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The Executive

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“The Executive”

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The Executive

India has a parliamentary system. The President is the head of the Union of India; the Prime Minister is the head of government.¹ Along with his or her cabinet, the Prime Minister is responsible to the Lower House of Parliament.² States have similar arrangements. They are formally headed by Governors. But chief ministers and their cabinets lead the governments. Executive power, ordinarily, is exercised by the Prime Minister, chief ministers and their respective councils of ministers. However, in keeping with India's Westminster inheritance, such power often vests in the formal heads, and is exercised in their names. This chapter offers an overview of the principal offices that make up the executive in India, their appointments, powers and functions, and importantly, the relationship between the formal and real heads of the executive. It has five sections. Section I introduces the office of the President and the Governor. Section II offers an overview of the council of ministers, the role of the Prime Minister and the chief ministers and the terms that govern their offices. Ministerial responsibilities and interactions with the President are discussed in Section III. Section IV briefly introduces the powers and functions of the executive in India. Lastly, Section V examines the range of discretionary powers vested in the President and Governors, and their effect, if any, on India's parliamentary credentials.

¹ The distinction between the head of state and head of government is fundamental to parliamentary systems. See Douglas Verney, *The Analysis of Political Systems* (Routledge 1970) 17-38.

² This implies a fusion of the executive with the legislature. The executive 'comes from' the legislature and is in turn responsible to it. See Walter Bagehot, *The English Constitution* (Oxford University Press 1873) 42-60. See also, Arend Lijphart, *Patterns of Democracy* (Yale University Press 1999) 116-42.

The Head of the State

There shall be a President of India: so says Article 52. Article 53 vests the executive power of the Union in him; he may exercise it ‘directly or through officers subordinate to him in accordance with [the] Constitution’. Consistent with her republican character, India’s Presidents do not inherit their offices; they are indirectly elected by the people. Rules regarding eligibility and electoral method are provided for in some detail in the Constitution.

Indian citizens who are thirty-five years of age or more are eligible to be elected President. They must satisfy all other conditions for membership to the Lower House of Parliament.³ In addition, such persons must not hold ‘any office of profit under the Government of India or the Government of any State or under any local or other authority’ under the control of such governments.⁴ In *Baburao Patel v Zakir Husain*,⁵ the petitioner challenged Hussain’s election as India’s third President; a mandatory requirement, he claimed, was not complied with. Candidates for elections to both Houses of Parliament must subscribe an oath that they shall ‘uphold the sovereignty and integrity of India’.⁶ Presidential candidates, the Constitution says, are bound by the same rules of eligibility. Therefore, Hussain too should have subscribed an oath to this effect, Patel argued. The Supreme Court rejected the argument. Based on a combined reading of Articles 58, 60 and 84, the Court concluded that Parliament had no intention of extending that oath to presidential aspirants.⁷ The presidential oath remains unique as a result. While parliamentarians, legislators, ministers, judges and other constitutional office-bearers swear to

³ Constitution of India 1950, art 58(1).

⁴ Constitution of India 1950, art 58(2).

⁵ AIR 1968 SC 904.

⁶ Constitution of India 1950, art 84(a).

⁷ *Baburao Patel v Zakir Husain* AIR 1968 SC 904 [12]-[16].

‘uphold the sovereignty and integrity of India’, Presidents pledge to ‘preserve, protect and defend the Constitution’ to the best of their abilities.

Elected members of both Houses of Parliament and those of the State legislative assemblies form the Electoral College.⁸ Members of legislative assemblies vote in proportion to the population of their respective States. The share of parliamentarians’ votes are obtained by dividing the total number of votes assigned to the elected members of all legislative assemblies by the total number of the elected members of both Houses of Parliament. These proportions ensure ‘uniformity in the scale of representation of the different states’.⁹ As a result, parity between the State assemblies and the two Houses of Parliament is maintained.¹⁰ Presidential elections are held by secret ballots ‘in accordance with the system of proportional representation by means of the single transferable vote’. Winners, therefore, are guaranteed at least 50.1 per cent of all votes cast. In this respect, presidential elections differ from parliamentary ones. Because they rely on the first-past-the-post system, ‘legislative’ candidates are often elected on the basis of no more than 20 or 30 percent of the total votes cast.¹¹

Article 71(1) grants the Supreme Court exclusive jurisdiction on ‘all doubts and disputes’ that arise out of or in connection with presidential elections. When, how and who should elect Presidents have been the subject of many controversies. In *Narayan Bhaskar Khare v Election*

⁸ For an analysis of the method of election, see Balkrishna, ‘Election of the President of India’ (1973) 7(3) Journal of Constitutional and Parliamentary Studies 33.

⁹ Constitution of India 1950, art 55(2).

¹⁰ Constitution of India 1950, art 55(1).

¹¹ Whether India’s President should be directly or indirectly elected was debated in the Constituent Assembly. *Constituent Assembly Debates*, vol 7 (Lok Sabha Secretariat 1986) 987-99, 13 December 1948.

Commission of India,¹² the petitioner challenged the notification for presidential elections in 1957 on the ground that seats in some State legislative assemblies lay vacant. He argued that the Electoral College in Article 54 must be fully constituted for elections to be validly held. Otherwise, in closely fought contests, the timing may decide the outcome, especially if some of the assemblies or the Lower House stands dissolved. The Court declined the petition. Nonetheless, judges expressed doubts about the correctness of this reading.¹³ Parliament soon amended Article 71. To prevent the argument from gaining interpretative validity, a proviso was added: 'The election of a person as President or Vice-President shall not be called in question on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him'.¹⁴ Article 54 must, therefore, be read as stating the maximum – or optimum – number of electors. There is no minimum floor; as few as one legislative assembly may validly elect a President in extreme cases. In *Re Presidential Poll*,¹⁵ the Supreme Court effectively upheld this view. But issues concerning improper dissolution of state assemblies or wilful delays in conducting State elections so as to affect the outcome of presidential elections were left open; the Court did not offer an opinion.¹⁶ Finally, in *Shiv Kirpal v VV Giri*,¹⁷ relying on Section 3(58), General Clauses Act 1897, the petitioner argued that State legislative assemblies in Article 54 includes those in Union Territories. The Supreme Court rejected that claim. Union Territories do not have legislative assemblies. Article 239A merely authorizes Parliament to create bodies that function *as* legislatures. But that, the Court clarified, does not

¹² AIR 1957 SC 694.

¹³ *Narayan Bhaskar Khare v Election Commission of India* AIR 1957 SC 694 [7].

¹⁴ The Constitution (Eleventh Amendment) Act 1961, s 3.

¹⁵ (1974) 2 SCC 33.

¹⁶ *Re Presidential Poll* (1974) 2 SCC 33 [35].

¹⁷ (1970) 2 SCC 567.

make them legislative assemblies in the proper sense.¹⁸ Some Union Territories – notably the National Capital Territory of Delhi and Pondicherry – have elected assemblies that are in no way different from those in other States. This created an anomaly; the verdict hindered their participation in the Electoral College. Parliament responded by amending Article 54.¹⁹ These territories were designated ‘States’ for the purposes of presidential elections, thereby giving them a proportionate say in electing India’s President.

Presidents enjoy a five-year term, but are eligible for re-election.²⁰ In practice, all occupants have served one term. Rajendra Prasad is the only exception; India’s first President, he served two. Elections for incoming Presidents must be mandatorily completed before the expiration of the terms of their predecessors.²¹ Vacancies may also arise otherwise. Presidents may die in office, resign, or be ‘impeached for violation of the Constitution’.²² The Vice-President temporarily takes over in such cases.²³

Impeachment is a serious matter; the mechanism is invoked only if Presidents violate the Constitution. ‘Violation of the Constitution’ in Article 61 can bear several meanings. Narrowly read, it may mean a violation of the *provisions* of the Constitution. Or a wider view is possible – one that includes violations of conventions and settled practices which on no account may be regarded as part of the provisions of the Constitution. Impeachment proceedings may be initiated if one-fourth of the total members of either House agree to move a resolution. Once moved, it

¹⁸ *Shiv Kirpal v VV Giri* (1970) 2 SCC 567 [242].

¹⁹ Constitution (Seventieth Amendment) Act 1992, s 2.

²⁰ Constitution of India 1950, arts 56(1) and 57.

²¹ Constitution of India 1950, art 62(1).

²² Constitution of India 1950, art 61(1).

²³ For issues associated with presidential vacancies, see KN Agarwal, ‘The Problem of the Temporary Vacancy in the Office of the Indian President’ (1965) 7(2) *Journal of Indian Law Institute* 238.

must be approved by two-thirds of the total membership of that House. The resolution is then sent to the other House; this latter body must ‘investigate the charges’ mentioned therein. If two-thirds of the total membership of the second House approves of the charges, the President stands impeached. Effectively, a President may be removed from office if two-thirds of the *total memberships* of both Houses agree to do so. This is admittedly a high bar. Except in limited cases, even constitutional amendments require no more than the support of a mere *majority* of the total memberships of both Houses.²⁴ It is easier to amend India’s Constitution than to impeach her President.²⁵

Presidents have near complete immunity while in office. They are not ‘answerable to any court for the exercise and performance of the powers and duties of [their] office or for any act done or purporting to be done by [them] in the exercise and performance of those powers and duties’.²⁶ Notice that the immunity extends even to acts ‘purporting to be done’ under the Constitution. Article 361, therefore, shields Presidents so long as they *claim* to act in performance of their powers or duties.²⁷ They also enjoy immunity in their personal capacity, especially in criminal matters: ‘No criminal proceedings whatsoever shall be instituted or continued against the President... in any court during his term of office’. The bar is limited to their term in office. Therefore, wrongful acts committed before or during a presidential term may bear prosecution after occupants vacate office. Immunity against civil proceedings is more restricted though.

²⁴ Constitution of India 1950, art 368(2).

²⁵ Madhukar Chaturvedi, ‘The Impeachment under Indian Constitution’ (1981) 14(3) Journal of Constitutional and Parliamentary Studies 179.

²⁶ Constitution of India 1950, art 361(1).

²⁷ See also, *State v Kavas Manekshaw Nanavati* (1960) 62 Bom LR 383.

Subject to a two-month notice along with information about the party instituting the proceedings and the cause of action, suits may be instituted even while they are in office.²⁸

In *Common Cause, A Registered Society v Union of India*,²⁹ the Supreme Court distinguished the official immunity of the President from immunity for actions done *in the name of* the President. A minister in the central government, Satish Sharma was found guilty of improperly allotting petrol pumps.³⁰ He argued that the allotments were in effect the decision of the President; it was issued in the latter's name. The decision, therefore, was immune from judicial review. The Court rejected the argument. Though signed in the name of the President, the order remained 'basically and essentially, the order of the Minister on whose advice the President had acted'.³¹ That being so:

[T]he order [carried] with it no immunity. Being essentially an order of the Government of India, passed in exercise of its executive functions, it would be amenable to judicial scrutiny... The immunity available to the President under Article 361 of the Constitution cannot be extended to the orders passed in the name of the President under ... the Constitution.³²

Presidents act in two capacities. In most cases, they act on the 'aid and advice' of the council of ministers; occasionally, they act in their discretion. After *Common Cause*, council of ministers must defend presidential actions in judicial forums. But *Rameshwar Prasad v Union of India*

²⁸ Constitution of India 1950, art 361(4).

²⁹ (1999) 6 SCC 667.

³⁰ (1996) 6 SCC 530.

³¹ *Common Cause, A Registered Society v Union of India* (1999) 6 SCC 667 [26].

³² *Common Cause, A Registered Society v Union of India* (1999) 6 SCC 667 [26].

goes further.³³ Discretionary actions of Governors and Presidents may also invite judicial review, the Court held, especially if they are challenged as being mala fide or arbitrary. Such actions have no existence in the eyes of the law.³⁴ The bar is simply against personally hauling them up before courts and other fora. Presidential immunity in India, therefore, means *personal* immunity from forced appearances; presidential actions, both aided and ‘unaided’, remain open to review.

Governors enjoy an analogous position at the State level. Every State must have a Governor, but two or more States may have the same Governor.³⁵ As formal heads of the executive, their terms, conditions and immunities of office mirror those of the President, but with two critical differences. First, they are appointed. Governors do not enjoy any form of electoral legitimacy; they are appointees of the President. Second, Governors hold office at the pleasure of the President.³⁶ There is no security of tenure. They nominally enjoy five-year terms, but Presidents may remove, transfer or reappoint them at any time.³⁷ Stripped of presidential regalia in important respects, Governors are perhaps diminished heads of States.

Whether Governors should hold offices by virtue of elections or appointments was the subject of an animated debate in the Constituent Assembly. Constitutional adviser BN Rau set the ball rolling with his suggestion for indirect elections by a system of proportional representation. In effect, he proposed a State version of presidential elections along with similar rules for

³³ (2006) 2 SCC 1.

³⁴ *Rameshwar Prasad v Union of India* (2006) 2 SCC 1 [170].

³⁵ Constitution of India 1950, art 153. The literature on Governors under the Indian Constitution is vast; it is easily among the most commented upon aspects of India’s Constitution. See eg, NS Gehlot, *The Office of the Governor, its Constitutional Image and Reality* (Chugh Publications 1977); Sibranjan Chatterjee, *Governor’s Role in the Indian Constitution* (Mittal Publications 1992); Chandrabhushana Pandeya, *Governor: Preserver, Protector, and Defender of the Constitution* (Vikas Publishing House 1999).

³⁶ Constitution of India 1950, art 156(1).

³⁷ Constitution of India 1950, art 156(3).

impeachment. The Patel-led Provincial Constitution Committee disagreed; indirect elections, the members said, were insufficiently representative. They favored direct elections. ‘The dignity of the office’ demanded nothing less, Patel argued.³⁸ In July 1947, the Committee’s report on provincial constitutions was discussed in the Constituent Assembly. Members widely endorsed the idea of directly-elected Governors.³⁹

Two years later the provision on electing Governors again came up before the Assembly. The Ambedkar-led Drafting Committee had little faith in popular Governors. Wary of unintended consequences that such an arrangement may produce, it offered the Constituent Assembly two alternatives to square on: direct elections or ‘guided’ presidential appointments.⁴⁰ By then, many members too had a change of heart. Overwhelmingly, they rejected elections, direct or otherwise – favoring to repose in the President the power to *appoint* Governors.

Broadly four arguments were pressed to make the case for this revision. First, there was an argument about conflicting expectations. The office of the Governor, many members felt, was analogous to an impartial constitutional head and, therefore, standing above and beyond the everyday politics of a State. But direct elections would require that Governors be invested with real executive powers. A popularly elected but ceremonial head of a State made little sense. The method of attaining the office and the expectations of that office, in other words, were not in sync.⁴¹ Second, fear of gubernatorial intrusion agitated some members. Popularly elected Governors with authority to intervene in the everyday affairs of States may breed instability, they

³⁸ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1986) 586, 15 July 1947.

³⁹ *Constituent Assembly Debates*, vol 1 (Lok Sabha Secretariat 1986) 602-17, 15 July 1947.

⁴⁰ B Shiva Rao, *The Framing of India’s Constitution*, vol 3 (Universal Law Publishing 2006) 564.

⁴¹ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 428-30, 433-34, 448-49 (30 May 1949).

argued. Backed by popular mandate, a Governor could claim greater representative authority than the chief minister. That would not augur well for a parliamentary form of government. Democracy, as such, would be self-defeating.⁴² Third, the fragility of the Union led many to vote against elected Governors. Their popularity may embolden fissiparous tendencies, some cautioned. Jawaharlal Nehru, in particular, was alarmed by this possibility.⁴³ Though heads of States, Governors in reality were to be seen as agents of national reconstruction, he implied. India, still fragile, needed strong regional hands. But gubernatorial elections were likely to promote provincial voices not all of which were fully reconciled to the idea of a united India. The laborious – and often unseemly – experience of stitching together India's Union between 1947 and 1949 perhaps had a role here. Fourth, there was an argument about unnecessary costs. Members who spoke against direct or indirect elections saw in the exercise a needless expense – one that impoverished India could hardly afford.⁴⁴ A ceremonial office, they argued, did not justify the trouble and expense associated with huge elections.

These arguments cumulatively won the day. A majority in the Constituent Assembly voted to strip Governors of their popular foundations. To a small and bitter minority, Nehru, Ambedkar, KM Munshi and others offered a generous palliative: Persons so appointed would be 'above party politics', detached outsiders, eminent in their achievements and with no reason to meddle in the everyday affair of the States they formally head.⁴⁵ After more than sixty years, this assurance, it is safe to say, has been honored more in the breach. The abuses are too many to list

⁴² *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 435, 444-46, 453 (30 May 1949).

⁴³ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 426, 454-56 (30 May 1949).

⁴⁴ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 433, 452, 468 (30 May 1949).

⁴⁵ *Constituent Assembly Debates*, vol 8 (Lok Sabha Secretariat 1986) 453-62 (30 May 1949). See KP Singh, 'The Governor in the Constituent Assembly' (1965) 26(4) *Indian Journal of Political Science* 37.

but the modus operandi has been remarkably uniform. Upon taking office, political parties at the centre removed incumbents no matter how qualified, appointed loyal party men and women, and often encouraged them to foment trouble. The Congress party established a troublesome legacy; its appointees often functioned as political lackeys rather than independent officers. After a Janata Party-led coalition was inaugurated at the center in 1977, the government repaid in kind disinfecting offices of ‘Congress Governors’. Since then, this fumigation has become a venerable practice, faithfully ritualized after every general election. The Sarkaria Commission on Centre-State Relations duly noted this recurring misuse, and there is a vast secondary literature that documents the abusive instances.⁴⁶

Oddly enough, the provision for removal – not appointment – of Governors has generously abetted this misuse. Governors are not impeached. Presidents may simply cashier them: They hold office ‘during the pleasure’ of the President.⁴⁷ This carelessly easy mechanism was challenged in *BP Singhal v Union of India*.⁴⁸ Presidents must have ‘good reasons’ to dismiss Governors, and such decisions should be subject to judicial review, Singhal argued. The Court fully accepted the first argument, and a modest version of the second. Without exhaustively listing them, the Court offered examples of what may qualify as valid reasons for dismissal: ‘Physical and mental incapacity, corruption, and behaviour unbecoming of a Governor’ would suffice.⁴⁹ ‘Loss of confidence in the Governor or the Governor being out of sync with the policies and ideologies of the Union Government’, however, the Court categorically said, are not

⁴⁶ See *Report of the Sarkaria Commission* (Government of India 1988), ch 4
<<http://interstatecouncil.nic.in/Sarkaria/CHAPTERIV.pdf>> accessed 11 December 2014.

⁴⁷ Constitution of India 1950, art 156(1).

⁴⁸ (2010) 6 SCC 331.

⁴⁹ *BP Singhal v Union of India* (2010) 6 SCC 331 [69].

acceptable reasons.⁵⁰ With that, the most common reasons for sacking Governors were declared ultra vires. The rigor of this otherwise important decision was softened by two additional findings. First, the Court held that presidential reasons for sacking Governors need not be shared with the latter; they have no recourse to rules of natural justice. Second, a strong prime facie case of arbitrariness or mala fides must be made out for a court to entertain a challenge.⁵¹ However, without access to the President's reasons for acting in a certain way, it is unlikely that this bar of sufficiency can be meaningfully met.

At the national level, below the President stands the Vice-President.⁵² The Vice-President is also indirectly elected but by a much smaller electorate; only members of both Houses of Parliament participate in this election.⁵³ The Vice-President is the ex-officio chairman of the Upper House, but steps in as an interim President in case of temporary vacancy.⁵⁴ The office has a five-year term, and incumbents are eligible for re-election.⁵⁵ They may resign, or may also be impeached. A simple majority in both Houses is sufficient to impeach a Vice-President. Super-majorities of the kind associated with presidential impeachments are not necessary.⁵⁶ States, however, do not have the equivalent of Vice-Presidents. In case of gubernatorial vacancies, the President is empowered to make provisions to deal with such contingencies.⁵⁷

⁵⁰ *BP Singhal v Union of India* (2010) 6 SCC 331 [69].

⁵¹ *BP Singhal v Union of India* (2010) 6 SCC 331 [82]. See also, *Ranji Thomas v Union of India* (2000) 2 SCC 81.

⁵² Constitution of India 1950, art 63. For a rare comment on the Vice-President, see JN Lal, 'The Vice-President of India' (1967) 28(3) *Indian Journal of Political Science* 104.

⁵³ Constitution of India 1950, art 66(1).

⁵⁴ Constitution of India 1950, art 65.

⁵⁵ Constitution of India 1950, art 67.

⁵⁶ Constitution of India 1950, art 67(b).

⁵⁷ Constitution of India 1950, art 160.

Presidents and Governors are the formal heads; for the most part, they act on the advice of the heads of government. The next section deals with the offices of the heads of government who wield real executive power: The Prime Minister, Chief Minister and their respective council of ministers.

The Head of Government

Article 74 says that there ‘shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President’.⁵⁸ Presidents appoint Prime Ministers. Other ministers are appointed on the latter’s advice.⁵⁹ The number of ministers cannot ‘exceed fifteen per cent of the total number of members of the House of the People’.⁶⁰ They hold office during the pleasure of the President and are collectively responsible to the Lower House of Parliament.⁶¹ Despite this, ministers may be members of either House of Parliament; membership of the Lower House is not a criterion for ministerial appointment. This applies even to Prime Ministers. However, they have mostly been from the Lower House. Indira Gandhi was an early exception. Appointed Prime Minister at a time she was in the Upper House, she promptly rectified her membership ‘anomaly’ by standing for and being elected to the Lower House. Manmohan Singh is the only real exception. India’s Prime Minister between 2004 and 2014, he never sought membership to the Lower House, choosing to remain with the elders for both his terms. Persons who are not

⁵⁸ For an assessment of ‘aid and advise’ in the Indian context, see Anirudh Prasad, ‘A Study of the Principle of “Aid and Advice” in Indian Constitutional Perspective’ (1976) 10(3) Journal of Constitutional and Parliamentary Studies 272.

⁵⁹ Constitution of India 1950, art 75(1).

⁶⁰ Constitution (Ninety-First Amendment) Act 2003, s 2.

⁶¹ Constitution of India 1950, art 75(3).

members of either House are also eligible for ministerial appointments. But they must acquire membership within six months of taking office.⁶²

Presidents appoint Prime Ministers at their discretion. Governors do the same at the State level; they appoint Chief Ministers. Ordinarily, the leader of the party that commands a majority in the Lower House is invited to form the government. In *SP Anand v HD Deve Gowda*,⁶³ the petitioner challenged Deve Gowda's appointment as Prime Minister on the ground that he was not a member of either House of Parliament. The argument failed. 'Minister' in Article 75(5), the Court clarified, includes the Prime Minister: In this limited respect, 'the Constitution does not draw any distinction between the Prime Minister and any other Minister'.⁶⁴ The Court, however, has read in several limitations to ensure that such non-member appointments do not militate against democracy, constitutionalism or collective responsibility. In *Harsharan Verma v Union of India*,⁶⁵ the Court held that non-member ministers may participate in the proceedings of both Houses. But in keeping with Article 88, they are not entitled to vote in either House. In *SR Chaudhuri v State of Punjab*,⁶⁶ the Court barred ministerial reappointments through this procedure. TP Singh was appointed a minister in Punjab. He was not a member of the State Assembly; and he did not become one even after six months. He resigned. Later a new Chief Minister, Rajinder Kaur, was sworn in during the term of the same Assembly. Once again, Singh was inducted as an unelected minister. The Supreme Court invalidated his second appointment. 'Reappointments', the Court warned, 'would... disrupt the sequence and scheme of Article

⁶² Constitution of India 1950, art 75(5).

⁶³ (1996) 6 SCC 734. See also, *Har Sharan Verma v Tribhuvan Narain Singh* (1971) 1 SCC 616.

⁶⁴ *SP Anand v HD Deve Gowda* (1996) 6 SCC 734 [16].

⁶⁵ 1987 Supp SCC 310.

⁶⁶ (2001) 7 SCC 126.

164 ... [and] defeat... the basic principles of representative and responsible government'.⁶⁷ An additional limitation was read into this extraordinary method in *BR Kapoor v State of Tamil Nadu*.⁶⁸ J Jayalalithaa did not stand for elections to the State Assembly in 2001. Convicted of various offences, she stood disqualified from membership to that body.⁶⁹ Still her party projected her as the chief ministerial candidate. When it won, party members elected Jayalalitha as their leader. The Governor swore her in as the Chief Minister. The appellant challenged this appointment: Persons who are otherwise ineligible to become members of the legislature, he argued, cannot take recourse to the six-month route. The Court agreed: 'It would be unreasonable and anomalous to conclude that a minister who is a member of the Legislature is required to meet the constitutional standards of qualification and disqualification but that a minister who is not a member of the Legislature need not'.⁷⁰ As a result, the extraordinary mechanism is available only to eligible persons; those already disqualified cannot invoke it.

Ministers take oath before assuming office.⁷¹ This is a constitutional requirement. But its legal effects, if any, are unclear. In *KC Chandy v R Balakrishna Pillai*,⁷² the Kerala High Court concluded that remedies for violations of ministerial oath lie in the political domain; the Governor, Chief Minister and the legislature are appropriate authorities to deal with such infractions. A minister in the Kerala government made a speech allegedly inciting people to 'resort to terrorism and wage war against the Union of India'.⁷³ These words, the petitioner argued, rendered the minister ineligible to hold office; he was in breach of his oath to uphold 'the

⁶⁷ *SR Chaudhuri v State of Punjab* (2001) 7 SCC 126 [35].

⁶⁸ (2001) 7 SCC 231.

⁶⁹ Constitution of India 1950, art 173.

⁷⁰ *BR Kapoor v State of Tamil Nadu* (2001) 7 SCC 231 [23].

⁷¹ Constitution of India 1950, arts 75(4) and 164(3).

⁷² AIR 1986 Ker 116.

⁷³ *KC Chandy v R Balakrishna Pillai* AIR 1986 Ker 116 [1].

sovereignty and integrity of India'. The Court declined to intervene. Denying that an oath of office is an 'empty formality', the High Court held that a writ of quo warranto will lie against a person who assumes office without an oath.⁷⁴ Breach of oath, on the other hand, requires 'a termination of the tenure of office' – a power best exercised by the appointing authority.⁷⁵ With respect to ministers at the State level, that means the Governor and the Chief Minister. In other words, breach of ministerial oath is a valid reason for a Governor to dismiss a minister. Whether to exercise that power of dismissal, however, is a matter entirely within the former's discretion; the Court will stay out of it.⁷⁶ The Punjab and Haryana High Court reached a similar conclusion in *Hardwari Lal v Bhajan Lal*.⁷⁷ Refusing to prohibit the Chief Minister from continuing in office, the Court held that the grounds for – and the manner of – disqualification are comprehensively provided for in Articles 191 and 192.⁷⁸ Breach of oath is not one of the listed grounds; and the Court could not add to it. Remedy, if any, lies with the Governor.

Ministerial tenure is not directly provided for in the Constitution. Ministers hold office during the pleasure of the President. They are also 'collectively responsible to the Lower House of the People'. Ministers continue in office so long as they enjoy the confidence of the Lower House. 'During the pleasure of the President', therefore, ordinarily, refers to the period during which ministers collectively enjoy the confidence of the Lower House. Article 83 limits the duration of this body to five years, unless dissolved earlier. Read together, it implies that a council of ministers has a maximum tenure of five years.

⁷⁴ *KC Chandy v R Balakrishna Pillai* AIR 1986 Ker 116 [6].

⁷⁵ *KC Chandy v R Balakrishna Pillai* AIR 1986 Ker 116 [9].

⁷⁶ *KC Chandy v R Balakrishna Pillai* AIR 1986 Ker 116 [10].

⁷⁷ AIR 1993 P&H 3.

⁷⁸ See also *Dhronamraju Satyanarayana v NT Rama Rao* AIR 1988 AP 62.

Ministers must resign on losing a vote of confidence; it is an established convention. If a council of ministers refuses to vacate office after such loss, the President may dismiss it. The discretion to dismiss governments is a limited one. In keeping with British parliamentary conventions, it is invoked only in rare circumstances when a minority government stubbornly imposes itself in office against the will of the majority. Policy differences, for example, are not a valid ground on which to dismiss an otherwise stable government. Doing so will likely invite constitutional uncertainties of many kinds. For one, finding an alternative Prime Minister will prove difficult; the new appointee is unlikely to command a majority in the Lower House. The ensuing instability will breed executive and legislative paralysis, with a government unable to enact its policies into law. High-handed dismissals may also invite impeachments. Parties with sufficiently large majorities may make the case that such dismissal amounted to a ‘violation of the Constitution’ – that is, a violation of the conventions associated with the Constitution. Apart from governments, President may also dismiss individual ministers. Ordinarily, it is for the Prime Minister to recommend such dismissal. Whether a President may dismiss an individual minister at his discretion remains an open question.

Similar rules apply to the State executive, but with one notable exception. A government with a stable majority may be dismissed under Article 356, ‘if the President ... is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of [the] Constitution’. The provision has been invoked on more than 100 occasions – many of them under questionable circumstances.⁷⁹ In such instances, Governors take

⁷⁹ K Suryaprasad, *Article 356 of the Constitution of India: Promise and Performance* (Synergy Books India 2012).

over the administration of the states until a new government is appointed, or new elections are held. This is a critical difference. Contrary to the practice at the State level, a council of ministers always exists to aid and advise the President. The Constitution does not envisage any situation when a President may govern on his own. The Supreme Court arrived at this conclusion in *UNR Rao v Indira Gandhi*.⁸⁰ With the Lower House dissolved in December 1970, Indira Gandhi had lost her mandate as the Prime Minister, the appellant argued. Without a Lower House, there was nothing the council of ministers could be responsible to. The ministers should resign, or be dismissed. Thereafter, the President must carry on the government to the best of one's abilities till a new ministry is installed. The Court rejected this reading. Article 74(1) says that there 'shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President'. The provision means what it says: There *shall* be a Council of Ministers.⁸¹ Even if the Lower House is dissolved prematurely, ministers remain in office till alternative arrangements are made. To hold otherwise and give effect to the appellant's contention would 'change the whole concept of the Executive', the Court reasoned. 'It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions'.⁸² Such a possibility is alien to the system of executive set up under the Constitution.

This mandatory requirement of a head of government means that there shall always be someone to aid and advise the Head of State. How, then, should the two interact? The next section addresses this issue.

⁸⁰ (1971) 2 SCC 63.

⁸¹ *UNR Rao v Indira Gandhi* (1971) 2 SCC 63 [8].

⁸² *UNR Rao v Indira Gandhi* (1971) 2 SCC 63 [7].

President and the Council of Ministers: Constitutional Interactions

Article 53 says that the executive power of the Union ‘shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with [the] Constitution’. Article 74 must be read alongside this provision to make sense of it. In its inaugurated form, Article 74(1) had a nebulous core: ‘There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions’. Notice that the provision demoted the Prime Minister and the council of ministers to an advisory capacity; nothing therein made ministerial advice binding on the President. In addition, Article 78 casts a duty on the Prime Minister to ‘communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation’ and to furnish information on these matters, if sought for. Taken together, these provisions lent credibility to the idea of a real – not formal – head of the Union.⁸³ With executive power vested in him, the President, it seemed, had discretion to exercise them directly or, in the interest of efficiency, delegate the same to subordinate officers. The council of ministers, subordinate to him in the constitutional scheme, performed an advisory role; he was free to accept or reject any advice tendered to him.⁸⁴

In *Ram Jawaya Kapur v State of Punjab*,⁸⁵ the Supreme Court read the provisions differently. Publishers of school text books challenged the state’s education policy. It violated their fundamental right to freedom of trade and profession, they claimed. The council of ministers,

⁸³ Soon after the Constitution came into effect, debate erupted on the position of the President under the Indian Constitution. See eg, BM Sharma, ‘The President of the Indian Republic’ (1950) 11(4) Indian Journal of Political Science 1; Mrityonjoy Banerjee, ‘The President of the Indian Republic’ (1950) 11(4) Indian Journal of Political Science 10; DN Banerjee, ‘Position of the President of India’ (1951) 89(5) Modern Review 365.

⁸⁴ See KM Munshi, *The President under the Indian Constitution* (Bharatiya Vidya Bhawan 1963); MM Ismail, *The President and the Governors in the Indian Constitution* (Orient Longman 1972).

⁸⁵ AIR 1955 SC 549.

they argued, did not have the authority to formulate a restrictive policy. In rejecting the argument, the Court held that the President has been made a formal or constitutional head; ‘real executive powers are vested in the Ministers or the Cabinet’.⁸⁶ With a majority in the legislature, the cabinet concentrates in itself ‘the virtual control of legislative and executive functions’, the Court said; and ‘the most important questions of policy are all formulated by them’.⁸⁷ In other words, executive powers inhere in those that are collectively responsible to the legislature. In India, that is the council of ministers. Articles 53 and 74, therefore, mean what Article 75 says.

This line of reasoning was developed in greater detail in *Samsher Singh v State of Punjab*.⁸⁸ Two members of the lower judiciary in Punjab were dismissed. The dismissal orders were signed in the name of the Governor, but in effect were ministerial decisions. The Governors should have exercised his discretion, the appellants contended. The Court rebuffed the claim: ‘Wherever the Constitution requires the satisfaction of the President or the Governor ... [it] is not... [his] personal satisfaction... [but the] satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions’.⁸⁹ ‘It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act’, the Court said. The sovereign never acts alone, but through advisers who have the confidence of the House of Commons.⁹⁰ The rule is the same in India. Clearly, British parliamentary conventions strongly, perhaps exclusively, mediated the Court’s reading of the Indian provisions.

⁸⁶ *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 [14].

⁸⁷ *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 [14].

⁸⁸ (1974) 2 SCC 831. See also, *A Sanjeevi Naidu v State of Madras* (1970) 1 SCC 443.

⁸⁹ *Samsher Singh v State of Punjab* (1974) 2 SCC 831 [48].

⁹⁰ *Samsher Singh v State of Punjab* (1974) 2 SCC 831 [32].

Samsher Singh was significant: leading up to it, the Court spoke about presidential discretion in differing voices. Two decisions are especially worth noting. In *Moti Ram Deka v General Manager, NEF Railways*,⁹¹ a majority upheld a previously expressed view that the power to dismiss a public servant at pleasure was a discretionary one; a Governor could not delegate the same to a subordinate officer.⁹² Later, in *Jayantilal Amritlal Shodhan v FN Rana*,⁹³ the Court offered a long list of discretionary powers:

The power to promulgate Ordinances... to suspend [provisions]... during an emergency; to declare failure of the Constitutional machinery in States... to declare a financial emergency... to make rules regulating recruitment and conditions of service... are not powers of the Union Government; *these are powers vested in the President* under the Constitution and are incapable of being delegated or entrusted to any other body.⁹⁴

These decisions offered a radically different view of the presidency. With a wide range of discretionary powers, Presidents and Governors were far from irrelevant in the everyday exercise of executive power.⁹⁵ *Samsher Singh*, however, relegated them to a mostly ceremonial role; except on rare occasions, they do not enjoy personal discretion.

⁹¹ AIR 1964 SC 600.

⁹² *Moti Ram Deka v General Manager, NEF Railways* AIR 1964 SC 600 [57].

⁹³ AIR 1964 SC 648. See also, *Sardari Lal v Union of India* (1971) 1 SCC 411.

⁹⁴ *Jayantilal Amritlal Shodhan v FN Rana* AIR 1964 SC 648 (emphasis added).

⁹⁵ For two comprehensive assessments on presidential powers, see Henry Holmes Jr, 'Power of President: Myth or Reality' (1970) 12(3) *Journal of Indian Law Institute* 367; VS Deshpande, 'The President, His Powers and Their Exercise' (1971) 13(3) *Journal of Indian Law Institute* 326.

As if to obviate this controversy from rearing again, Parliament amended Article 74. Inspired by the reasoning in *Samsher Singh*, an elongated provision replaced the original: ‘There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President *who shall, in the exercise of his functions, act in accordance with such advice*’.⁹⁶ A polite practice till then, ministerial primacy now enjoyed textual pedigree. But even this, some felt, was insufficient. Two years later further elongation came in the form of a proviso: ‘Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration’.⁹⁷ As it stands now, Article 74 recognizes the possibility that the head of the Union may disagree with the head of government, but offers a straightforward template by which to resolve such disagreements. Notwithstanding these later developments, obligations under Article 78 remain: All decisions regarding the administration of and proposals for legislation must be communicated to the President, and information sought for, if any, must be furnished.

Article 74(1) is cast in mandatory terms: The President *shall* act in accordance with ministerial advice. Yet violations of this mandatory requirement are unlikely to yield judicial remedies. Presidents are immune from legal actions for ‘the exercise and performance of the powers and duties of [their] office’. Also, Article 74(2) bars courts from intervening between the President and the council of ministers: ‘The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court’. Whether an advice was repeated or new advice tendered, in effect, remains occluded in judicial proceedings. Presidential

⁹⁶ The Constitution (Forty-Second Amendment) Act 1976, s 13.

⁹⁷ The Constitution (Forty-Fourth Amendment) Act 1978, s 11.

intransigence must be resolved politically. The council of ministers may resign to register their protest. Or political parties with robust majorities may initiate impeachment proceedings against the President. Article 74, in its original form, offered similar possibilities. The elongated version clarified the mandatory nature of ministerial advice. Beyond that, the amendments, it seems, have achieved little.⁹⁸

Article 74(2) renders ministerial advice confidential. The early line of cases read this zone of confidentiality widely. Notings on files, cabinet notes and the cornucopia of documents that form the *basis* for ministerial advice were protected from disclosure.⁹⁹ But *SR Bommai v Union of India* reversed much of this.¹⁰⁰ The new reading greatly narrowed the scope of secrecy, limiting its application to the actual advice tendered. *Bommai* distinguished ‘advice’ from the documents – notes, reports, file notings – on the basis of which such advice is offered. Article 74(2) only protects the former, the Court said; everything else may be judicially scrutinized.¹⁰¹ This reduced protection increases the volume of materials on which to judicially review executive actions.

Ministers exercise real executive power; they are both individually and collectively responsible for their actions in doing so. Collective responsibility, mentioned earlier, is provided for in Article 75(3). Incubated by British conventions over centuries, it stands for the idea that a council of ministers is jointly responsible for the affairs of the government.¹⁰² Collective responsibility has several facets. First, ministers act as a common unit; cabinet decisions are

⁹⁸ The debate on presidential power lingers. See Anirudh Prasad, *Presidential Government or Parliamentary Democracy* (Deep and Deep Publications 1981); VR Krishna Iyer, *The Indian Presidency* (Deep and Deep Publications 1988).

⁹⁹ *State of Rajasthan v Union of India* (1977) 3 SCC 592; *State of Punjab v Sodhi Sukhdev Singh* AIR 1961 SC 493.

¹⁰⁰ (1994) 3 SCC 1.

¹⁰¹ See also, *Rameshwar Prasad v Union of India* (2006) 2 SCC 1.

¹⁰² See *A Sanjeevi v State of Madras* (1970) 1 SCC 443.

binding on all ministers. Disagreements, if any, may be aired in private. Ministers, however, speak in one voice and stand by one another in Parliament and in public.¹⁰³ Those that cannot reconcile themselves with particular government policies or are unwilling to defend them in public must resign. Conversely, decisions of particular ministers, unless overruled, are decisions of the government. However, Article 78 authorizes the President to submit for the consideration of the council of ministers any matter on which a decision has been taken by an individual minister. The Prime Minister, in such cases, must bring the matter before the council of ministers.¹⁰⁴

Clearly, joint responsibility has a political component; political parties in power invoke it to maintain party discipline. However, its legal standing, if any, remains unclear. In *Subramanian Swamy v Manmohan Singh*,¹⁰⁵ the Supreme Court did not enforce it. The origins of the controversy lay in the sale of telecom spectrum in 2008 that Union Minister A. Raja oversaw. The sale was voided; the policy underlying the sale and the procedure adopted were illegal and arbitrary, the Court found.¹⁰⁶ A. Raja designed some of the key rules regarding the sale. Documents revealed that the Prime Minister and his Empowered Group of Ministers were in the know of these irregularities. While A. Raja was subsequently charged on several counts, the Prime Minister's omissions were neither challenged nor probed: The Court gave him a pass. Raja's decisions were discrete, judges implied; the council of ministers did not have to bear the cross of his alleged criminalities. Individual ministerial decisions, it therefore seems, do not

¹⁰³ *Common Cause, A Registered Society v Union of India* (1999) 6 SCC 667 [31].

¹⁰⁴ Constitution of India 1950, art 78(c).

¹⁰⁵ (2012) 3 SCC 64.

¹⁰⁶ *Centre for Public Interest Litigation v Union of India* (2012) 3 SCC 1.

always generate collective legal responsibilities. Occasionally, joint responsibility may only be politically enforced.¹⁰⁷

Second, a council of ministers stands or falls together. They collectively command a majority support in the legislative branch. As such, a no-confidence motion against the council of ministers is a motion against all ministers. Prime ministerial resignation automatically dissolves the council of ministers; separate resignations are unnecessary. Conversely, a vote of no-confidence against a particular minister may be regarded as a vote against the entire council of ministers. This, however, depends on the circumstances of the motion. Occasionally, the legislative branch may target a minister individually, without reference to the council of ministers to which he or she belongs. In such instances, only the minister is expected to resign.¹⁰⁸ Ministers in their individual capacities may also be judicially hauled up for their arbitrary actions, provided they are motivated by animus. In *Common Cause*, the Supreme Court reversed an earlier decision to impose exemplary damages against a minister.¹⁰⁹ Bona fide exercise of power that produces an unintended injury, the Court said, does not justify punitive or exemplary damages. Malicious abuse of power or deliberate maladministration may, however, do so.¹¹⁰

Governing is a complex affair; hundreds of officials in dozens of departments make many decisions on a daily basis. Article 77(3) recognizes this possibility: The provision authorizes the President to ‘make rules for the more convenient transaction of the business of the Government

¹⁰⁷ See Pratap Bhanu Mehta, ‘The Indian Supreme Court and the Art of Democratic Positioning’ in Mark Tushnet and Madhav Khosla (eds), *Unstable Constitutionalism: Law and Politics in South Asia* (Cambridge University Press 2015) (forthcoming).

¹⁰⁸ *State of Karnataka v Union of India* (1977) 4 SCC 608. See also, *State of Jammu and Kashmir v Bakshi Gulam Mohammad* AIR 1967 SC 122.

¹⁰⁹ *Common Cause v Union of India* (1996) 6 SCC 530.

¹¹⁰ *Lucknow Development Authority v MK Gupta* (1994) 1 SCC 243.

of India, and for the allocation among Ministers of the said business'. These officials are also part of the executive, and ministers are responsible for those that serve in their departments.¹¹¹ This responsibility remains even in situations where ministers have no knowledge of the actions of their departmental subordinates. Ordinarily, ministers busy themselves with policy issues; matters of implementation are usually left to officials over whom ministers command little or no oversight. Yet, when they act, subordinates notionally do so on behalf of ministers. Ministers, therefore, cannot seek refuge in ignorance. Nor can they absolve themselves by pointing to their officers. Both inside and outside Parliament, *they* are accountable for their departmental shortcomings. This too is a facet of collective responsibility.

Powers and Functions of the Executive

The Prime Minister, council of ministers and the civil service form the executive at the federal level in India. Different kinds of powers are vested in them. Naturally, the executive exercises executive power. What does that entail? Executive power, the Supreme Court has repeatedly said, defies definitional precision. It is not merely about executing laws that have been enacted. Rather, it 'connotes the residue of governmental functions that remain after legislative and judicial functions are taken away'.¹¹² Determining policies and executing them, initiating legislation, maintaining law and order, promoting social and economic welfare, directing foreign policy among other things involve the exercise of executive power.¹¹³

¹¹¹ *Common Cause v Union of India* (1996) 6 SCC 530 [26].

¹¹² *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 [12].

¹¹³ *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 [13].

Two kinds of executive powers are found in India's Constitution; general and specific. The scope of general executive power is outlined in Article 73: It extends to matters 'with respect to which Parliament has power to make laws'. It also extends 'to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement'. The executive power of the States is outlined in Article 162: Subject to the provisions of the Constitution, it extends to 'matters with respect to which the Legislature of the State has power to make laws'. Notice that the scope of executive power is defined with reference to the scope of legislative power; generally speaking, both the Union and State executives may exercise executive power on matters over which their respective legislatures are authorized to enact legislation.

In *Ram Jawaya Kapur*, the education department of the State of Punjab practically took over the task of printing and publishing school textbooks. Deprived of their business, publishers challenged the relevant notification. It was illegal, they argued; in creating a monopoly in the business of printing and publishing textbooks, the State acted without legislative sanction. The Supreme Court rejected this argument. The State's executive power is 'not confined to matters over which legislation has been passed already'; rather, it extends to all matters on which legislation *may be passed*.¹¹⁴ Prior legislative action in other words is not a prerequisite for the exercise of executive power.¹¹⁵

This, however, is not a blank check; the exercise of unsanctioned executive power is cabined by some exceptions. First, executive action cannot contravene the Constitution. In *Madhav Rao*

¹¹⁴ *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 [7].

¹¹⁵ See also, *Maganbhai Ishwarbhai Patel v Union of India* (1970) 3 SCC 400.

Jivaji Rao Scindia v Union of India,¹¹⁶ privy purses promised to the rulers of the erstwhile princely states were wrecked by executive action. Grandfathered into various provisions of the Constitution, these payments, the petitioners argued, were immune from executive imprudence. The Court agreed. ‘The voice of the Constitution is paramount’, and ‘neither the legislature nor the executive can have a policy that runs counter to the policy laid down [therein]’.¹¹⁷ ‘If a Constitution or any part of it [becomes] out of tune [with society], appropriate steps may be taken to alter the Constitution’, the Court reasoned.¹¹⁸ But the executive must ‘uphold it even when it is inconvenient to do so’.¹¹⁹ Constitutional obsolescence or inconvenience does not justify executive illegality. Second, executive action cannot infringe fundamental rights. In *State of Madhya Pradesh v Thakur Bharat Singh*,¹²⁰ local authorities restricted the respondent’s physical movements by executive order. It was done under the provisions of the Madhya Pradesh Public Security Act 1959. The Court struck down some provisions of the Act. With no statutory basis left on which to restrict the free movement of citizens, the State resorted to its general executive power to justify the restrictions. The Court disagreed. Actions that restrict the rights and freedoms of citizens must enjoy legislative backing, the Court held; executive power, by itself, cannot achieve these ends.¹²¹ Third, executive action cannot contravene a statute or exceed powers conferred through it. In *KN Guruswamy v State of Mysore*,¹²² liquor rights were auctioned for the city of Bangalore under the Mysore Excise Act 1901. The highest bidder, Guruswamy won the auction. But the deputy commissioner rescinded his rights on receiving a

¹¹⁶ (1971) 1 SCC 85.

¹¹⁷ *Madhav Rao Jivaji Rao Scindia v Union of India* (1971) 1 SCC 85 [161].

¹¹⁸ *Madhav Rao Jivaji Rao Scindia v Union of India* (1971) 1 SCC 85 [176].

¹¹⁹ *Madhav Rao Jivaji Rao Scindia v Union of India* (1971) 1 SCC 85 [176].

¹²⁰ AIR 1967 SC 1170.

¹²¹ *State of Madhya Pradesh v Thakur Bharat Singh* AIR 1967 SC 1170 [8]. See also, *Kharak Singh v State of Uttar Pradesh* AIR 1963 SC 1295.

¹²² AIR 1954 SC 592.

higher bid after the auction. He was at liberty to cancel the bid, the commissioner rationalized. The Court disagreed. ‘Fetters imposed by legislation cannot be brushed aside at the pleasure of either the Government or its officers’; ‘rules bind State and subject alike’.¹²³ Executive power, in other words, is bound by – not beyond – statutory provisions and rules.¹²⁴ Fourth, the executive can neither impose taxes nor spend money without legislative sanction.¹²⁵ This was explained in *Ram Jawaya Kapur*. Trade or business, such as printing and publishing school textbooks, that require funds must be legislatively authorized ‘directly or under the provisions of a statute’. Ordinarily, estimates of expenditures ‘are submitted in the form of demands for grants to the legislature’. These are often legislatively sanctioned in the form of Appropriation laws.¹²⁶ Only in such circumstances are expenses deemed authorized; general executive power is insufficient for these purposes. Fifth, executive action cannot contravene statutory rules. In *J&K Public Service Commission v Narinder Mohan*,¹²⁷ State colleges made ad-hoc appointments. Later, they regularized them. This was challenged. The relevant service rules neither made provision for ad-hoc appointments nor any provision for relaxing the ordinary process of appointment to regularize the former. The State drew from the well of general executive power to justify these appointments. The Supreme Court shot down that claim. Having made the Rules, ‘the executive cannot fall back on its general power’, the Court rebuked.¹²⁸ To fill gaps, supplement rules and address unforeseen exigencies are acceptable. But executive power, under no circumstances, may ‘supplant the law’. The Constitution does not permit that. In short, the executive may exercise

¹²³ *KN Guruswamy v State of Mysore* AIR 1954 SC 592 [7].

¹²⁴ *State of Uttar Pradesh v Johri Mal* (2004) 4 SCC 714.

¹²⁵ *State of Kerala v P.J. Joseph* AIR 1958 SC 296.

¹²⁶ *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 [16]-[17].

¹²⁷ (1994) 2 SCC 630.

¹²⁸ *J&K Public Service Commission v Narinder Mohan* (1994) 2 SCC 630 [7].

general executive power on an *unoccupied* field provided it does not violate the Constitution; in particular, it cannot restrict rights or impose taxes, offend statutes or contravene statutory rules.

Specific executive powers are many. The power to make appointments and the power to pardon are especially worth noting. The Constitution creates a large number of institutions and vests in the executive the authority to appoint their functionaries. Some of these offices are political, others more independent. The Union executive appoints, for example, the Attorney-General,¹²⁹ the Auditor and Comptroller General,¹³⁰ members of the Union Public Service Commission,¹³¹ and members of the Election Commission.¹³² The Constitution replicates some of these offices at the State level, and the State executive is authorized to make similar appointments.

The other specific executive power is the power to grant pardons.¹³³ The President may ‘grant pardons, reprieves, respites or remissions of punishment’ or ‘suspend, remit or commute the sentence of any person convicted of any offence’. The power may be invoked in three contexts; first, in cases where punishment and sentence is by a Court Martial; second, in cases where the punishment or sentence is for an offence against any law which Parliament is competent to enact; and, third, in all cases where the sentence is a sentence of death.¹³⁴ The provision has attracted many controversies, and a large body of precedents must be mined to understand the nature, scope and extent of this power. Pardon is not a private act of grace. The power to grant is constitutionally reposed on the head of the state and, therefore, constitutes a ‘responsibility of

¹²⁹ Constitution of India 1950, art 76.

¹³⁰ Constitution of India 1950, art 148.

¹³¹ Constitution of India 1950, art 315.

¹³² Constitution of India 1950, art 324.

¹³³ Constitution of India 1950, art 72.

¹³⁴ R Prakash, ‘Does the Pardoning Power of the President Under the Constitution Extend to Criminal Contempts of Court’ (2000) 42(2-4) Journal of the Indian Law Institute 469.

great significance'.¹³⁵ Historically exercised by most heads of states, the power rests on the rationale that the judicial process may occasionally go awry, the Supreme Court has said. As such, entrusting 'some high authority to scrutinize the validity of the threatened denial of life ... or personal freedom' is a worthy undertaking: Article 72 does that in India's Constitution. Also, pardon is not an extension of – or an interference with – the judicial process; it stands on a 'wholly different plane'.¹³⁶ Consequently, rules of natural justice do not apply. In making such decisions, the President enjoys discretion of the widest amplitude. He may re-examine the facts of the cases, reassess the evidence, take into account newly disclosed information if any, and fashion appropriate remedies keeping in mind the personal circumstances of those pleading for mercy.¹³⁷

This wide discretion has invited anguish on many occasions. In *G Krishna Goud v State of Andhra Pradesh*,¹³⁸ the Supreme Court, long before *Kehar Singh*, pondered over the nature of the power to pardon. It is a 'public power', the Court said – one that must be exercised with 'intelligence... informed care and [honesty]'.¹³⁹ This was reiterated in *Maru Ram v Union of India*.¹⁴⁰ Though wide, the power 'cannot run riot';¹⁴¹ religion, caste, color or political loyalties,¹⁴² for example, are irrelevant to the discretionary matrix of Article 72. The 'widest amplitude' in *Kehar Singh* notwithstanding,¹⁴³ the idea of reasoned discretion remains prominent

¹³⁵ *Kehar Singh v Union of India* (1989) 1 SCC 204.

¹³⁶ *Kehar Singh v Union of India* (1989) 1 SCC 204 [10].

¹³⁷ *Kehar Singh v Union of India* (1989) 1 SCC 204 [10].

¹³⁸ (1976) 1 SCC 157.

¹³⁹ *G Krishna Goud v State of Andhra Pradesh* (1976) 1 SCC 157 [7].

¹⁴⁰ (1981) 1 SCC 107.

¹⁴¹ *Maru Ram v Union of India* (1981) 1 SCC 107 [62].

¹⁴² *Maru Ram v Union of India* (1981) 1 SCC 107 [65].

¹⁴³ *Kehar Singh v Union of India* (1989) 1 SCC 204 [16].

in many decisions.¹⁴⁴ Public power in all forms has limits, the Court in *Epuru Sudhakar v Government of Andhra Pradesh* pointed out; and the right to equality is not irrelevant to Article 72.¹⁴⁵ As such, the law of pardon in India endures in flux: The extent – and grounds of – judicial review are still insufficiently clear.

India's executive also enjoys legislative powers. Delegated legislative powers – rule making powers – are provided for in a variety of provisions. Most important of these are provided for in Article 77(3): 'The President shall make rules for the more convenient transaction of the business of the Government of India'. Known as the Rules of Business, these instruments allocate and define the zone of authority for ministers and their subordinates. They have statutory force and are binding. Actions consistent with these Rules become the actions of the government. Conversely, actions in contravention of these Rules are ultra vires.¹⁴⁶ Other specific rule-making powers include the power to make rules for the joint sittings of the two Houses of Parliament;¹⁴⁷ rules regarding the conditions of service of government employees¹⁴⁸ and rules regarding the appointment of officials of various constitutional bodies.¹⁴⁹

More strikingly, the Constitution authorizes the executive to exercise *original* legislative power; Presidents may promulgate 'ordinances' under Article 123.¹⁵⁰ Ordinances are not by-laws, rules, orders or delegated legislation of some other kind. They are the equivalent of parliamentary

¹⁴⁴ See *Ashok Kumar v Union of India* (1991) 3 SCC 498; *Dhananjoy Chatterjee v State of West Bengal* (2004) 9 SCC 751; *Bikas Chatterjee v Union of India* (2004) 7 SCC 634.

¹⁴⁵ (2006) 8 SCC 161 [20].

¹⁴⁶ *A Sanjeevi Naidu v State of Madras* (1970) 1 SCC 443; *State of Rajasthan v AK Datta* (1980) 4 SCC 459.

¹⁴⁷ Constitution of India 1950, art 118(3).

¹⁴⁸ Constitution of India 1950, art 309.

¹⁴⁹ Constitution of India 1950, arts 148(5) and 146(1).

¹⁵⁰ Constitution of India 1950, art 213 provides for a similar arrangement at the State level; Governors too may promulgate ordinances.

legislation.¹⁵¹ Two conditions must be met for the President to invoke Article 123. At least one House of Parliament must not be in session and he must be satisfied that ‘circumstances exist which render it necessary for him to take immediate action’. The satisfaction is of the council of ministers; that is how the provision has come to be understood and practiced. Ministers decide if an ordinance is necessary and draft it; the President formally promulgates it into law. In a series of cases, the Supreme Court has repeatedly held that presidential satisfaction in Article 123 is not subject to judicial review; it is ‘purely subjective’.¹⁵² Parliament has complete discretion to decide whether or not to enact legislation. The executive too, the Court said, has complete discretion to decide whether or not to promulgate ordinances.¹⁵³ As a result, grounds of review ordinarily applicable to the exercise of executive power are inapplicable to ordinances. They are products of legislative power, vested in the executive.¹⁵⁴

Ordinances are temporary. They must be laid before both Houses once Parliament reconvenes. The duration of ordinances, however, is not directly provided for. Article 123(2) merely says that unless properly enacted within six weeks from the date of reassembly of Parliament, they ‘cease to operate’.¹⁵⁵ They may also cease to operate if both Houses of Parliament disapprove them by a resolution, or if the President withdraws the ordinances. In *State of Orissa v Bhupendra Kumar Bose*,¹⁵⁶ the Court struggled with the ‘cessation’ requirement. Election to a municipality was successfully challenged on the ground that the electoral rolls had been inadequately vetted. Worried about similar challenges against other elections, the Governor promulgated an ordinance

¹⁵¹ Constitution of India 1950, art 123(2).

¹⁵² *Rustom Cavasjee Cooper v Union of India* (1970) 1 SCC 248; *SKG Sugar Ltd v State of Bihar* (1974) 4 SCC 827.

¹⁵³ *T Venkata Reddy v State of Andhra Pradesh* (1985) 3 SCC 198.

¹⁵⁴ *K Nagaraj v State of Andhra Pradesh* (1985) 1 SCC 523.

¹⁵⁵ Constitution of India 1950, art 123(2)(a).

¹⁵⁶ AIR 1962 SC 945.

validating all electoral rolls. The ordinance lapsed. Did the lapse revive the invalidity of the election? It did not, the Court determined. Even if an ordinance lapses, all actions completed during the period an ordinance is in force remains permanently valid; it only ceases to operate *prospectively*. This view has serious implications: The executive can effectively generate permanent changes in the law even through failed ‘legislative’ action.¹⁵⁷

Ordinances may lapse. The possibility of repromulgating them, therefore, remains. In *DC Wadhwa v State of Bihar*,¹⁵⁸ the Supreme Court confronted questions about the constitutionality of repromulgating ordinances. The State of Bihar repeatedly promulgated some ordinances, thereby, keeping them ‘alive’ for periods ranging from 3 to 14 years. The executive showed no interest in enacting them through the normal legislative procedure. Turning an ‘exceptional’ method of enacting legislation into a regular one amounts to a usurpation, the Court reasoned. It is contrary to India’s ‘constitutional scheme’ and, therefore, unconstitutional.¹⁵⁹ However, a small window of exception was left open. ‘If there is too much legislative business ... or the time at the time at the disposal of the Legislature is short’, repromulgation may be justified, the Court added.¹⁶⁰ This exception is a convenient alibi for governments keen to repromulgate ordinances; many have taken refuge in it.¹⁶¹ Overall, the Court’s forgiving approach to ordinances has meant that they are persistently present in India’s legislative annals.¹⁶²

¹⁵⁷ See also, *T Venkata Reddy v State of Andhra Pradesh* (1985) 3 SCC 198; *Maitreyee Mahanta v State of Assam* AIR 1999 Gau 32.

¹⁵⁸ (1987) 1 SCC 378.

¹⁵⁹ *DC Wadhwa v State of Bihar* (1987) 1 SCC 378 [6].

¹⁶⁰ *DC Wadhwa v State of Bihar* (1987) 1 SCC 378 [6].

¹⁶¹ *Gyanendra Kumar v Union of India* AIR 1997 Del 58.

¹⁶² See Shubhankar Dam, *Presidential Legislation in India: The Law and Practice of Ordinance in India* (Cambridge University Press 2014).

Finally, India's executive also has modest judicial powers. Aspirants to both Houses of Parliament must meet certain eligibility criteria; they are provided for in Article 102. Article 103 empowers the President to adjudicate if persons who are already members have fallen foul of these criteria.¹⁶³ In making these decisions, the President relies on the opinion of the Election Commission.¹⁶⁴ The Election Commission acts in a quasi-judicial capacity and must, therefore, adhere to the principles of natural justice.¹⁶⁵

This panoply of powers demonstrates that India's constitutional system does not have a watertight arrangement of separated functions. The executive exercises a range of powers and performs an array of functions, some of which are legislative and judicial. Conversely, the legislative and judicial branches do not limit themselves to legislative and judicial powers respectively. They occasionally perform executive functions as well. Irrespective of the kind of power it exercises, the executive principally functions through the council of ministers and the officials responsible to it. However, Presidents and Governors enjoy some discretion – the precise boundaries of which remain disputed. The final section offers an overview of such discretionary powers.

Discretionary Powers of Presidents and Governors

That Presidents and Governors enjoy discretionary powers in some situations was clarified in *Samsher Singh*. 'Without being dogmatic or exhaustive, these situations', Krishna Iyer J

¹⁶³ *Election Commission v Saka Venkata Subba Rao* AIR 1953 SC 210. See also, *Consumer Education and Research Society v Union of India* (2009) 9 SCC 648.

¹⁶⁴ Constitution of India 1950, art 103(2).

¹⁶⁵ *Election Commission of India v Subramanian Swamy* (1996) 4 SCC 104.

suggested, ‘relate to (a) the choice of Prime Minister (Chief Minister)... (b) the dismissal of a Government which has lost its majority in the House, but refuses to quit office; [and] (c) the dissolution of the House where an appeal to the country is necessitous’.¹⁶⁶ These are, it should be noted, among the most important discretionary powers. But they are by no means the only ones.¹⁶⁷ We may consider these situations briefly.

In a chronological sense, the ‘first’ exercise of discretionary power involves the appointment of Prime Ministers. The Constitution is economical on this; it only says that they ‘shall be appointed by the President’. Yet, discretion may be a misnomer in most instances. In keeping with Westminster conventions, persons who command clear majorities in the Lower House are appointed Prime Ministers. Discretion is moot in such cases. Fractured electoral verdicts, however, add an important dimension to it. With no obvious prime ministerial candidate, Presidents must exercise discretion in a real sense; it is for them to assess the likelihood that a person may successfully command a majority in due course.¹⁶⁸ A practice now governs these uncertain circumstances as well. If no party secures a majority in the Lower House, Presidents look for the leader of a pre-poll alliance who may enjoy majority. In 1999, Atal B Vajpayee led such an alliance. If such a leader does not exist, Presidents look for the leader of post-poll alliances. In 2004 and 2009, Manmohan Singh led such alliances. Post-poll alliances may also involve ‘outside support’. Such alliances often require compromise, and the invited leader may not be from the largest party in the Lower House. Lacking majority, VP Singh, Chandra Sekhar, Inder Gujral and HD Deve Gowda were all appointed Prime Ministers on the promise of outside

¹⁶⁶ (1974) 2 SCC 831 [154].

¹⁶⁷ KR Bombwall, ‘The President of India: Limits of Discretion’ (1966) 27(3) Indian Journal of Political Science 23.

¹⁶⁸ *Dinesh Chandra Pande v Chaudhury Charan Singh* AIR 1980 Del 114.

support. If no such leader is available, the President may appoint the leader of the largest party as the Prime Minister in the hope that he or she will muster a working majority.

Ordinarily, ministries resign on losing trust votes. If they refuse, they may be dismissed. Can they, however, be dismissed under other circumstances? Presidents have not done so at the centre for reasons mentioned earlier. But Governors have occasionally done so at the State level. Two options are available for this purpose. Pursuant to Article 356, Governors may write to the President suggesting that the administration of 'the State cannot be carried on in accordance with the provision of the Constitution'. Governors are not bound by ministerial advice in writing such reports; they make independent assessments. Otherwise, they may invoke the 'pleasure' rule in Article 164: 'Ministers shall hold office during the pleasure of the Governor'. In 1967, the Governor of West Bengal dismissed the United Front Ministry on the *assumption* that it had lost the majority.¹⁶⁹ Similarly, in 1998, the Governor of Goa dismissed the ministry in office and installed a new one.¹⁷⁰ The same year, the Governor of Uttar Pradesh also dismissed his ministry and installed a new one, once again, on the assumption that the former had lost its majority.¹⁷¹ Except in this instance, courts have generally refused to intervene against Governors. As such, the legality of dismissing democratically-elected ministries based on private assessments of the loss of majority support remains undecided.

Thirdly, Lower Houses have a maximum tenure of five years. Presidents and Governors may also dissolve them earlier. In doing so, they generally act on the advice of the council of

¹⁶⁹ *Mahabir Prasad Sharma v Prafulla Chandra Ghose* AIR 1969 Cal 198.

¹⁷⁰ *Pratapsingh Raojirao Rane v Governor of Goa* AIR 1999 Bom 53.

¹⁷¹ *Jagdambika Pal v Union of India* (1999) 9 SCC 95.

ministers. Whether Presidents and Governors are invariably bound by the advice of the cabinet remains unclear. Majority as well as minority cabinets may recommend premature dissolution. They may do so for a variety of reasons. A desire to seek electoral validation of specific policies may motivate majority cabinets to seek dissolution. They may also do so in order to time elections with particular political, economic or military events – and benefit from them. Minority governments, on the other hand, may recommend dissolution to prevent competing coalitions from staking claim. Heads of state in India, generally speaking, have not bound themselves by the advice of minority cabinets in dissolution matters. They have frequently exercised discretion, looked for alternative ministries, and only then, in appropriate instances, proceeded with dissolution. Their discretionary quotient remains high, and a consistent practice is yet to develop.¹⁷²

The inaugurated provisions no longer govern the executive in India. Changes have been made. Parliamentary amendments and judicial interpretations have remade key aspects of the executive. New words have found their way in; some clarified existing meanings, others cautioned against new possibilities. Yet the nature and extent of presidential discretion endure in uncertainty. Paradoxically, the system, the arrangement of the executive as a whole, remains remarkably stable; it has hardly wavered. The only exception – a modest one at best – is the early years of the republic. Confronted with a Constitution unburdened by usage, President Rajendra Prasad and Prime Minister Jawaharlal Nehru stood divided over meanings. Interpretative skirmishes broke out. To Prasad, ‘presidential’ words had life; to Nehru, they were lifeless. Prasad saw *some* role for the President in the affairs of the state; Nehru did not. Prasad dilated on executive

¹⁷² See Ravindra Mishra, ‘Governor and Dissolution of the Legislative Assembly’ (1967) 28(4) Indian Journal of Political Science 183.

matters, and occasionally delayed on legislative ones. He anguished over the proposed Hindu Code Bill and the law on Zamindari Abolition. Nehru, though, would have none of it. Determined to break Prasad's intransigence, he lined up a battery of lawyers. Those legal opinions coupled with Nehru's brutal parliamentary majority occluded Prasad's arguments of any staying power. He relented.¹⁷³ Nehru won against Prasad; then he won over the people. It heralded the Nehruvian presidency. In handing Jawaharlal Nehru the prime ministerial baton in 1952 and 1957, India's electorate effectively interpreted the presidency into ceremonial irrelevance. The President no longer mattered; only the Prime Minister did. While provisions of the executive, particularly those relating to the President, weathered occasional controversies and impelled debates, the basic consensus has since remained undisturbed.¹⁷⁴ *Samsher Singh* aided this.

The consensus notwithstanding, concerns remain. I shall briefly highlight two. Presidents have some measure of electoral legitimacy; Governors have none. And yet, gubernatorial discretion is potentially wider. Article 163 recognizes that Governors have discretionary powers in the everyday administration of their States: 'There shall be a Council of Ministers ... to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution *required to exercise his functions ... in his discretion*'.¹⁷⁵ Interestingly, Governors self-police their discretionary boundaries: 'If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his

¹⁷³ For a conventional, but misleading, account of the early controversies, see Harshan Kumarasingham, 'The Indian Version of First among Equals: Executive Power During the First Decade of Independence' (2010) 44(4) *Modern Asian Studies* 709.

¹⁷⁴ Whether India should move to a presidential form of government has been the subject of some academic debate. See Jashwant B Mehta, *Presidential System, A Better Alternative?* (NM Tripathi 1979); Vasant Sathe, *Two Swords in One Scabbard: A Case for Presidential Form of Parliamentary Democracy* (New India Books 1989).

¹⁷⁵ Constitution of India 1950, art 163(1) (emphasis added).

discretion, *the decision of the Governor in his discretion shall be final*'.¹⁷⁶ And unlike Presidents, they are not bound by ministerial decisions. Article 74, we know, was elongated to limit presidential discretion over ministerial decisions. No such proviso burdened Article 163; the original text remains. Beyond this general grant of discretion, the Constitution also confers specific legislative and executive powers. Governors may withhold assent to Bills,¹⁷⁷ reserve them for presidential reconsideration,¹⁷⁸ recommend President's Rule in the States,¹⁷⁹ and are responsible for the administration of areas designated under the Fifth and Sixth Schedules of the Constitution.¹⁸⁰ These discretionary powers, widely formulated and often indiscreetly applied, continue to invite constitutional anxieties. That the powers vest in an unelected and, therefore, electorally unaccountable office amplifies the concerns. Governorships are an anomaly; they always have been. The Nehruvian consensus, for better or worse, never extended to them.

Secondly, the Nehruvian presidency has struggled with possibilities that seemed distant in the 1950s. Article 74, in part, reads: 'There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President'. Many kinds of Council of Ministers exist. Some represent majority governments; others shepherd minority ones. Timing too is relevant. A Council of Ministers baptized by a confidence motion, presumably, is different from one that has yet to secure parliamentary benediction. Similarly, a Council of Ministers that has lost a confidence vote but retains office as a 'caretaker government' is of a different kind altogether. Many minority governments have populated India since the late 1980s; some also functioned as

¹⁷⁶ Constitution of India 1950, art 163(2) (emphasis added).

¹⁷⁷ Constitution of India 1950, art 200.

¹⁷⁸ Constitution of India 1950, art 201.

¹⁷⁹ Constitution of India 1950, art 356.

¹⁸⁰ Constitution of India 1950, arts 244 and 244A.

caretaker ones. PV Narasimha Rao deftly ran a single-party minority government between 1991 and 1996. VP Singh, Chandra Sekhar, HD Deve Gowda, Inder Gujral fumbled with their minority coalitions for short durations. Later, AB Vajpayee and Manmohan Singh ran more competent coalition-minority governments. Charan Singh, India's ninth Prime Minister, was the first to lead a caretaker ministry. Upended by political intrigue of the Congress party, he resigned soon after taking oath. President Sanjiva Reddy, starved off alternatives, saddled him with a caretaker ministry; he was to remain Prime Minister for five weary months. The second Vajpayee Cabinet added to this legacy in 1999. Despite resigning from office in April 1999, it held the executive reigns for six more months.

To whom does Article 74 apply? Does it apply to all of them, or only to some? Recall the Nehruvian consensus on Article 74, endorsed by *Samsher Singh*: Presidential discretion is moot; what ministers say, goes. To indiscriminately apply this dictum to all Council of Ministers is to bludgeon a system into feigned consistency. Parliamentary losers people caretaker ministries; their lost mandate makes them so. To bow before their dictates is to privilege the will of the defeated few over the will of the majority; Presidents have little reason to conspire in this constitutional travesty. In *Madan Murari Verma v Choudhuri Charan Singh*,¹⁸¹ the Calcutta High Court said as much. 'In order to tender advice to the President which is binding on him by virtue of Article 74(1)... the condition precedent is the responsibility of the executive to the legislative branch' Mukharji J wrote. 'The executive must act subject to the control of the legislature'.¹⁸² But with Parliament dissolved, and a caretaker Council of Ministers in office, the President, he added:

¹⁸¹ AIR 1980 Cal 95.

¹⁸² *Madan Murari Verma v Choudhuri Charan Singh* AIR 1980 Cal 95 [26].

[I]s... not obliged to accept [any] advice... [tendered] to him except for day-to-day administration... This in effect means that any decision or policy decision or any matter which can await disposal by the Council of Ministers responsible to the House of People must not be tendered by the... [Prime Minister] and his Council of Ministers. With this limitation... [he] and the Council of Ministers can only function.¹⁸³

Whether advice tendered is necessary to carry on the day-to-day administration or beyond that, the President, Mukharji J pointed out, ‘is free to judge’.¹⁸⁴ The Nehruvian consensus had shown up. Constitutional possibilities, it turns out, are too complex to keep the President confined to irrelevance: Circumstances may indeed compel the exercise of discretion. This concession, however, begs the larger question: Was Rajendra Prasad right to romance discretionary powers in more ordinary situations? That there is a presidency beyond the Nehruvian consensus is obvious; its depth though remains to be revealed. In 1969, parliamentarians urged the government to set up a committee; the constitutional position of the President must be studied and legislatively defined, they said.¹⁸⁵ More than four decades later, it may still be a worthy undertaking.

Written to serve generations, the provisions on the executive steadied the principal branch of government at the moment of founding, underwent amendments, witnessed controversies and

¹⁸³ *Madan Murari Verma v Choudhuri Charan Singh* AIR 1980 Cal 95 [26]-[27] (emphasis added).

¹⁸⁴ *Madan Murari Verma v Choudhuri Charan Singh* AIR 1980 Cal 95 [27].

¹⁸⁵ *The Hindustan Times*, 9 August 1969.

generated debates. That it has served well is a testament to the genius of those who penned it. The challenge, however, is to make the template – and its meanings – relevant to both stable and unstable times, politically. Whether those that work the Constitution and interpret it are up to this challenge remains to be seen.