the end—or "death"—of a particular House, thereby necessitating new elections. All pending matters, including bills, lapse on dissolution.³⁹ Interestingly, while both the Lower and Upper Houses may be adjourned or prorogued, only the Lower House can be dissolved in India.⁴⁰ Once dissolved, it cannot be revived.⁴¹

To summarize, once summoned to meet, both Houses of Parliament may be brought to a close in a number of ways. An adjournment ends a particular *sitting* of Parliament. Prorogation ends a particular *session* of Parliament. Dissolution ends that *Parliament*—namely, the Lower House itself.⁴² These distinctions are important because they determine when an ordinance may be promulgated. Recall the temporal limits in Article 123(1): "at any time, except when both Houses of Parliament are *in session*," the president may promulgate ordinances.⁴³

36. This has happened on a number of occasions. On May 25, 1987, the Lower House was adjourned *sine die* to mark the end of the budget session. But the house was never prorogued. Accordingly, on July 27 it met again for the monsoon session, which was, legally speaking, a continuation of its earlier session. On July 28, the speaker adjourned the house *sine die* and on September 3 it was finally prorogued by the president. See STATISTICAL HANDBOOK, *supra* note 17, at 10–25.

37. Reference by President, *supra* note 31, ¶ 52.

38. *Id.* ¶ 53. That is unless the prorogation coincides with the House's maximum tenure.

39. *Id.* ¶ 52.

40. The Upper House, consistent with Article 83, is a permanent body. INDIA CONST. art. 83(1) ("The Council of States shall not be subject to dissolution, but as nearly as possible one third of the members thereof shall retire as soon as may be on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.").

41. Reference by President, *supra* note 31, ¶ 52.

42. See also MUKHERJEA, *supra* note 35, at 61–65.

43. INDIA CONST. art. 123(1) (emphasis added).

Our earlier distinctions make it clear that Parliament is not in session when either House stands prorogued or the Lower House stands dissolved. Clearly ordinances may be promulgated then.

But if Parliament is in sitting, or in session but not in sitting, the only way for a Cabinet to promulgate an ordinance is to prorogue either House, or dissolve the Lower House. Improper as it sounds, Cabinets have resorted to this method—or attempted to do so—on several occasions. The 2006 controversy surrounding Mrs. Sonia Gandhi and her alleged “office of profit” is instructive here.⁴⁴ In June 2004, Prime Minister Manmohan Singh and his Cabinet created the National Advisory Council (“NAC”)—apparently to oversee the implementation of the Common Minimum Program to which the coalition partners of the United Progressive Alliance had agreed. Mrs. Gandhi, as the president of the Congress Party, was appointed its chairperson. She enjoyed the rank and status of a cabinet minister and received perks and benefits paid out by the central government.⁴⁵ In March 2006, the National Democratic Alliance-led opposition questioned Mrs. Gandhi’s appointment, alleging that it amounted to an “office of profit” under Article 102—something that disqualified her from membership to either House of Parliament.⁴⁶ Unable to find fault with the opposition’s legal arguments, the Cabinet secretly came up with a draft ordinance to remove Mrs. Gandhi’s disqualifications under the relevant legislation.⁴⁷ But the two Houses were in ses-

44. See generally DAM, *supra* note 15.

45. See The Parliament (Prevention of Disqualification) Amendment Act, No. 31 of 2006, INDIA CODE (2006).

46. INDIA CONST. art. 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.

Id. Earlier in Day, *BJP Spelt Out Her Office of Profit*, *Indian Express* (Mar. 23, 2006), <http://www.indianexpress.com/news/earlier-in-day-bjp-spelt-out-her-office-of-profit/1040/0>; Neena Vyas, *Adjournment Aimed at ‘Saving’ Sonia*, *Hindu* (Mar. 23, 2006), <http://www.thehindu.com/todays-paper/tp-national/adjournment-aimed-at-saving-sonia/article3168149.ece>.

47. Vyas, *supra* note 46; R. Venkataraman, *Stop Office-of-Profit Axe*, *UPA Gets Ordinance*, *INDIAN EXPRESS* (Mar. 21, 2006, 4:21 AM), <http://www.indianexpress.com/news/to-stop-officeofprofit-axe-upa-gets->

sion and that created a hurdle. The Cabinet asked the speaker to adjourn the Lower House *sine die* and recommended to the president that it be prorogued.⁴⁸ But the ordinance did not materialize. An alert piece of reporting by the *Indian Express* made those plans public, and an embarrassed Cabinet backtracked.⁴⁹ Eventually, Mrs. Gandhi resigned, only to be re-elected, and a later piece of legislation regularized her NAC appointment.⁵⁰

This sort of legislative maneuvering has an obvious air of impropriety. But are there *legal* limits to how and when the executive may prorogue parliamentary sessions to make way for ordinances? The Madras High Court in *In Re Kalyanam Veerabhadraya* determined that there are not.⁵¹ In July 1949, the Madras Legislative Assembly was in the process of debating several amendments to the Madras Maintenance of Public Order Act, 1947.⁵² Despite that, the governor prorogued the session and promulgated an ordinance—the Madras Ordinance, 1949—on the grounds that “immediate action was necessary.”⁵³ The petitioners argued that the governor’s action was a fraudulent exercise of power: there was no urgency, and the legislature was prorogued solely to make an ordinance possible.⁵⁴ The High Court rebuffed that claim.

It is open to the Governor to prorogue the legislature at any time he pleases. We do not see anything wrong in the Gover-

ordinance-/922/; see The Parliament (Prevention of Disqualification) Act, No. 10 of 1959, INDIA CODE (1959).

48. *Uproar in Parliament over Ordinance ‘Shielding’ Sonia*, HINDUSTAN TIMES (Mar. 22, 2006, 4:00 PM), <http://www.hindustantimes.com/News-Feed/NM8/Uproar-in-Parliament-over-ordinance-shielding-Sonia/Article1-77777.aspx>.

49. Venkataraman, *supra* note 47.

50. The Parliament (Prevention of Disqualification) Act, No. 10 of 1959, INDIA CODE (1959); Venkitesh Ramakrishnan, *A Masterstroke*, 23 FRONTLINE, Mar. 25–Apr. 7, 2006, available at <http://hindu.com/fline/fl2306/stories/20060407007212900.htm>; *Sonia Gandhi Runs for Re-election*, BBC NEWS (May 8, 2006), http://news.bbc.co.uk/2/hi/south_asia/4983682.stm; see also Sujay Mehdudia, *President Kalam Signs Office of Profit Bill*, HINDU (Sept. 19, 2006), <http://www.hindu.com/2006/09/19/stories/2006091922020300.htm>.

51. *In re Kalyanam Veerabhadrayya*, A.I.R. 1950 (Mad.) 243, ¶ 21 (1949) (India).

52. The Madras Maintenance of Public Order Act, No. 1 of 1947 (India).

53. Madras Ordinance, 1949, No. 1 of 1949 (India).

54. *In re Kalyanam Veerabhadrayya*, *supra* note 51, ¶ 21.

nor proroguing the Assembly and the Council with a view to enable himself to issue an Ordinance. The legislature . . . is very slow to move in the matter of legislation and if the Governor has reasons to believe that immediate action is necessary, it [can] be more expedient to have resort to the power of issuing an Ordinance . . . rather than approach the Legislature for the necessary legislation.⁵⁵

In other words, the power to prorogue is absolute; the executive may invoke it at any time and for any reason. Even if done *solely* to make an ordinance possible—as in the office of profit controversy—the High Court seemed to suggest that it too would be lawful.

This absolute reading of prorogation was somewhat disputed in *State of Punjab v. Satya Pal Dang*.⁵⁶ The facts of the case are peculiar. During the budget session in March 1968, a resolution expressing no-confidence in the speaker was moved in the Punjab State Assembly.⁵⁷ The next day, the speaker declared the motion unconstitutional and deemed not to have been moved. He then adjourned the Assembly for two months until May 6, 1968.⁵⁸ This led to a crisis. The state budget had a March 31 deadline, but the Assembly stood adjourned until May. With the speaker unwilling to resume legislative proceedings, the governor prorogued the Assembly and promulgated the Punjab Legislature Regulation of Procedure in Relation to Financial Business Ordinance, 1968.⁵⁹ It barred both Houses of the State Legislature from being adjourned without consent until the completion of the financial business.⁶⁰ When challenged on the ground that the Houses were prorogued solely to make way for an ordinance, the Court sided with the governor. “There was no abuse of power by him, nor can his action be described as mala fide,” Chief Justice Hidayatullah wrote.⁶¹ But he hedged on the larger question:

55. *Id.*

56. *State of Punjab v. Satya Pal Dang*, A.I.R. 1969 S.C. 903 (1968) (India).

57. *Id.* at 907.

58. *Id.*

59. The Punjab Legislature (Regulation of Procedure in relation to Financial Business) Ordinance, 1968, No. 1 of 1968.

60. *Id.* § 3.

61. *State of Punjab v. Satya Pal Dang*, A.I.R. 1969 S.C. 903, ¶ 14 (1968) (India).

Whether a Governor will be justified to do this when the Legislature is in session and in the midst of its legislative work is a question that does not fall for consideration here. When that happens, the motives of the Governor may conceivably be questioned on the ground of an alleged want of good faith and abuse of constitutional powers.⁶²

Satya Pal Dang is less sweeping than the view articulated by the Madras High Court, and if correct, would imply that presidents (and governors) do not have complete discretion in proroguing Houses. Nonetheless, both decisions and their general tenor err on the side of wide discretion and that has stark implications for Article 123. If the decision to prorogue a parliamentary session is entirely—or substantially—within the discretion of a Cabinet, it follows that the temporal limit in Article 123 does not impose any meaningful restriction. The executive may satisfy the “not in session” requirement simply by proroguing a House when it *is* in session.

B. Whimsically Legal: Measuring Presidential Satisfaction

The first control has a second leg that must also be met before Article 123 can be invoked. The president must be satisfied “that circumstances exist that render it necessary for him to take immediate action.”⁶³ In other words, at least one House of Parliament must not be in session, and the president must be satisfied that the circumstances demand an immediate parliamentary response. This latter condition—the emphasis on “immediate action”—reiterates the idea that the arrangement did not establish a parallel Parliament. As mentioned earlier, the power to promulgate ordinances is nominally vested in the president; in practice, it is exercised by the Cabinet. If the latter decides that an ordinance is immediately necessary, the president promulgates it into law. But such decisions may be made for reasons other than the fact that it is, legislatively speaking, immediately necessary. The dramatic circumstances under which banks were nationalized in 1969 illustrate this.

When India's second Prime Minister Lal Bahadur Shastri unexpectedly died in office in 1966, the ruling Congress Party turned to Mrs. Indira Gandhi to lead the nation. At forty-eight, she was young, charismatic, and—as the daughter of India's

62. *Id.*

63. INDIA CONST. art. 123(1).

longest serving Prime Minister, Jawaharlal Nehru—widely admired.⁶⁴ She led her party to its fourth victory in the General Elections in 1967 but with a reduced majority.⁶⁵ Soon, her position became suspect as senior—and more conservative—leaders openly defied her.⁶⁶ In a shrewd move, Mrs. Gandhi allied herself with the younger, socialist faction of her party. The clash of personalities became ideological as a result and turned in *her* favor.⁶⁷ She unveiled an aggressive socialist agenda, matching it with powerful rhetoric both inside and outside Parliament. But an agenda was not enough; Mrs. Gandhi had to act.

On the evening of July 18, 1969, a senior draftsman from the Law Ministry, S. K. Maitra, was ordered by the Prime Minister's Secretariat to draft an ordinance nationalizing fourteen of India's biggest commercial banks.⁶⁸ The matter was top secret, and only a handful of bureaucrats were privy to the drafting process. Mrs. Gandhi looked through the draft early the next morning and made minor modifications.⁶⁹ Later approved unopposed by a Cabinet that had neither seen nor heard about it earlier, the ordinance was sent to then Acting President V. V. Giri who signed it into law.⁷⁰ "By a mere stroke of the pen the Government [took] control of the deposits of 14 banks, totaling . . . nearly 70 percent of the aggregate amount of deposits under the banking system."⁷¹ A day later, Parliament came back to session.⁷²

The Prime Minister's action invited sharp criticisms. M. R. Masani and C. Rajagopalachari, leaders of the free-market *Swatantra* Party, criticized the takeover, and not just for policy reasons. They argued that an ordinance a day before Parlia-

64. RAMCHANDRA GUHA, *INDIA AFTER GANDHI* 405–06 (2007).

65. *Id.*

66. *Id.* at 435–38.

67. *Id.*; see also GRANVILLE AUSTIN, *WORKING A DEMOCRATIC CONSTITUTION: THE INDIAN EXPERIENCE* 176–79 (1st ed. 1999).

68. AUSTIN, *supra* note 67, at 214–15.

69. *Id.*

70. The Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, No. 3 of 1969, Gazette of India (Extraordinary), section II(1) (July 19, 1969) (India).

71. *Top Fourteen Banks Are Nationalised*, *TIMES INDIA*, July 20, 1969, at 1.

72. Decisions regarding the start and closing of parliamentary sessions are conventionally made by the Council of Ministers in consultation with the speakers of the two houses and the opposition parties. The dates and the parliamentary agenda are agreed upon well in advance of the actual sessions.

ment was to convene "was immoral."⁷³ A. B. Vajpayee, then president of the conservative *Jan Sangh* Party, made a similar point. He stated that imposing a far-reaching decision on the nation "through the backdoor of an ordinance and that too just on the eve of the Parliament session is in itself proof that the Government is afraid of facing Parliament in a straightforward manner."⁷⁴ The criticisms mattered little though. As the *Times of India* editorial put it, "the die [was] cast."⁷⁵ While ordinances in Article 123 are temporary measures that eventually require formal parliamentary approval, by 1969, in practice, there was clearly no going back after promulgation.⁷⁶ Ordinances by then had acquired a firm quality; once promulgated, it only had the effect of tying Parliament's hand.

Examined in context, bank nationalization for Mrs. Gandhi was a vehicle by which to cement herself as the leader of the government *and* the party.⁷⁷ Legislative urgency, if any, was "political" and tied to machinations within the Congress Party. As such, was the reliance on Article 123 justified? Rustom C. Cooper, a shareholder in one of the nationalized banks, did not think so. He challenged the ordinance in the Supreme Court.⁷⁸ He argued that the nationalization ordinance was contrary to Article 123 because the president—acting on the advice of the Council of Ministers—wrongly came to the conclusion that immediate action was necessary. His larger point was that presidential satisfaction had limits, and ordinances were valid only if they were promulgated for the "right" reasons.⁷⁹ The Attorney General took the contrary view, arguing that the decision to promulgate an ordinance was a "matter of high policy" and therefore completely immune from judicial review.⁸⁰ The Union of India was "under no obligation to disclose the existence of, or to justify the circumstances of the necessity to take immediate action," he insisted.⁸¹ The Supreme Court left the matter unde-

73. *C.R. Doubts Validity of Ordinance*, TIMES INDIA, July 19, 1969, at 8.

74. *UF Circles Hail Bank Nationalisation*, TIMES INDIA, July 20, 1969, at 8.

75. *The Die Is Cast*, TIMES INDIA, July 21, 1969, at 6.

76. This practice eventually earned a legal status when the Supreme Court ruled that even ordinances that fail to secure parliamentary approval could create permanent effects. *See infra* Part III.

77. AUSTIN, *supra* note 67, at 174.

78. *Cooper v. Union of India*, (1970) 3 S.C.R. 530 (India).

79. *Id.* ¶ 24.

80. *Id.* ¶ 25.

81. *Id.*

cided. By the time hearings began, the ordinance had already become an Act, and questions about presidential satisfaction in Article 123 were no longer relevant.⁸² But the Court's refusal to wade into the issue demonstrated the provision's potential—especially the many ends for which it could be invoked.

The Court shed its reticence in *Nagaraj v. State of Andhra Pradesh* and sided with the executive.⁸³ The governor of the southern state of Andhra Pradesh promulgated an ordinance reducing the retirement age of public sector employees from fifty-eight to fifty-five. The ordinance was challenged, among other reasons, on the basis that the governor wrongly—and perhaps with improper motives—came to the conclusion that it was necessary. The Court rebuffed that argument. A president (or governor's) decision to promulgate an ordinance, it said, was immune from judicial review.⁸⁴ The Court reached that conclusion in three steps. First, an ordinance is identical to an Act.⁸⁵ Second, when Parliament enacts legislation, it cannot be accused of having done so “for an extraneous purpose.”⁸⁶ Even if the executive, in a given case, has an ulterior motive in introducing a piece of legislation, “that motive cannot render the passing of the law mala fide.”⁸⁷ This kind of “transferred malice” was “unknown in the field of legislation.”⁸⁸ The same is true of presidents and governors, Chief Justice Chandrachud claimed; they alone may decide if an ordinance is necessary. This view was repeated in *Reddy v. State of Andhra Pradesh*.⁸⁹ “The propriety, expediency and necessity of a legislative act,” Chief Justice Chandrachud once again wrote, “are for the determination of the legislative authority,” not courts.⁹⁰ Ordinances are like acts, and thus subject to similar restrictions.⁹¹

82. The Banking Companies (Acquisition and Transfer of Undertaking) Act, No. 22 of 1969, INDIA CODE. It should also be noted that the Supreme Court invalidated the Act on other grounds.

83. *Nagaraj v. Andhra Pradesh*, A.I.R. 1985 S.C. 551, ¶¶ 28, 37 (India).

84. *Id.* ¶ 14.

85. *Id.* ¶ 35.

86. *Id.* ¶ 36.

87. *Id.*

88. *Id.*

89. *Reddy v. Andhra Pradesh*, A.I.R. 1985 S.C. 724, ¶ 13–14 (India).

90. *Id.* ¶ 14.

91. *Id.*; see also *Agarwal v. Uttar Pradesh*, A.I.R. 1956 All. 557, ¶ 22 (India); *Tandon v. Uttar Pradesh*, A.I.R. 1960 All. 205, ¶ 9 (India); *Pandey v. Uttar Pradesh*, A.I.R. 1970 All. 571, ¶ 20 (India); *Bhadra v. Union of India*,

The law regarding presidential satisfaction, therefore, is precisely what Attorney General Niren De argued for in the *Bank Nationalization Case*.⁹² The president may promulgate an ordinance for *any* reason, and that decision is final. The satisfaction is completely subjective and totally immune from any kind of judicial scrutiny. Indeed, Cabinets may take to them for personal, political, or whimsical reasons and courts still would not review the validity of such reasons. As seen earlier, Mrs. Gandhi resorted to an ordinance for “personal” reasons. Her authority was under challenge and the ordinance became a vehicle by which to strengthen her position within the Congress Party. What other reasons may motivate Cabinets to indulge in ordinances? The remainder of this section sketches out a typology of motives that can help further an understanding of the presidential reasons underlying ordinances.

First, as mentioned earlier, ordinances may be promulgated for personal reasons. Such “preferential” ordinances are principally about the *partisan* interests of ministers, individually or collectively, or the party to which the Cabinet belongs. Both Mrs. Indira Gandhi’s bank ordinance and the proposed, though ultimately not promulgated, 2006 ordinance aimed at remedying Mrs. Sonia Gandhi’s disqualification are obvious examples. But they are not the only ones. Perhaps the most egregious of such partisan ordinances was attempted in 1996. The Narasimha Rao Cabinet was in its “caretaker phase” and the next general election was two months away.⁹³ The cabinet drafted two ordinances.⁹⁴ The first reduced the campaigning period from three to two weeks.⁹⁵ The second extended the benefits of India’s reservation policy to an estimated 12 million lower caste Christians concentrated in southern India.⁹⁶ But President S. D. Sharma declined to promulgate them; he felt that

A.I.R. 1975 Cal. 72, ¶ 18 (India); *Beebi v. Ravindranathan*, A.I.R. 1975 Ker. 202, ¶ 3 (India).

92. *Cooper v. Union of India*, (1970) 3 S.C.R. 530 (India).

93. The “caretaker phase” refers to the fact that the Rao Cabinet had completed its tenure and the dates for the next general elections had already been notified. By convention, governments in India do not make major policy decisions during this period. The actions of the Rao Cabinet were an exception to this practice.

94. *Ordinances Move Assailed*, TIMES INDIA, Mar. 17, 1996, at 1.

95. *Id.*

96. *Id.*

“they did not pass the test of constitutional propriety.”⁹⁷ Perhaps these ordinances were “necessary” only in the sense that they benefitted the ruling party or persons therein.

Second, cabinets may resort to ordinances to further specific policy preferences that do not enjoy parliamentary support. Indeed, they may do so *because* they lack majority support. These “anti-majoritarian” ordinances are different from partisan ordinances; they do not benefit ministers, individually or collectively, or the ruling party specifically. Instead, they further a cabinet’s preferences, albeit ones that lack majority support. The original and the repromulgated versions of the Prevention of Terrorism Ordinance, 2001 (“POTO”) are good examples. The Vajpayee Cabinet mooted the idea of an anti-terrorism legislation in the aftermath of the attacks in New York City in 2001. Some members of the ruling NDA opposed it. They felt that such a law could target India’s religious minorities and undermine press freedom.⁹⁸ Fully aware that the proposal enjoyed insufficient support in Parliament, the cabinet pressed on with an ordinance.⁹⁹ Later on, still unable to persuade its coalition partners, the cabinet repromulgated a slightly altered version once the relevant session concluded.¹⁰⁰ That a parliamentary majority had rebuffed the need for such a law, even if impliedly, did not matter. The ordinance mechanism became an alibi through which to enact a piece of legislation despite majority support *against* it.

Occasionally, cabinets may promulgate anti-majoritarian ordinances not by choice but under “compulsion.” Consider the 1994 controversy involving India’s accession to the World Trade Organization (“WTO”). India became a founding member of the WTO in 1995 and simultaneously signed the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPs”).¹⁰¹ This latter agreement mandated several changes

97. *President Declines Assent to Ordinances*, TIMES INDIA, Mar. 20, 1996, at 1.

98. Smita Gupta, *Naidu Wants POTO Amended to Protect Press Freedom*, TIMES INDIA, Nov. 18, 2001, at 7.

99. Prevention of Terrorism Ordinance, 2001, No. 9 of 2001 (India).

100. Prevention of Terrorism (Second) Ordinance, 2001, No. 12 of 2001 (India).

101. TRIPs: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY

to India's intellectual property laws—especially patent legislation—to meet the new obligations.¹⁰² The Narasimha Rao Cabinet had more than eight months during which to evolve a political consensus in favor of these changes. Yet it did nothing. Later, faced with an impending deadline, the cabinet took the easy way out. It promulgated an ordinance—The Patents (Amendment) Ordinance, 1994—on December 31, 1994, proclaiming in the preamble that “it [had] become necessary to amend the Patents Act, 1970 in conformity with the obligations under the [TRIPs] Agreement.”¹⁰³ The move angered the opposition.¹⁰⁴ To J. S. Reddy of the *Janata Dal*, it “was a classic case of misuse of a constitutional provision,” and “a nasty conspiracy to confront Parliament with a *fait accompli*.”¹⁰⁵ The cabinet had foreknowledge of the impending legislative void, and if anything, the urgency was orchestrated by inaction. As the *Times of India* editorial put it, rather than make any conciliatory moves, the government “gambled on the opposition supporting it to save face abroad.”¹⁰⁶ Perhaps it was “necessary” only to avoid a parliamentary defeat. This was later borne out. The ordinance was introduced in Parliament in March 1995 only to be indirectly rejected by the Upper House.¹⁰⁷

Third, occasionally cabinets, especially minority cabinets, may rely on ordinances to legislate systematically. Their minority status implies that they do not have the numeric support to muscle legislation through Parliament. Thus, Article 123 acts as the crutch through which to churn out new legislation. This is different from the second reason for promulgating an ordinance; in the earlier case, the cabinet had a working major-

ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement].

102. For an analysis of the changes required, see Suresh Koshy, Note, *The Effect of TRIPs on Indian Patent Law: A Pharmaceutical Industry Perspective*, 1 B.U. J. SCI. & TECH. L. 4 (1995).

103. The Patents (Amendment) Ordinance, 1994, No. 13 of 1994 (India).

104. *Patent Law Amendment Angers Opposition*, TIMES INDIA, Jan. 2, 1995, at 13.

105. *Id.* The indigenous drug lobby also criticized the move, but mostly for policy reasons. *Patents Act Changes Pique Drug Makers*, TIMES INDIA, Jan. 6, 1995, at 19.

106. *Patent Myopia*, TIMES INDIA, Apr. 1, 1995, at 14.

107. Priya Ranjan Dash, *Patent Act Changes Set to Lapse*, TIMES INDIA, Mar. 25, 1995, at 15.

ity in Parliament but lacked support for a *specific* piece of legislation. With minority cabinets, the lack of support is more general, and the reliance on ordinances more systematic. We may refer to them as “substitutive ordinances”; the mechanism almost functions like a parallel Parliament.

H. D. Deve Gowda and Inder K. Gujral and their respective cabinets best exemplify this. As the leader of the minority United Front coalition, Deve Gowda became India's eleventh Prime Minister and held office between June 1996 and April 1997. He promulgated twenty-three ordinances in those eleven months.¹⁰⁸ Inder K. Gujral took over as Prime Minister after Deve Gowda resigned, and ran another minority government. He also held office for eleven months and was responsible for another twenty-three ordinances.¹⁰⁹ The two cabinets jointly promulgated forty-six ordinances during their twenty-two months in office. In the same period, they legislated no more than sixty-one acts. When put side by side, these figures reveal the extent to which ordinances were systematically used to legislate without Parliament. Ordinances were “necessary” for these cabinets, though not in the sense of Article 123. Rather, they filled a political void brought about by fractured electoral verdicts and the cabinets' inability to develop a network of support from parliamentary friends and foes alike.

Fourth, occasionally cabinets may rely on ordinances simply because they are convenient. They are convenient in the sense that the ordinance in question is a relatively uncontroversial one—and unlikely to generate objections. We may refer to them as “convenient ordinances.” The creation of the National Human Rights Commission (“NHRC”) is a good example. The NHRC is a statutory body with the authority to inquire into allegations of human rights abuse, review legislative and constitutional safeguards, study international treaties and conventions, and promote human rights literacy in India.¹¹⁰ Yet an

108. PRESIDENTIAL ORDINANCES, 1950–2009, *supra* note 16.

109. *Id.*

110. The Protection of Human Rights Act, No. 12 of 1993, INDIA CODE. In its early days, the Commission, it must be mentioned, was viewed with grave suspicion. See, e.g. *Human Rights Panel a 'Fraud on People,'* TIMES INDIA, Dec. 8, 1993, at 11; *Parliament Okays Rights Bill,* TIMES INDIA, Dec. 23, 1993, at 11. For a more optimistic early assessment, see *To Right Wrongs,* TIMES INDIA, Oct. 4, 1993, at 14.

ordinance was used to establish it.¹¹¹ Senior officials boasted of the law's deliberated status while explaining its salient features at a news conference. It was "an entirely new kind of legislation," they claimed, "drafted after sixteen months of intense discussions."¹¹² "All shades of public opinion" were heard, including consultations with federal ministries and state governments.¹¹³ If true, these expansive briefings take away the very justification for the ordinance. Something written, reviewed, and revised over a period of sixteen months cannot plausibly claim the mantle of urgency. Perhaps the ordinance was "necessary" only in the sense that it was convenient and assured of a parliamentary majority in due course.

As this typology suggests, a wide variety of motives propel ordinances to life. By favoring an understanding of "necessity" not grounded in Article 123, these motives undermine the basic norm that primary legislation must satisfy certain representative, numeric, and deliberative criteria. But more importantly, they reveal the hollowness of the preconditions. Recall that two conditions must be satisfied before ordinances may be promulgated. At least one House of Parliament must not be in session, and the president should be satisfied that circumstances make it necessary to do so. But these, we now know, are mere formalities. A functioning Parliament may be prorogued at *any* time for *any* reason, and the cabinet may recommend an ordinance for *any* reason at all. As a result, there are no *ex ante* constraints on invoking Article 123. Effectively, there are *two* distinct sources of primary legislation in India—the Parliament and the president. They function independently but also often cross purposes with one another.

II. KEEPING ORDINANCES IN EFFECT: A ROGUE METHOD EXPLAINED

The argument that there are two distinct sources of primary legislation does not necessarily imply that there are two Parliaments. Whether presidential and parliamentary legislation equate to one another will depend on events post-promulgation. Ordinances under Article 123 are temporary provisions of law.

111. The Protection of Human Rights Ordinance, 1993, No. 30 of 1993 (India).

112. *Human Rights Body to Be Set Up*, TIMES INDIA, Sept. 30, 1993, at 1.

113. *Id.*

They remain in effect for six weeks from the day the two Houses reconvene and must be converted into an act within this duration.¹¹⁴ This is a critical hurdle; the “Two Parliaments” argument cannot succeed without overcoming it. There are two mechanisms by which to overcome this hurdle. This section discusses the empirical record of ordinances post-promulgation and focuses on the first mechanism; namely, repromulgation.

A. What Happens after Promulgation: Five Possibilities

Once promulgated, every ordinance, in keeping with Article 123(2), must be laid “before both Houses.”¹¹⁵ Four outcomes are largely possible at this stage. First, the ordinance may become an Act through the normal legislative procedure. This is the best-case scenario from the cabinet’s point of view. It must be done within six weeks of the reassembly of the two Houses.¹¹⁶ Second, the ordinance may be put to vote, but “disapproved” by one or both Houses. It is the worst-case scenario from the cabinet’s point of view. The ordinance immediately “ceases to operate” in such a case.¹¹⁷ Third, the cabinet may decide against putting the ordinance to a vote at all. That is to say, it may let the ordinance “lapse.” Lastly, the cabinet may withdraw an ordinance.¹¹⁸ These four possibilities fall into two broad categories. The first outcome is the successful one; the ordinance becomes an act. Though for different reasons, the other three outcomes share an unsuccessful quality. In each of those cases, an ordinance ends as an ordinance; it does not become an act. Parenthetically, it may be noted that a fifth outcome is also possible. If a cabinet so chooses, it may *repromulgate* an unsuccessful ordinance after the reassembled Houses are no longer in session. But a repromulgated ordinance is still an ordinance and will eventually meet one of the four outcomes mentioned earlier.

Table A lists the ways in which Parliament has responded to ordinances thus far. Of the 615 ordinances, 478 (77.7%) “succeeded;” they became acts. Of the “unsuccessful” ones, seventy-five (12.1%) expired (or lapsed); fifty-nine (9.5%) were reprom-

114. INDIA CONST. art.123(2)(a).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* art.123(2)(b).

ulgated; and two (.003%) were withdrawn.¹¹⁹ These numbers, when plotted by decade, show a marginal decline in the percentage of successful ordinances. The 1950s had the lowest number of ordinances and nearly the highest conversion rate: fifty-two ordinances were promulgated and forty-eight of them became acts (92.3%). The success rate was 92.5% in the 1960s, 90.3% in the 1970s, 89.2% in the 1980s, and 77.7% in the 2000s. The 1990s is the outlier. Of the 196 ordinances promulgated during that decade, only 107 (54.5%) became acts. As many as eighty-nine failed, of which thirty-six (18.3%) expired and another fifty-three (27%) were repromulgated. These low rates of success were brought about by poor performances in several years. For example, in 1995, of the fifteen ordinances promulgated only six became acts. The performance in 1996 was even worse: thirty-two ordinances were promulgated and only nine became acts. Similarly, in 1997, thirty-one ordinances were promulgated and only eleven became acts. Taken together, the 1990s, in contrast to the 1950s, had the most number of ordinances and the worst conversion rate.

Table A. Parliamentary Responses to Ordinances

	Acts	Disapproved	Lapsed	Withdrawn	Repromulgated
1952–1959	48	–	03	01	–
1960–1969	62	–	05	–	–
1970–1979	122	–	12	01	–
1980–1989	83	–	10	–	–
1990–1999	107	–	36	–	53
2000–2009	56	–	10	–	06

Our focus must be on repromulgated ordinances. Repromulgation is the method by which a cabinet may reintroduce an ordinance upon its lapse, withdrawal, or rejection, and therefore is an important mechanism by which to overcome the “temporary” hurdle identified previously. As Table A shows, until the 1990s, the established practice was against repromulgating ordinances. In fact, ordinances had *never* been repromulgated at the federal level prior to the early 1990s. But that established practice quickly succumbed to political expediency when fractured parliamentary verdicts and minority cabinets

119. All figures analyzed here have been calculated based on information provided in PRESIDENTIAL ORDINANCES, 1950–2009, *supra* note 16.

became the norm. Of the 196 ordinances promulgated in the 1990s, as many as fifty-three (27%) were repromulgated, including some that were promulgated twice or more. Though the trend began in 1992, repromulgation assumed hideous proportions in 1996 and 1997. There were thirty-two ordinances in 1996; of those ordinances, nineteen were repromulgated or repeatedly repromulgated. Similarly, there were thirty-one ordinances in 1997; sixteen were repromulgated and at least seven were repromulgated twice. Incidentally, they all came from minority cabinets.¹²⁰

B. Repeated Promulgations: The First Step Toward “Two Parliaments”?

Note that Article 123 says nothing about repromulgation. Its silence raises two important questions. Is repromulgation valid? Second, are there limits to the number of times an ordinance may be repromulgated? An affirmative answer to the first question and a negative answer to the second question will support the argument that there are “Two Parliaments.” It would imply that the second control—the requirement that an ordinance be properly enacted as an act—is an empty one. A cabinet may repeatedly repromulgate an ordinance to confer on it a kind of permanence normally accorded to acts.

Between 1967 and 1981, the State of Bihar in eastern India promulgated 256 ordinances that “were kept alive for periods ranging between one and fourteen years by repromulgation from time to time.”¹²¹ Repromulgated mechanically and strategically, the authorities ensured that the ordinances did not outlive their prescribed tenure.¹²² In *D. C. Wadhwa v. State of Bihar*,¹²³ the Supreme Court concluded that the practice was, generally speaking, unconstitutional. Four steps made up most of the Court’s reasoning: (a) the lawmaking function in the Constitution is entrusted to the legislature; (b) it is contrary to democratic norms that the executive should have the power to

120. DAM, *supra* note 15, at 66–117.

121. *Wadhwa v. State of Bihar*, A.I.R. 1987 S.C. 579 (India).

122. For a copy of a circular letter advising repromulgation, see *id.* para. 5. For a detailed description of the assiduous manner in which Legislative sessions were timed and their implications for keeping Ordinances alive, see D.C. WADHWA, RE-PROMULGATION OF ORDINANCES: A FRAUD ON THE CONSTITUTION OF INDIA, 8–17 (1983).

123. *Wadhwa*, A.I.R. 1987 S.C. 579.

make law; (c) the power to issue ordinances to tide over emergent situations is exceptional and, therefore, must be limited in point of time; and (d) a contrary view—of allowing the executive to usurp legislative functions—is opposed to India's "constitutional scheme."¹²⁴ The Court's conclusion, though defensible, is far from uniform. On two separate occasions the Patna High Court interpreted Article 213 (the state version of Article 123) in favor of repromulgative powers.¹²⁵ Referring to the permissibility of repromulgation, in *Mathura Prasad Singh v. State of Bihar*¹²⁶ Singh J. concluded "it is not for the Court to declare such an Ordinance ultra vires on this score." If a state is ruled by successive ordinances, the Legislature may disapprove of the ordinances or the electorate may disapprove of the conduct of its accredited representatives in promulgating the ordinances and reject them at the next poll.¹²⁷

Two aspects in *D. C. Wadhwa* have attracted attention and criticism. First, there was a mismatch between the Court's hortatory denunciation of the practice and its formal order. At various points, Chief Justice Bhagwati was scathing in his assessment of the repromulgative practice. He considered the "enormity of the situation . . . startling" at one point;¹²⁸ elsewhere, he anointed the practice as "nothing short of usurpation,"¹²⁹ a clear "subverting of the democratic process,"¹³⁰ a "subterfuge,"¹³¹ "reprehensible,"¹³² and finally, "a fraud on the Constitution."¹³³ And yet, this litany of linguistic censures did not translate into meaningful remedies. Except for invalidating one of the three ordinances specifically under challenge, the Supreme Court fell back on "hope and trust that such practice shall not be continued in the future."¹³⁴ It said or did nothing about the endemic practice that had otherwise taken root in Bihar. The narrative of subversion, subterfuge, and fraud,

124. *Id.* ¶¶ 6–7.

125. *Chakradharpur Biri v. State of Bihar*, (1973) 32 S.T.C. 573 (1972) (India); *Singh v. State of Bihar*, A.I.R. 1975 Pat. 295.

126. *Mathura Singh*, A.I.R. 1975 Pat. 295.

127. *Id.* ¶ 16.

128. *Wadhwa*, A.I.R. 1987 S.C. 579, ¶ 4.

129. *Id.* ¶ 6.

130. *Id.*

131. *Id.*

132. *Id.* ¶ 7.

133. *Id.* ¶ 6.

134. *Id.* ¶ 7.

Upendra Baxi says, was inconsistent with the Court's eventual "hope and trust" kind of order.¹³⁵ "Both 'hope' and 'trust' are singularly misplaced," he argues, "in a context where a state has usurped unconstitutionally the power of the elected representatives of the people."¹³⁶

Second, the Court's conclusion that repromulgation is unconstitutional leaves certain matters unclear. For example, is repromulgation *always* unconstitutional? That is unlikely: Chief Justice Bhagwati himself listed circumstances in which the executive may be compelled to repromulgate 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 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.¹³⁷

What this exception suggests is that the Court merely invalidated *mechanical* repromulgation of ordinances, not repromulgation *per se*. Promulgation (or repromulgation) as an exercise of original legislative powers requires an application of mind, not just clerical approval. Repromulgation, in other words, would be valid if the original emergent conditions persist alongside adequate reasons for failing to legislate an ordinance into law. Unlike promulgation, the validity of repromulgation, therefore, is predicated both on the persistence of emergent conditions *and* the availability of reasons as to why an ordinance was not transacted in the intervening legislative session. It is noteworthy that the Court imposed no restriction on repeated repromulgations; if it could be done once, it could be done several times.

Our focus must then be on "adequate reasons" that would justify repromulgation. Chief Justice Bhagwati pointed out two. First, if the volume of legislative business in the intervening session were such that the cabinet failed to push a bill

135. Upendra Baxi, *Introduction* to D.C. WADHWA, RE-PROMULGATION OF ORDINANCES: A FRAUD ON THE CONSTITUTION OF INDIA, at lxxxvi (1983).

136. *Id.* at lxxxvii.

137. *Wadhwa*, A.I.R. 1987 S.C. 579, ¶ 6.

through, repromulgation would be acceptable.¹³⁸ Second, if time were too short during an intervening session to enact an ordinance into law, repromulgation would also be acceptable.¹³⁹ Both these options, to some extent, belie the fundamental requirement that an emergency situation must exist for repromulgation. If a legislative emergency truly persists, with a make-do ordinance brought in to tide over it, why should such a matter be treated with low priority? If Parliament does not prioritize ordinance-related matters for reasons of volume or duration, that itself may be a ground to doubt the existence of emergency conditions.

Unsurprisingly, the exceptions were greeted with skepticism. A. G. Noorani was personal in his criticism: "When Justice P. N. Bhagwati retired as the Chief Justice of India even those who had made it their vocation in recent years to extol his qualities had to concede that when it came to great power, timidity was his watchword."¹⁴⁰ The exemption carved out by Chief Justice Bhagwati, Noorani thought, was "wholly gratuitous and rob[bed] the judgment of merit and value."¹⁴¹ For him, "[i]t was a case of interpretation and the exception, based on pure legislative convenience, derive[d] no sanction from Article 213."¹⁴² It was, as he put it, "devoid of any justification."¹⁴³ Anil Nauriya, in his more measured analysis, pointed out the potential incoherence of the propositions.¹⁴⁴ Given that the decision outlawed "only *successive* repromulgations indulged in as a practice," Nauriya argued that the Court had in effect upheld three contradictory propositions. One, the subjective satisfaction of the president as to whether an ordinance is necessary remains outside judicial scrutiny. Two, in some cases repromulgation may be constitutionally justifiable, and finally, that successive repromulgation would be bad.¹⁴⁵ If the first and sec-

138. *Id.*

139. *Id.*

140. A.G. Noorani, *Supreme Court and Ordinances*, 22 ECO. & POL. WKLY. 357 (1987).

141. *Id.*

142. *Id.*

143. *Id.*; see also Jill Cottrell, *Re-promulgation of Ordinances in India: A Note*, 37 INT'L & COMP. L.Q. 1044 (1988) (book review).

144. Anil Nauriya, *Indian Judicial Renaissance: The Lines Not Crossed*, 22 ECO. & POL. WKLY. 239 (1987).

145. *Id.* at 239.

ond propositions are valid, the third does not stand up to scrutiny.

If the Supreme Court insists on a set of exceptions to the general rule against repromulgation, what other reasons apart from those in *D. C. Wadhwa* might be valid? Take the case of POTO, the anti-terror legislation previously mentioned. Support for the ordinance was low from the beginning and even the government's coalition partners were hesitant.¹⁴⁶ But the Vajpayee Cabinet repromulgated the ordinance with few changes.¹⁴⁷ That a parliamentary majority had impliedly rebuffed the need for such legislation hardly mattered. Is the absence of legislative support an adequate reason for repromulgating an ordinance? *D. C. Wadhwa* provides no guidelines in this regard. It is unclear if Chief Justice Bhagwati's exceptions should be read as a closed category.¹⁴⁸ The Delhi High Court, it should be mentioned, chose to read the exceptions widely. In *Gyanendra Kumar v. Union of India*,¹⁴⁹ the Court used the *Wadhwa* exceptions to uphold the validity of ten repromulgated ordinances. The Solicitor General argued that the ordinances were tabled in the two Houses, but other pressing and urgent matters meant that the bills could not be taken up for a full discussion.¹⁵⁰ The High Court accepted that claim without any further inquiry. Left unsaid was the fact that the minority cabinet did not have the requisite number in the two Houses to properly legislate the ordinances into acts.

The second control in Article 123 has to do with parliamentary approval: an ordinance does not become permanent unless Parliament converts it into an act. But the possibility of repromulgation has watered down that control. To be sure, repromulgation is nominally unconstitutional. But it is also the beneficiary of a generous exception; cabinets merely need to summon the alibi of two Houses burdened with other "urgent

146. V. Venkatesan, *POTO and a Stand-Off*, FRONTLINE (Dec. 22, 2001), available at <http://www.hindu.com/fline/fl1826/18260190.htm>.

147. Prevention of Terrorism (Second) Ordinance, 2001 (12 of 2001) (India); see also *POTO Promulgated with Amendments*, TRIBUNE (Dec. 31, 2001), available at <http://www.tribuneindia.com/2002/20020101/nation.htm#3>.

148. For an unconvincing argument that the repromulgation was unconstitutional, see D. Nagasaila & V. Suresh, *Repromulgation of POTO: Is It Legal?*, 37 ECO. & POL. WKLY. 371 (2002).

149. *Kumar v. Union of India*, A.I.R. 1997 Delhi 58 (1996) (India).

150. *Id.* ¶ 9.

matters" to invoke it. This way cabinets have an alternative means by which to make ordinances permanent. Parliamentary Acts are permanent from the very beginning unless otherwise stated. Ordinances too are permanent, but with the president's periodic intervention. As such, we are well on our way to establishing the "Two Parliaments" argument. The next section explores the second aspect of permanence, which has to do with the effect of failed ordinances.

III. SUCCESS IN FAILURE: THE AFTERLIFE OF FAILED ORDINANCES

The previous sections have shown that the president in India may promulgate an ordinance effectively at any time for any reason. Such an ordinance may be made effectively permanent simply by repromulgating it repeatedly. But Article 123 has a third control, and we must consider its effectiveness before rendering a final verdict. It has to do with failed ordinances. Since Parliament may reject an ordinance, some ordinances do not become acts. Also, the president may withdraw an ordinance, or it may simply lapse. In all such cases, what happens to the validity of actions taken while the ordinances were in force?

Article 123(2) says that failed ordinances "cease to operate."¹⁵¹ In *State of Orissa v. Bhupendra Bose*,¹⁵² the Supreme Court turned its attention to this clause: What does it mean to say that an ordinance "ceases to operate?" The petitioner challenged the results of an election to a local municipal body on the ground that the election did not comply with procedural requirements. The High Court agreed and invalidated the result. Alarmed by the possibility that elections to other municipal bodies may also be invalidated, the governor promulgated an ordinance.¹⁵³ Electoral laws were retrospectively amended to override the High Court's reasoning and judgment. But the ordinance did not become permanent; the State Assembly failed to convert it into an act.¹⁵⁴ Consequently, the ordinance lapsed and ceased to operate. Did this lapse revive the High

151. INDIA CONST. art. 123(2)(a).

152. *State of Orissa v. Bose*, (1962) A.I.R. 945 (1961) (India).

153. Orissa Municipal Elections Validation Ordinance, 1959 (1 of 1959) (India).

154. *Bose*, (1962) A.I.R. 945, ¶ 2.

Court's earlier decision invalidating the elections—the very thing that led the governor to promulgate the ordinance? The Supreme Court said no. And the Court's reasoning has important implications for the “Two Parliaments” argument.

The Court began by looking at the effect of temporary acts. Based on a quick survey of three English decisions,¹⁵⁵ Chief Justice Chandrachud concluded that no inflexible rule could be laid down regarding the effects of a temporary act.¹⁵⁶ As he put it, at least in some cases, “repeal effected by a temporary act would be permanent and would endure even after the expiration of the temporary act.”¹⁵⁷ The precise nature of the effect, he said, “must depend upon the nature of the right or obligation resulting from the provisions of the temporary act and upon their character whether the said right and liability are enduring or not.”¹⁵⁸ And keeping in mind “the object of the Ordinance and the right created by the validating provisions,” the Court concluded that it “must be held to endure and last even after the expiry of the Ordinance.”¹⁵⁹

The reasoning was reiterated in *Venkata Reddy v. State of Andhra Pradesh*.¹⁶⁰ The governor promulgated the Andhra Pradesh Abolition of Posts of Part-time Village Officers Ordinance, 1984, to abolish the post of part-time Village Officers and to create a new category of posts referred to as “Village Assistants.”¹⁶¹ The ordinance, despite a series of repromulgations, lapsed; the State Assembly refused to enact it. The petitioner, previously a part-time Village Officer, argued that the Ordinance having lapsed, his earlier post stood revived. The Supreme Court rejected that claim. Chief Justice Chandrachud once again came to the conclusion that failed ordinances do not become void retrospectively.¹⁶² Article 123(2) says that a failed ordinance “shall cease to operate,” and that, he said, “only means that it should be treated as being effective till it ceases

155. *Steavenson v. Oliver*, (1841) 151 Eng. Rep. 1024 (Eng.), 8 Meeson & Welsby 234; *Warren v. Windle*, (1803) 102 Eng. Rep. 576 (K.B.); *Wicks v. Director of Public Prosecutions*, (1947) A.C. 362 (H.L.) (U.K.).

156. *Bose*, (1962) A.I.R. 945, ¶ 22.

157. *Id.* ¶ 22.

158. *Id.* ¶ 21.

159. *Id.* ¶ 23.

160. *Reddy v. Andhra Pradesh*, A.I.R. 1985 S.C. 724 (India).

161. *Id.* ¶ 1.

162. *Id.* ¶ 18.

to operate on the happening of the events mentioned in [the provision].”¹⁶³ The part-time posts stood abolished on the date on which the Ordinance was promulgated, and its effects are irreversible except by new legislation.¹⁶⁴ Parliament and State Legislatures are not powerless to undo the effects of failed ordinances; but only new acts can achieve such corrections with retrospective effect. Chief Justice Chandrachud concluded that new acts are the only way to revive “closed or completed transactions” generated under a failed ordinance.¹⁶⁵

The implications are stark. The reasoning elevates the status of ordinances to temporary acts. That is, an ordinance is an act with a sunset clause. And because the Court interprets the effects of failed ordinances through the prism of temporary acts, it has the implied effect of *privileging* presidential legislation over parliamentary legislation. In *Venkata Reddy*, for example, the post of part-time Village Officer was created by an act.¹⁶⁶ The ordinance that abolished it lapsed. But it still generated a permanent state of affairs. Only a new act, the Court says, can revise this new state of affairs. This implies that the president may negate statutorily conferred rights and duties merely by issuing ordinances. Their effects, however, can be undone only by acts of Parliament.

Consider what this means for repeal by an ordinance. Parliament, in the exercise of its legislative power, may repeal legislation; ordinances, therefore, may also do so.¹⁶⁷ Let us assume that an ordinance repeals an existing piece of legislation but lapses.¹⁶⁸ Does that lapse revive the repealed act? A temporary act on its expiry does not revive the repealed law unless specifically provided for in the act itself.¹⁶⁹ And if an ordinance is constitutionally equivalent to a temporary act, as the Supreme Court says it is, a lapse will have no effect. The repealed act would remain permanently repealed unless subsequently re-

163. *Id.*

164. *Id.*

165. *Id.* ¶ 19.

166. Madras Hereditary Village Offices Act, No. 3 of 1895, INDIA CODE.

167. *King-Emperor v. Benoarilal Sarma*, (1944) 72 I.A. 57 (India).

168. *See, e.g.*, Saurashtra (Abolition of Local Sea Customs Duties and Imposition of) Port Development Levy Repealing Ordinance, 1952, No. 4 of 1952 (India); Parliamentary Proceedings (Protection of Publication) Repeal Ordinance, 1975, No. 25 of 1975 (India).

169. *Krishnan v. State of Madras*, A.I.R. 1951 S.C. 301 (India).

vived by a new act. The implication is obvious: the president acting independently can *permanently repeal* a piece of parliamentary legislation.

This manner of reasoning has effectively undone the third control—the requirement that a failed ordinance must “cease to operate.” To Chief Justice Chandrachud, the cessation requirement meant that an ordinance “should be treated as being effective till it ceases to operate on the happening of the events mentioned in [the provision].”¹⁷⁰ In other words, all actions taken during the period when an ordinance is in force remain valid forever. In *Bhupendra Bose*, the petitioner’s electoral loss remained permanent.¹⁷¹ Similarly, in *Venkata Reddy* the failed ordinance permanently destroyed the part-time posts for some.

What this means is that an ordinance, when it ‘ceases to operate,’ does not really cease to operate. Take the case of a university. In India, a university can only be established by an act.¹⁷² An ordinance therefore can also establish a university.¹⁷³ Let us assume that the ordinance lapses months later. In addition, let us assume that the university had achieved several things in those six months. It may have, for example, put in place an academic infrastructure sufficient to commence functioning, secured approvals for some courses, completed the first round of admissions, and started introductory classes. What would be the legal effect of this lapse? Nothing, if the Supreme Court is correct. The university will continue as if the ordinance is *permanently* valid.

The dramatic implications of this interpretation are made clear by the case of Mohammad Afroze and his prosecution under the dreaded POTO. Afroze was arrested in Mumbai on October 2001 and initially charged with robbery.¹⁷⁴ The police later claimed that he was an al-Qaida agent; he had been conspiring to crash a plane into the British House of Commons.¹⁷⁵ To

170. *State of Orissa v. Bose*, (1962) A.I.R. 945, ¶ 18 (1961) (India).

171. *Id.*

172. *Jain v. Chhabra*, (1984) 2 S.C.R. 883 (India).

173. *See e.g.* The Manipur University Ordinance, 2005, No. 2 of 2005 (India). Note that this was a case of converting a State University into a Central University, not a proper case of an ordinance establishing a new university entirely.

174. Ranjit Khomne, *Afroze Likely to Be Booked under POTO*, TIMES INDIA, Jan. 3, 2002, at 3.

175. *Afroze Was Part of Al Qaida Hit Squad*, TIMES INDIA, Mar. 28, 2002, at 3.

unearth the details of what the Mumbai police referred to as an “international conspiracy,” senior officers went to Australia, the United Kingdom, and the United States for further “investigations.”¹⁷⁶ However, less than four weeks after he was formally charged, the public prosecutor reversed his position. He requested to the trial court that the POTO charges be dropped.¹⁷⁷ There was no evidence to prosecute the accused under that ordinance. That same day Scotland Yard categorically dismissed claims of any plot to attack the British Parliament.¹⁷⁸ With no corroborating evidence to back up Afroz’s so-called confession, the special prosecutor in the case admitted to a “bona fide error of judgment” in applying the POTO.¹⁷⁹ Afroz was charged under the POTO at a time when there was a real possibility that the Vajpayee Cabinet would fail to translate the ordinance into an act for a second time. What if the ordinance had failed a second time? It would have made no difference for Mohammad Afroz. As senior counsel, P.R. Vakil rightly pointed out that the cabinet’s failure to enact POTO into an act would not have affected cases already under way.¹⁸⁰ Afroz, in other words, could be arrested, tried, and even sentenced to life in prison or death in pursuance of presidential legislation, so long as the process began while the ordinance was still in force. None of this unfolded because the police retracted their claims. However, if the Vajpayee Cabinet had failed to get POTO enacted and the police had persisted with their original charges, the invasive potential of presidential legislation would have come into sharp focus.

The third control in Article 123 has endured a common fate. Like the previous two, the control is in the provision but effec-

176. *Afroz is the First to Be Booked under POTO in State*, TIMES INDIA, Mar. 9, 2002, at 2.

177. *Public Prosecutor Says Police Didn’t Consult Him about POTO Charges*, TIMES INDIA, Mar. 27, 2002, at 2.

178. Sanjay Suri, *Scotland Yard Dismisses Mumbai Police’s Claims on Afroz*, TIMES INDIA, Mar. 28, 2002, at 11.

179. *Mohammed Afroz Finally Gets a Taste of Freedom*, TIMES INDIA, Apr. 10, 2002, http://articles.timesofindia.indiatimes.com/2002-04-10/mumbai/27139613_1_mohammed-afroz-sessions-court-nikam.

180. Ranjit Khomne, *Cases under POTO Will Stay Even if the Bill Is Defeated*, TIMES INDIA, Mar. 22, 2002, http://articles.timesofindia.indiatimes.com/2002-03-22/mumbai/27119339_1_poto-afroz-trombay-based-transporter-abdul-razzak.

tively not part of it. Under existing interpretations, a failed ordinance retains its legal rigor, and functions as if it is legislation proper. As such, parliamentary preeminence, it has to be said, is no longer part of India's legislative design.

IV. PRESIDENTIAL PREEMINENCE: NOTES FROM COMPARATIVE DESIGN

Effectively, India's president may promulgate any law at any time for any reason. When promulgated, such laws are permanent. That presidents should have such extensive legislative powers in an otherwise parliamentary system is something of an anomaly. But such arrangements are not uncommon in presidential systems. Jurisdictions in Eastern and Western Europe, Africa, and Latin America frequently endow their presidents with a range of legislative—or, decree—powers.¹⁸¹ This penultimate section offers a bird's eye view of decree powers in presidential systems, and situates the Indian experience within the broader literature.

John Carey and Matthew Shugart's edited volume on decree authority is perhaps the most comprehensive comparative treatment of the subject.¹⁸² 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 are Latin American (Argentina, Brazil, Peru, and Venezuela), while two are West European (Italy and France). Russia and the United States made up the remaining two. With the exception of Italy and France, the rest

181. For an introductory overview of "decree powers," as it is commonly referred to, see José Antonio Cheibub & Fernando Limongi, *Legislative-Executive Relations*, in *COMPARATIVE CONSTITUTIONAL LAW* 211, 226–29 (Tom Ginsburg & Rosalind Dixon eds., 2011); Matthew S. Shugart & John M. Carey, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 131–47 (1992); see also John M. Carey, *Presidential versus Parliamentary Government*, in *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* 91, 103–07 (C. Menard & M.M. Shirley eds., 2005).

182. EXECUTIVE DECREE AUTHORITY (John M. Carey & Matthew S. Shugart eds., 1998). For an introduction to decree powers, see John M. Carey & Matthew S. Shugart, *Calling Out the Tanks or Filling Out the Forms?*, in EXECUTIVE DECREE AUTHORITY, *supra*, at 1, 3; see also José Antonio Cheibub, Zachary Elkins, & Tom Ginsburg, *Beyond Presidentialism and Parliamentarism*, *BRIT. J. POL. SCI.* (2013) (forthcoming), available at <http://repositories.lib.utexas.edu/bitstream/handle/2152/22250/cheibub%20elkins%20ginsburg%20beyond%20presidentialism.pdf?sequence=3>.

are thoroughly presidential systems and that fact colored the prism through which the contributors presented and evaluated their arguments.

Carey and Shugart offer a two-by-two matrix to explain the various ways in which presidential decree authority can be constitutionally entrenched.¹⁸³ They focus on two aspects: permanence and timing. Are decrees permanent? Do they come into effect immediately? These two variables generate four possibilities, as shown below.¹⁸⁴

		Decree becomes permanent law?	
		YES	NO
Decree in effect immediately?	YES	Russia (Art. 90) Peru '93 (Art. 118:19) Colombia '91 (Art. 215) Chile '89 (Art. 32: 22)	Brazil '88 (Art. 62) Italy (Art. 77) Colombia '91 (Art. 213) France (Art. 16)
	NO	Ecuador (Art. 65) France (Art. 49:3)	NA

Carey and Shugart argue that Russia, Peru, Colombia, and Chile are examples of the strongest possibility for presidential decree authority.¹⁸⁵ Presidential decrees in these jurisdictions are permanent and they enjoy immediate effect—the “prototypical” decree authority.¹⁸⁶ Because they are permanent, decrees can be parliamentarily undone only through contrary legislation. The immediate effect of the decrees means that the legislative branch has no influence over them prior to their promulgation; parliamentary response, if any, is always *ex post*. However, such powers often come with some additional limits. Article 90 in Russia’s Constitution, for example, authorizes the president to issue “edicts and regulations” provided they do “not conflict with the Constitution of the Russian Federation

183. EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 10.

184. Note that many of the constitutions listed in the table have since been amended, including provisions on decree power. But Carey and Shugart’s basic claims still hold, and the table still organizes the information in a way that is relevant.

185. EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 10.

186. *Id.*

and federal laws.”¹⁸⁷ Similarly, in Peru, the president can exercise such power only “on economic and financial matters, when so required by the national interest.”¹⁸⁸ While prototypical decree authority means that there are two distinct paths to primary legislation, parliament and the 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.¹⁸⁹ Article 62 in Brazil’s Constitution, for example, provides that presidential decrees shall lapse after sixty days unless “converted into law” by Congress.¹⁹⁰ In neighboring Argentina, the Chief of the Ministerial Cabinet must personally submit, within ten days, promulgated decrees to the Joint Standing Committee of Congress for its consideration.¹⁹¹ The Committee must make a report to both

187. KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 90(3) (Russ.).

188. CONSTITUCIÓN POLÍTICA DEL PERÚ (1993) art. 118(19) (Peru) (“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.”).

189. EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 11.

190. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 62(3) (Braz.) (“[P]rovisional measures shall lose effectiveness from the day of their issuance if they are not converted into law within a period of sixty days, which may be extended once for an identical period of time.”). There is a burgeoning literature on decree authority in Brazil. *See, e.g.*, Timothy Power, *The Pen Is Mightier Than the Congress: Presidential Decree Power in Brazil*, in EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 197, 204; Gabriel L. Negretto, *Government Capacities and Policy Making by Decree in Latin America: The Cases of Brazil and Argentina*, 37 COMP. POL. STUD. 531 (2004); Carlos Pereira, Timothy J. Power & Lucio Rennó, *Under What Conditions Do Presidents Resort to Decree Power? Theory and Evidence from the Brazilian Case*, 67 J. POL. 178 (2005); Gary Reich, *Executive Decree Authority in Brazil: How Reactive Legislators Influence Policy*, 27 LEGIS. STUD. Q. 5 (2002); Carlos Pereira, Timothy J. Power & Lucio Rennó, *Agenda Power, Executive Decree Authority, and the Mixed Results of Reform in the Brazilian Congress*, 33 LEGIS. STUD. Q. 5 (2008).

191. Art. 99(3), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.)

Only when due to exceptional circumstances the ordinary procedures foreseen by this Constitution for the enactment of laws are impossible to be followed, and when rules are not referred to criminal issues, taxation, electoral matters, or the system of political parties, he shall

Houses of Congress where it is immediately discussed.¹⁹² Whether a ratification requirement limits a president's ability to initiate long-term change depends in part on the legality of reissuing such decrees. If presidents are authorized to repromulgate decrees, legislative opposition to such measures may not mean much. However, the effectiveness of the ratification requirement also depends on "clean-up costs."¹⁹³ If it is disproportionately costly to undo presidential initiatives, legislatures may ratify them despite their opposition to such measures.¹⁹⁴ Therefore, depending on how and why decrees are issued (and reissued), countries with provisional decree authority may, in effect, function like those with prototypical decree authority.

A third and still less strong possibility is what Carey and Shugart refer to as "delayed" decree authority.¹⁹⁵ As the name suggests, such decrees do not take immediate effect. Instead, they become permanent law in the absence of legislative action.¹⁹⁶ This arrangement offers the legislative branch an opportunity to prohibit decrees from coming into effect or to alter their content before authorizing them. The scrutiny, if any, is *ex ante*. In Ecuador, the president can propose legislation by declaring it "urgent," and if the National Assembly fails to act within thirty days, the decree becomes law.¹⁹⁷ The Assembly,

issue decrees on grounds of necessity and urgency, which shall be decided by a general agreement of ministers who shall countersign them together with the Chief of the Ministerial Cabinet.

Id.

192. *Id.*; see Delia Ferreira Rubio & Matteo Goretti, *When the President Governs Alone: The Decretazo in Argentina 1989-93*, in EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 33. There is some controversy about the numbers. President Menem issued more than 13,500 during the period in question, but the vast majority of these "decrees" were in effect delegated legislation and therefore not the kind of legislation we are concerned about in this book. Rubio and Gorreti argue that of the more than 13,500 decrees, 336 of them may be classified as constitutional decrees, which are effectively primary legislation "enacted" by the executive. *Id.* at 43.

193. EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 12.

194. *Id.*

195. *Id.* at 12.

196. *Id.* at 11.

197. CONSTITUCIÓN POLITICA DE LA REPÚBLICA DEL ECUADOR [CONSTITUTION OF ECUADOR] art. 140 ("The President of the Republic will be able to send to the National Assembly bills qualified as urgent on economic matters. The Assembly must adopt, amend or turn them down within thirty (30) days at the most as of their reception.").

nonetheless, retains the competence to amend or repeal such decrees at a later point in time.¹⁹⁸ Under Ecuadorian rules, the president may send only one “urgent” decree to the Assembly at a time.¹⁹⁹ Similarly, France’s *guillotine* procedure may also be read as an example of delayed decree authority. There, if parliament rejects the executive’s proposal, then the government falls; but if parliament takes no action, the decree becomes law.²⁰⁰ Consistent with France’s semi-presidential arrangement, the authority over the *guillotine* is vested in the French premier rather than the president.²⁰¹ The effectiveness of delaying the implementation of decrees depends, in part, on legislators’ willingness to challenge the president (or the parliamentary head). Because an affirmative vote is required to prevent an executive measure from becoming law, legislators can “authorize” a decree simply by refusing to act on it.²⁰² In such cases, delayed decree authority can effectively transform into prototypical decree authority.

Such a transformation is evident in India. India’s Article 123, in its original form, conferred “provisional” decree authority.²⁰³ Ordinances come into effect immediately but lapse after a specified duration unless properly enacted by Parliament.²⁰⁴ In its applied form, however, Article 123 effectively functions as a prototypical authority; a combination of the constitutional text, political context, and judicial subtext made this alchemy possible. First, ordinances come into effect immediately. Textually, they can be promulgated only when either House of Parliament

198. *Id.*

When the Assembly does not adopt, amend or turn down the bill qualified as urgent in economic matters within the stipulated time-limits, the President of the Republic shall enact it as a decree-law or shall order its publication in the Official Register. The National Assembly shall be able, at any time, to amend or repeal it, on the basis of the regular process provided for by the Constitution.

Id.

199. *Id.*

200. (1958) CONST. art. 49 (Fra.) (“The Prime Minister, after deliberation by the Council of Ministers, may make the Government’s programme or possibly a general policy statement an issue of a vote of confidence before the National Assembly.”).

201. EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 13.

202. *Id.*

203. INDIA CONST. art. 123.

204. *Id.* art. 123

is not in session. However, this limitation does not apply in practice.²⁰⁵ Second, lapsed ordinances may be repromulgated, thereby conferring quasi-permanence on such legislation. While the Supreme Court has declared such practice nominally unconstitutional, it also carved out wide exceptions. Those exceptions make it legal to repromulgate ordinances *endlessly*. There are effectively no limits on the number of times ordinances can be repromulgated. Third, recall that prototypical decree authority, as Carey and Shugart claimed, often comes with substantive restrictions. In Russia, for example, the president may issue "edicts" only to the extent that they do not contravene federal laws.²⁰⁶ Similarly, in Peru, the president may invoke this authority only in specified matters.²⁰⁷ In India, however, there are no subject matter limitations. Article 123(3) makes this clear: "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."²⁰⁸ In other words, the president may promulgate an ordinance on *any* subject matter on which Parliament is competent to enact legislation. Taken together, these attributes suggest that India functions as a prototypical decree regime. There are two parliaments in other words, with the president acting as a parallel parliament. More importantly, these attributes suggest that India's prototypical arrangement is one of the strongest in the world, much stronger than many in presidential systems.

Prototypical decree authority is commonly associated with unilateral presidential action and, occasionally, constitutional breakdowns. In Russia, provisions for an independently elected president and decree authority were first introduced in 1991.²⁰⁹ Almost immediately after taking office on July 20, 1991, President Boris Yeltsin invoked the provision to ban, among other things, "political activity" within state institutions during office hours.²¹⁰ While he justified the decree as an attempt to ensure

205. See *supra* Part II.

206. EXECUTIVE DECREE AUTHORITY, *supra* note 182.

207. *Id.*

208. INDIA CONST. art. 123(3).

209. Scott Parrish, *Presidential Decree Authority in Russia, 1991-95*, in EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 62; see also Thomas F. Remington, Steven S. Smith & Moshe Haspel, *Decrees, Laws, and Inter-Branch Relations in the Russian Federation*, 14 POST-SOVIET AFF. 287 (1998).

210. Parrish, *supra* note 209, at 69.

“equal rights of political parties,” the Constitutional Court, under controversial circumstances, invalidated parts of it.²¹¹ In 1994, a new Constitution gave the president even wider legislative powers.²¹² Decrees under Article 90, as previously mentioned, have the force of law, come into effect immediately upon publication, and are obligatory on all levels of government.²¹³ While presidential decrees may be overridden by parliamentary legislation, the president also has veto power. As a result, the president’s decrees may be repealed or amended only with the support of a two-third majority in each house of the Federal Assembly of Russia.²¹⁴ President Yeltsin took advantage of this new arrangement to introduce decrees to combat organized crime, partially privatize the airwaves and the state-owned television broadcasting corporation, and introduce pension reforms.²¹⁵ These decrees often faced parliamentary opposition, with members at times enacting contrary legislation for Yeltsin to sign.²¹⁶ But the divided body could not muster enough votes to overcome his veto.²¹⁷ Yeltsin’s choices, therefore, remained in effect except on rare occasions when he agreed to compromise with Parliament.²¹⁸

The developments in Peru in the early years of the Fujimori administration are also a good example of how prototypical decree authority can precipitate a full-blown constitutional crisis. In 1990, Alberto Fujimori came to power with a landslide victo-

211. *Id.* at 69–71.

212. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 90 (Russ.).

213. *Id.*

214. *Id.* art. 105(5).

In the event that the State Duma disagrees with the decision of the Council of Federation, a federal law shall be considered to have been adopted if in the second vote not less than two thirds of the total number of deputies of the State Duma has voted in favour of it.

Id.

215. Parrish, *supra* note 209, at 84–92.

216. *Id.*

217. For an analysis of Russia’s divided parliament in the 1990s, see THOMAS F. REMINGTON, *THE RUSSIAN PARLIAMENT: INSTITUTIONAL EVOLUTION IN A TRANSITIONAL REGIME, 1989–1999* (2001).

218. Parrish, *supra* note 209, at 90–91. There is some evidence to suggest that the reliance on decrees has decreased from the early 1990s to the early 2000s. See Oleh Protsky, *Ruling with Decrees: Presidential Decree Making in Russia and Ukraine*, 56 EUR.-ASIA STUD. 637 (2004).

ry but faced a thoroughly fragmented Congress.²¹⁹ With the aid of delegated decree authority (that is, legislation passed by Congress authorizing presidential action), Fujimori enacted decrees in response to the economic crisis sweeping Peru during the period.²²⁰ But it was his counterinsurgency decrees that faced stiff opposition in the legislative chambers; the provisions, many legislators alleged, threatened civil liberties and democratic governance. Of the 117 decrees on economic and counterinsurgency issues, Congress repealed sixteen, modified fourteen, and delayed action on nine of them.²²¹ It also enacted legislation, overriding a presidential veto that asserted congressional authority over the president's legislative powers.²²² Faced with the prospect of greater congressional scrutiny over his public, and some private, affairs, President Fujimori called out the tanks, closed, and later dissolved Congress. Peru's 1993 Constitution made significant changes to presidential decree authority, and there is evidence to suggest that the number of decrees and conflicts has decreased over the years.²²³

India, however, stands in contrast. Severe conflicts, or constitutional breakdowns, associated with presidential jurisdictions and decree power are unknown in the country. Given India's parliamentary arrangement, both legislation and ordinances originate from the same source: the cabinet. Parliamentary legislation originates in the cabinet, is voted upon in both Houses of Parliament, and is finally assented to by the president. Ordinances also originate in the cabinet, but are directly promulgated by the president. The two Houses of Parliament are not involved. This shared origin explains the absence of *institutional* conflict in India. At least in the conventional view, there is no competing office that can challenge the cabinet's institu-

219. Gregory Schmitt, *Presidential Usurpation or Congressional Preference? The Evolution of Executive Decree Authority in Peru*, in EXECUTIVE DECREE AUTHORITY, *supra* note 182, at 104.

220. For an overview of the period, see Philip Mauceri, *An Authoritarian Presidency: How and Why Did Presidential Power Run Amok in Fujimori's Peru*, in THE FUJIMORI LEGACY: THE RISE OF ELECTORAL AUTHORITARIANISM IN PERU 39–60 (Julio Carrión ed., 2006).

221. Gregory Schmitt, *supra* note 219.

222. *Id.*

223. *Id.* at 127–129.

tional competence to midwife ordinances.²²⁴ To be sure, *substantive* conflicts are common with opposition parties routinely disagreeing about the necessity of particular ordinances. Their parliamentary resources, however, are limited and mostly procedural. They may table statutory resolutions disapproving ordinances or press for amendment motions.²²⁵ But they have no guns or tanks to call out. In the Indian system, opposition parties can only oppose, not obstruct, the promulgation of ordinances. All things being equal, cabinets will have their way. This is true even of minority cabinets. The salience of prototypical decree authority in India, therefore, perhaps has to do with Parliament's *procedural* importance. Does it matter that the parliamentary process ordinarily involves large numbers of legislators? Do parliamentary debates matter? Does open voting in a public forum matter? In short, does an open, public, and elaborate parliamentary procedure matter to the legislative process?²²⁶ At their best, parliamentary legislation enjoys these qualities, but ordinances, even at their best, do not. And that is the key challenge India's "second" Parliament raises.

CONCLUSION

Jyoti Singh endured heinous brutality. Demanding prompt action against her assailants, India's collective disgust rightly spilled over to the streets. But the president's hasty ordinance proclaiming death penalty for rapists is emblematic of the larger challenges that this "Alternative Parliament" poses. First, consider the timing. The Criminal Law (Amendment) Ordinance, 2013 was promulgated on February 3.²²⁷ The two Houses of Parliament assembled for the budget session on February

224. I have argued elsewhere the powers of India's president should be interpreted so as to offer him or her an institutional basis to obstruct the promulgation of ordinances. See DAM, *supra* note 15.

225. LOK SABHA SECRETARIAT, MOTIONS AND RESOLUTIONS IN PARLIAMENT (2009), <http://164.100.47.132/LssNew/Motions%20and%20Resolutions.pdf>.

226. For an argument about the philosophical importance of an open debate and voting in a multi-member body to the legislative process, see Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 664 (1995); see also JEREMY WALDRON, LAW AND DISAGREEMENT (2000).

227. *New Anti-Rape Legislation*, NDTV (Feb. 04, 2013), <http://www.ndtv.com/article/india/new-anti-rape-legislation-criminal-law-amendment-ordinance-2013-326240>.

21.²²⁸ It is far from clear that the ordinance was “necessary” except to offer the impression of a cabinet in charge. Next, consider the changes introduced. The ordinance made three significant changes to criminal law in India. It did away with the term “rape”; “sexual assault” took its place.²²⁹ And the latter was made gender neutral in some respects.²³⁰ Most critically, the ordinance introduced the death penalty for certain categories of sexual assault.²³¹ Some of these changes were problematic, but all were important, and a hasty promulgation offered little possibility of a thoughtful consideration. Finally, consider the retractions made. Soon after it was promulgated, news trickled out that the cabinet was divided.²³² As the ordinance moved through the two Houses, several reversals were made. The term “rape” returned, and in its gendered form; women could no longer perpetrate it.²³³ New crimes were added, but with mangled definitions.²³⁴ The cabinet offered no meaningful rationale for the dramatic changes in February and its still more dramatic reversal a month later. It is almost as if the mechanism allows cabinets to legislate first and reflect later. That hardly bodes well for India’s parliamentary tradition.

Abetted by aggressive political use and alchemic interpretations, the exceptional and temporary arrangement in Article 123 is now normal and permanent. India’s president, acting through the cabinet, may effectively enact any legislation at any time for any reason. He or she may make it permanent by repeatedly repromulgating it. And even if the two Houses of Parliament express their collective judgment against such a piece of legislation, its effects endure. Indeed, if the Supreme Court is correct, it may permanently repeal any parliamentary

228. Press Release, Ministry of Parliamentary Affairs, Pre-Budget Session (Jan. 18, 2013), *available at* <http://mpa.nic.in/preb13.pdf>.

229. Criminal Law (Amendment) Ordinance, 2013, No. 3 of 2013, § 8 (repealed) (India).

230. *Id.*

231. *Id.*

232. See Smita Gupta, *Cabinet Divided on Anti-Rape Draft Law*, HINDU, Mar. 13, 2013, <http://www.thehindu.com/news/national/cabinet-divided-on-antirape-draft-law/article4500256.ece>; *Law, Home Ministries Not Split on Anti-Rape Bill: Ashwani Kumar*, INDIAN EXPRESS, Mar. 10, 2013, <http://www.indianexpress.com/news/law-home-ministries-not-split-on-antirape-bill-ashwani-kumar/1085892/>.

233. Criminal Law (Amendment) Act, No. 13 of 2013, INDIA CODE, § 7.

234. *Id.* § 9.

legislation. The conclusion then is unavoidable: India has two Parliaments. The president and his or her cabinet act as an independent Parliament. When analyzed in comparative context, it becomes clear that India's "second" Parliament is one of the strongest in the world—much stronger than those in many presidential jurisdictions.

If correct, this analysis raises a paradox. It began by suggesting that ordinances have a large presence in India's legislative landscape; there are too many of them. Since 1952, presidents have promulgated more than ten ordinances every year on average. That adds up to 615 ordinances between 1952 and 2009. But once the legal architecture surrounding ordinances becomes clear, and it shines through that there are no legal costs to promulgating ordinances and that even failed ordinances count as a success, that suggestion should be revised. Perhaps the question should be: Why so *few* ordinances? Not why so many. And that is a question worth paying attention to.