

‘Constitutional Privileges’ from the prism of Constitution of India and Judicial Precedents: A Holistic Analysis

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ABSTRACT

The First Prime Minister of India Shri Jawaharlal Nehru once commented that, “*The emphasis of Ministerial form character of Government and that power resides in the Ministry and the Legislature, where the power of the President is one of great authority and dignity... The President of India is also the supreme Commander-in-Chief of defence forces...*” The immunity enjoyed by President is extensive; the privileged communication with the Council of India, has to be seen in the perspective of enormous responsibility of the President of India in the constitutional framework. The instant paper is an attempt to look at varied facets of Constitutional privileges of President, Governor, Prime Minister, Council of Minister and their ever-increasing role for the welfare of citizenry in the realm of societal growth and development and upholding the noble ideals of the framers in light of testing the aforementioned enunciated powers and privileges with the touchstone of the Indian Constitution. Without concentration of power in single office, Dr. BR Ambedkar⁴ once said that *an ideal executive should be stable and symbolise the Indian National unity, glory, inclusiveness and goes beyond the responsibility towards People of India*. In sequitur it is averred that, President can have a high persuasive influence on the legislative setup. The ordinance making power is an important facet of the power of the President, though it has to be passed within 6 months of the starting of the session, provides legislative power also to the President of India.

Keywords: *Doctrine of Pith and Substance; primus inter pares; Constitutionalism; Doctrine of Pleasure.*

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Introduction

There been catena of cases surfacing before the Hon'ble Courts of Law, which has not only helped in establishing the quintessential role of Constitutional dignitaries but also their powers and privileges in the realm of Constitution, as supreme law of the land. Unlike the US President who is the real executive head and the whole of the administration vests on him, the Indian President has executive power; However, Power of the Indian President has multifarious in nature, including that of executive power, legislative power, financial power, judicial and diplomatic power and emergency power. India follows the "Parliamentary form of Government" in contrast to "Presidential form of Government in US".

President's ever-increasing role

The *oath* of the office of the President as enshrined in **Article 60**⁵ is the speaking honour in the framework of Constitution of India as it specifies, "*to preserve, protect and to defend the Constitution and law and that of devoting to the service of the people of India*", in that endeavour the President advises, guides and exerts his influence in the ambit of the constitutional realm including with that of the Council of Ministers and Prime Minister of India. In **S.P Anand v. HD Deve Gowda**⁶, the Hon'ble Supreme Court of India held categorically that, "the Article 75(5) permits the President to appoint anyone who is not a member of either Lok Sabha or Rajya Sabha, that is either House of Parliament as the Minister including the Prime Minister which is subject to Prime Minister commanding the support of majority of Members in the Lok Sabha or the Lower House of the Parliament..." The interesting application of Parliamentary form of democracy along with the Judicial precedent has to be looked into challenges posed by 'defection' and the 'floor test' which the Prime Minister and his minister has to go through if called into question. In this context, the expressions in Constitution, 'purporting to be done' has a wider interpretation, so long as he does the act in furtherance of the constitutional obligations. It is pertinent to mention that extensive power of the President was exemplified in the year 1998, when the "then President Shri K.R. Narayanan did not second with the United Front Cabinet advice for Presidential rule in Uttar

⁵ Seen in the backdrop of Article 52 of Constitution of India specifying about the "President of India"; while, Article 53 further states that "President is the head of the State and elected by electoral college (Article 54) consisting of elected members of both the House of Parliament and elected members of Legislative Assemblies of State..."

⁶ S.P Anand v. HD Deve Gowda 1996 6 SCC 734

Pradesh and its was construed in contravention to the established and settled guidelines”, as enunciated in **S.R. Bommai vs Union Of India**⁷. It becomes interesting and logical to see that, “Governor’s advice in this context was rendered unconstitutional and violative of the decision of the **Bommai Case**. Likewise, the Cabinet has also respected the decision of the President when the then President Shri Giani Zail Singh sent the Indian Postal Amendment Bill, 1986 to Government for reconsideration”.

Vice President

Article 63 of Constitution of India, mentions that there should be a Vice President. On the Constitutional provision of “Removal of the Vice President”⁸ which is to maintain the high position and dignity of the office. Keeping his office distinct and separate is a challenge where the honour and the responsibility on Vice President is of paramount nature. When Vice President, discharge the role of President because of the enunciated reasons in the Constitution, he avails of the entitlement of such “emoluments, allowances and privileges as per law decided by Parliament” as enshrined in **Article 65**. Talking about the functional and dignified role as “ex-officio Chairman of Rajya Sabha”, **Article 64** is the guiding light and the touchstone of that high responsibility as he presides in the meetings of the Rajya Sabha. The powers and immunity of Vice President as per Constitution is the same when he/she is functioning as President. It is vital to note that there is no formal process for impeachment as it is in case of President.

Governor’s Role

In **Hargovind v Raghukul Tilak**⁹, the Hon’ble Court elaborated at length the role of Governor as such is not restrained or is not amenable to Government’s direction as such the responsibility as “head of the State is that of a high constitutional office and is high important Constitutional functions in the setup of Parliamentary form of Government”, as held in the judgment.

President’s Executive Power

⁷ S.R. Bommai vs Union Of India 1994 SCC (3) 1

⁸ Article 67 specifies, “a resolution has to be moved in Rajya Sabha passed by a majority of all the then members, which means that the total strength of the Rajya Sabha minus the number of vacancies have to provide a 14 days’ notice of the intention of removal of the Vice President...”

⁹ Hargovind v Raghukul Tilak AIR 1979 SC 1113

Convention is unwritten understanding which is universally observed. The convention is not made but come into existence by practice. In the provisions enunciated in the role of Constitutional leadership, President appears a '**figurative head**'; thereby what is inherent in the constitution is that President of India assumes responsibility as per the broader contours of the scope and ambit of Constitutional necessity and requirement. However, that responsibility includes taking essential advice from the Council of Ministers elaborated under **Article 74(1)**¹⁰. Gap by death and resignation, that vacancy can be addressed by selection of another Council of Minister. In **U.N.R Rao v Indira Gandhi**¹¹, the judgment was a light house for setting the frame and the fence of the conceptual understanding of Parliamentary system of Government with the Council of Minister and Cabinets role. In the aforesaid case, the Apex Constitutional Court, the Supreme Court of India held that, "the application of **Article 74(1)** of the Constitution of India is sacrosanct and mandatory to the extent that the Hon'ble President of India cannot with respect to his functioning as the executive supreme cannot exercise that executive power without the aid and the advice as rendered, even if the President has dissolved the legislature"¹²; in that direction it is unconstitutional in the light of **Article 74(1) and Articles 75(2) read with Article 75(3)**

Council of Ministers

When seen from the perspective of the powers of Council of the Ministers, it is pertinent to what **Prof. Kenneth C. Wheare**¹³ once emphasised, "*the definition of Constitution conventions must thus be amplified by saying use of constitutional discretion where non-legal rules regulate how the legal rules shall be applied..*"

Judicial Scrutiny and Privileged Communication with Council of Ministers

The Court cannot adjudicate on the matter which was advice by Council of Ministers via Prime Minister to President. That immunity is there in Constitution. The reason for such advice from the part of advice is immune from 'judicial scrutiny'. The 'privileged communication' is the

¹⁰ Article 74(1) extends, "even when the House of People, that is Lok Sabha has been dissolved or the term of the Lok Sabha has completed..."

¹¹ U.N.R Rao v Indira Gandhi AIR 1971 SC 1002

¹² Ibid.

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substantive component in the functioning of the “Parliamentary form of Government” as existing in India. Though the advice is having the immunity, the question comes: Can Supreme Court compel the production of the materials based on which Council of Minister given advice? Possibly, the substantive element on certain material is subject matter for ‘judicial review’. Judicial Review is established and pronounced by Judicial wing of the Constitution as the “basic structure of the Constitution”. Indirectly the Council of Minister are in turn responsible for their acts and decision, however the basis and the context of the advice is very important. Seen in this context, Article 143 provides for President seeking advice of Supreme Court of India, invoking its advisory jurisdiction when providing its interpretation on the issue of law or public importance. Time and again with catena of cases including that of President, the quintessential role of prominence of President is seen. In **Rameshwar Prasad v. Union of India**¹⁴, where the Hon'ble Apex Court reviewed the constitutional validity of the Union's dissolution of the Bihar assembly where the primacy of President satisfaction was observed by then 36th Chief Justice of India, Shri Y.K. Sabharwal.

As seen in **Shamsher Singh v State of Punjab**¹⁵, the interpretation has also led one to an interesting observation as the Hon'ble Supreme Court of India held that, “the position of President (or the Governors in states of India) is similar to that of the Crown under the British Parliamentary system; which is the fundamental principles enunciating the role of the Council of Ministers as a collective responsibility towards the functions of the President or Governor as specified in **Articles 123, 213, 311(2)(c), 356 and 360**...” A conjoint reading with Article 53(1)¹⁶ is warranted in this perspective.

Prime Minister wider role

Article 74(1) specifies, “Prime Minister is the leader of majority in Lok Sabha as such his/her function is that of *primus inter pares*, that is ‘First among Equals’ in Council of Ministers. Clause (1A) added to **Article 75(1)** provides for the “total number of Council of Ministers should not exceed 15 percent of total number of members in the Lower House of Parliament,

¹⁴ Rameshwar Prasad v. Union of India W.P. (C) No.255 of 2005

¹⁵ Shamsher Singh v State of Punjab AIR 1974 SC 2192

¹⁶ Article 53(1) vests, “the executive responsibility of the Union of India on President, which is subject to power exercised either directly or through officers’ subordinate to the President. In that endeavour, the Ministers are deemed to be officers subordinate to the executive in-charge of the Parliament...”

that is Lok Sabha”. **Article 78** enlists the duties of Prime Minister in the realm of Constitution of India.

India’s first law minister, Dr. BR Ambedkar once said, “*The Prime Minister is the keystone arch of Cabinet and until there is creation of that office and endow that office with statutory authority enabling that Office to nominate and dismiss Ministers there cannot be any collective responsibility...*”.

The difference between ‘Collective Responsibility of Cabinet’ vis-a-vis the ‘Individual Responsibility of Council of Ministers’ has elaborated at length in the case **Ram Jawaya v State of Punjab**¹⁷, where it was held that if a minister has acted without the support of whole Cabinet, the cabinet in such course would not be responsible collectively.

Constitutional Provisions

Article 58 specifies, “the qualification to be President of India as to being citizen of India, attaining 35 years of age and to be qualified for election as member of Lok Sabha; whereas, he/she should not hold ‘Office of Profit’ or be a member of either House of Parliament or a House of Legislature of the State...”

Article 56 specifies the process of “Impeachment of President”. It is vital to note the provisions enunciated in the Constitution, “before the completion of the term of office and has to be preferred by either House of the Parliament with 14 days written notice which has to be sent by not less than 1/4th of total member of the House and passed by not less than 2/3rd of total membership of the House”. The concept of “impeachment” goes back to 14th century, as a quasi-judicial procedure conducted in Parliament. The two-step process as enunciated before has the effect from the date of passing such resolution (Article 61).

In **R.C Cooper v Union of India**¹⁸, the Hon’ble top Court of the country elaborated on the “power of President to legislate by promulgating Ordinances, even though President is not the repository of legislative power of the Union”. In **R.K Jain v Union of India**¹⁹, the issue which surfaced before the Hon’ble Supreme Court of India was on valid grounds of appointment including that of integrity of the President of India from the perspective of

¹⁷ Ram Jawaya v State of Punjab AIR 1955 SC 519

¹⁸ R.C Cooper v Union of India AIR 1970 SC 564

¹⁹ R.K Jain v Union of India 1993 SCR (3) 802

legality and validity of retired judge of High Court as President. **Article 71(1)** specifies, “disputes as to election of the President and Vice President, Hon’ble Supreme Court would look into the matter and its decision is final”. The interpretation of Article 77(1) also came up in the case **Common Causes (A Registered Society) v Union of India**²⁰ where it was held that, “Article 361 of Constitution would not extent to orders passed by President under Article 77(1) and 77(2)”. In **Kehar Singh v Union of India**²¹, it was observed that a review petition for mercy and forgiveness cannot be construed to be transgression of the **Judicial Power** of the President in that essence and spirit of the Constitution. The case **Kartar Singh v State of Punjab**²², delved into the “issue of grounds of decision making including that of production of documents on the basis of which Council of Ministers have advised the President”

Governor’s Constitutional Role

Article 156 states, “The Governor shall hold office during the pleasure of the President”. Applying “Doctrine of Pith and substance” for construing the meaning of the power under the Article 74(2) becomes vital. ‘Doctrine of Pleasure’ assumes that powers have to be exercise reasonably and should be based on public good and not on ‘whims and fancies’ and not in capricious manner. So, it discourages unfettered power in the nature of absolute nature; In India, it works on the broader principles of ‘Rule of Law’ and the essential philosophy of ‘fundamentals of Constitutionality’.

In **BP Singhal v Union of India**²³, all constitutional functionaries cannot be removed except by impeachment or by process laid down in the Constitution. The judgment was vital as the subject matter of application of ‘Doctrine of Pleasure’ was analysed on the basis of restrictions subject to ‘fundamentals of Constitutionalism’ with regard to ‘Rule of Law’. The instant case had also delved into the quintessential aspect of appointment and grounds for removal of the Governor in the Constitutional framework. The question of ‘whimsical’, ‘capricious’ and ‘arbitrary’ discretionary power of the Constitutional authority was the moot question when it surfaced before the Court. The Constitutional Apex Court held that such discretional powers associated with ‘Doctrine of Pleasure’ has to be reasonable and to be exercised in the broader “public interest and thereby, primacy of the ‘Rule of Law’ and ‘Constitutionality’ has to be

²⁰ Common Causes (A Registered Society) v Union of India 1999, (2018) 5 SCC 1

²¹ Kehar Singh v Union of India 1988 SCR Supl. (2) 24

²² Kartar Singh v State of Punjab (1994) 3 SCC 569

²³ BP Singhal v Union of India 2010 (5) SCALE 134

provided a higher paramount importance in the parliamentary system of Government". The Court further said that such discretion is not unfettered and has to necessarily read with 'fundamentals of Constitutionalism' which warrants a conjoint reading of the Article 156(1), Article 156(3) along with Article 310 and Article 311 of Constitution of India.

Another dimension of the responsibility of Governor includes the 'Ordinance' making power as embodied in the Article 213 of Constitution of India. Reliance is placed on this pertinent aspect in the case **D.C Wadhwa v State of Bihar**²⁴, where the "re-promulgation of Ordinances was the core of contention"; whereby, "repeated promulgation of ordinances was the subject matter which was delved into by Court". It was observed that promulgation of Ordinances is emergent power which had to be exercised with due caution and when the legislature is not in session, as for that matter in the recesses of the State Legislative Assembly if the situation so demands as to the emergent and pressing needs for which it cannot wait till the legislature reassembles and the Hon'ble Court further observed *that it necessarily should have a limited life*, as such the promulgated ordinances lapses on the expiry of 6 weeks from the date of assembly session. The vital lessons learnt included that of the process of repromulgation cannot by-pass the legislative process and if the legislature in a particular session is for lesser duration, whereby in situations the repromulgation has to be seen in a different light. It is a vital observation as it is more or less a settled law that "constitutional authority cannot do indirectly what it is not supposed to do directly". The Court in the instant case, "struck down the Bihar Intermediate Education Council Ordinance 1985 as unconstitutional and void". In **Krishna Kumar Singh v State of Bihar**²⁵, the Hon'ble Supreme Court with its seven-judge bench held two observations. Firstly, the 'validity of promulgation and re-promulgation' as 'unconstitutional', if not warranted on emergent grounds/circumstances and 'not qualifying the test of good spirit of law and order'. Secondly, the Article 213 and Article 123 are subject matter which can be called to question by 'Judicial scrutiny'.

Conclusion

In light of the various facets of arguments when it comes to discretionary powers of Governor include that of validity of ordinance making power of Governor has to be seen in congruent and synergetic fashion as it is subject to 'Judicial Scrutiny'. In this context, in the broader

²⁴ D.C Wadhwa v State of Bihar (1987) 1 SCC 378

²⁵ Krishna Kumar Singh v State of Bihar 2017 (2) SCJ 136

parlance of the application of Article 213 by Governor and Article 123 by President of India, has surfaced in catena of cases including that of **Satya Pal Dang v State of Punjab**²⁶ and in **Gyanender Kumar v Union of India**²⁷. In the latter aforesaid case, it was observed that, “it is for the petitioner to make out a prima facie case while narrating the circumstances necessitating issuance of ordinances before the Government could be called upon to disclose the facts and such casual interpretation would not shift the burden of proof to executives to establish the circumstances which warranted the promulgation of ordinances in first instance...” In **Rameshwar Prasad v Union of India**²⁸, it was the interpretation of the expression ‘required’ in Article 163(1) of Constitution of India which was deliberated upon, calling into question the discretionary powers of Governor which has to be compelling necessity to examine the validity of actions of the Governor. In **K.A. Mathialagan v Governor of Tamil Nadu**²⁹, the Hon’ble Supreme Court looked at Article 163(1), Article 163(2) when read with Article 164(1) where certain acts of the Governor has to be in the ambit of discretionary parlance has to be limited based on ‘*Convention*’ with no exception when it comes to appointment of Chief Minister; while advice of the Ministers is guided by norms of relative conventions.

In **Moti Ram v N.E. Frontier Railways**³⁰, where the Hon’ble Supreme Court delved into the applicability of ‘*durante bene placito*’, latin maxim meaning “during the pleasure of President”, it was held that, “if is controlled by Provisions of Article 311 then it is to be construed as *fair and reasonable construction*”. In **Samsher Singh v State of Punjab**³¹, the seven-judge bench of the Apex Court held that, “Governor acts in conformance as per Constitutional provisions laid down with the aid and advice of Council of Ministers; however, discretionary power of the Governor may be warranted for upholding the democratic principles which may not be amenable to the advices rendered at times”. Another vital aspect which has a profound effect in the Constitutional jurisprudence as seen in the case **Anil Kumar Jha v Union of India**³², is the “exercise of power under the proviso of Article 164(1)” where the Governor appointed leader of the party who did not command majority support of

²⁶ Satya Pal Dang v State of Punjab AIR 1969 SC 903

²⁷ Gyanender Kumar v Union of India AIR 1997 Del 58

²⁸ Rameshwar Prasad v Union of India AIR 2006 SC 980

²⁹ K.A. Mathialagan v Governor of Tamil Nadu AIR 1973 Madras 198

³⁰ Moti Ram v N.E. Frontier Railways, AIR 1964 SC 600

³¹ Samsher Singh v State of Punjab (1974) 2 SCC 831

³² Anil Kumar Jha v Union of India (2005) 3 SCC 150

legislators. The Hon'ble Supreme Court held it to be construed from the prism of contravention as to arbitrary nature by Court pronouncing to hold the floor test which subsequently was directed for fairness of floor test on immediacy and urgent grounds. As seen in the light of the above deliberations, ***Nabam Rebia v Deputy Speaker***³³, enunciated the limitation when it comes to Governor's discretion with regards to Article 163.



³³ Nabam Rebia v Deputy Speaker, 2016 SCC OnLine SC 694