Can a Legislative Assembly Function Without an Executive Government Under the Indian Constitution?*

Elections to the Indian state of Bihar in early 2005 threw up a hung Legislative Assembly. Of the total 243 seats, the National Democratic Alliance (NDA), a pre-poll alliance, secured 92 seats while the incumbent government and its coalition partners secured 85 seats.[1] The remaining seats were divided amongst other smaller parties and independent candidates with some securing as many as 30 seats and others as few as 2.[2] Given the fractured verdict, majority support for any party (or coalition of parties) proved illusive. And with no party in a position to form the government, Governor Buta Singh sent a report to the President recommending that the Legislative Assembly be kept under suspended animation.[3] Accordingly, President's rule was imposed in Bihar whereby all executive and legislative powers of the Bihar Assembly stood transferred to the Union of India and the Parliament respectively.[4]

The imposition of President's rule triggered a spate of political activities in the state: several smaller parties and independent legislators reconsidered their position and pledged support to the NDA.[5] Two months after President's rule had been imposed; realignment of political forces made the formation of a NDA led coalition government a real possibility.

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[1] The NDA principally composed of the Bharatiya Janata Party (BJP) and Janata Dal – United (JD). The incumbent government and its coalition partners included the Rashtriya Janata Dal (RJD) and the Indian National Congress (I).

[2] For a detailed list of party positions, see Bihar State Assembly Election Results, 2005 available at http://www.indian-elections.com/assembly-elections/bihar/result-constituencies.html

[3] In India's federal system, the Governor is the executive head of the state though with limited discretionary powers. However, under Article 356(1), the Governor is authorized to send a report to the President asserting that the constitutional machinery in the State has failed. For the text of the letter, see *Rameshwar Prasad and others* v *Union of India* AIR 2006 SC 980 para 5. [hereinafter *Rameshwar Prasad*]

[4] Under Article 356(1), if the President is satisfied that the Government of a State cannot be carried on in accordance with the provision of the Constitution, he may by a Proclamation assume all or some of the powers of the State Executive and the Legislative Assembly. Such assumed power, though expressed in the name of the President, is usually exercised by the Union Council of Ministers in India's parliamentary system.

[5] See Purnima Tripathy, *A role for the Governor* Vol. 22 (10), May 2005 available at *http://www.hinduonnet.com/fline/fl2210/stories/20050520002903500.htm.*

But the Governor, for his part, had different ideas. In his second letter to the President in April 2005, based on "newspapers and other intelligence reports," Buta Singh alleged the free flow of "money, caste, posts etc." to allure legislators into the government – a process he thought made a "mockery of [Indian] democracy."[6] Finally, with a NDA government certain, the Governor sent his final report to the President recommending that the Legislative Assembly be permanently dissolved and fresh elections notified.[7] The Union of India accepted the recommendations of the Governor and advised the President to order the dissolution of the Assembly.[8]

Rameshwar Prasad challenged the constitutionality of the dissolution of a duly elected Legislative Assembly.[9] In particular, the petitioners questioned the permissibility of dissolving an Assembly that had not yet come into existence. An Assembly that had no occasion to meet had no existence and that which did not exist could not be dissolved, the petitioners argued.[10] Sabharwal C. J., writing for a five judges' bench of the Supreme Court, rejected the argument: for him, the Indian Constitution did not envisage a "live Assembly" without a functioning Executive.[11] In this comment, I argue that the reasoning for rejecting the petitioners' argument was made plausible by a method of qualified silence. Three forms of qualified silence, I argue, enabled the C. J. to introduce a hierarchy that made a Legislative Assembly dependent on the Executive. In a parliamentary democracy, where the

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[6] The allegation was especially ironic given Singh's own track record. Buta Singh was charged and convicted by a Special Court in 2000 for bribing MPs to vote against a no – confidence motion tabled against the Government of which he was a part of. The conviction was, later, overturned.

[7] For a less – than – successful effort to rationalize the blatantly partisan behavior of the Governor see V. Venkatesan, *The dissolution of the law* Vol. 22 (12) June 2005 available at *http://www.hinduonnet.com/fline/fl2212/stories/20050617004601900.htm*. For the text of the letter see *Rameshwar Prasad* n. 3 above para 11.

[8] In an incisive op – ed article, former Law Minister Arun Jaitely denounced the decision to dissolve the Assembly as a "constitutional monstrosity." See Arun Jaitley, *Read Your Constitution, Dr. Singh* 27 May, 2005 Indian Express. The Supreme Court by a majority decision eventually struck down the Proclamation while seriously questioning the integrity of the Governor. Eventually, Buta Singh resigned as the Governor of Bihar.

[9] AIR 2006 SC 980.

[10] *Ibid*. para 22

[11] *Ibid*. para 38

Executive is but a small representative of the members composing the Legislature, the relationship must be otherwise.[12]

"Due Constitution:" Finding the Governor in the Election Commission

The Bihar Legislative Assembly was dissolved even prior to its first meeting. The petitioners argued that a Legislative Assembly under the Indian Constitution did not "exist" prior to its first meeting and, therefore, that which had no existence could not be dissolved.[13] Two sets of related provisions are relevant for determining an Assembly's existence. On one hand, there are constitutional provisions describing the Governor's powers and functions concerning the formation of a Legislative Assembly and the appointment of the Council of Ministers. Let me lay out the provisions relevant for our purposes:

Article 164: (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor.
Article 172: Every Legislative Assembly of every State, unless sooner dissolved, shall continue for five years from the date appointed for its first meeting and no longer and the expiration of the said period of five years shall operate as a dissolution of the Assembly.
Article 174: (1) The Governor shall from time to time summon the House or each House of the Legislature of the State to meet at such time and place as he thinks fit, but six months shall not intervene between its last sitting in one session and the date appointed for its first sitting in the next session. (2) The Governor may from time to time — (*a*) prorogue the House or either House; (*b*) dissolve the Legislative Assembly.
Article 176: **(**1) At the commencement of the first session after each general election to the Legislative Assembly and at the commencement of the first session of each year, the Governor shall address the Legislative Assembly or, in the case of a State having a Legislative Council, both Houses assembled together and inform the Legislature of the causes of its summons.

On the other hand, there are constitutional and statutory provisions relating to the powers and functions of the Election Commission regarding the constitution of a Legislative Assembly. Let me lay out the provisions relevant for our purposes.

[12] This comment is only limited to the question concerning the coming into being of Legislative Assemblies. *Rameshwar Prasad*, however, dealt with many other issues including the constitutionality of the Governor's advice and the scope of judicial review.
[13] n. 9 above para 22

Article 327: … Parliament may from time to time by law make provision with respect to all matters relating to … either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.
§ 73 Representation of People's Act, 1951 (RPA): Where a general election is held for the purposes of constituting a … new State Legislative Assembly, there shall be notified in the Official Gazette … the results of the elections in all the constituencies … and upon the issue of such notification that … Assembly shall be deemed to be duly constituted.

Reading the general powers of the Election Commission along with § 73 RPA, Sabharwal C. J. concluded that the "due constitution" of the Assembly for the purposes of the Election Commission also constituted "due constitution" for the purposes of the Governor.[14] In other words, when the Election Commission notifies that a Legislative Assembly has been "duly constituted," it implies that the Assembly has come into "being." Why? For Sabharwal C. J. it is so because "no provision, constitutional or statutory, stipulates that the 'due constitution' is only for the purposes of Articles 324, 327 and 329 and not for the purposes of enabling the Governor" to dissolve the Assembly.[15] Presumably, the C.J. posed the following question: was there any provision stipulating that the phrase "due constitution" appearing in Article 327 was limited for the purposes of the Election Commission? Admittedly, there is no such provision. But the premise on which Sabharwal C. J. built his conclusion, I would argue, is itself an *assumption*. He assumed that the absence of any provision limiting the relevance of "due constitution" to the powers of the Election Commission was in itself a *reason* to conclude to the contrary. To put it differently, Sabharwal C. J. could have just as validly asked: is there any provision – constitutional or statutory – that required a common attribution of "due constitution" to the Election Commission and the Governor? Again, admittedly, there is no such provision. In this version, the absence of any provision enjoining a common attribution of "due constitution" to the EC and the Governor may have counted as a reason against any such interpretation. It is important to note that there is no obvious reason for preferring the former question over the latter. Nor did he give any reasons for doing so. And to the extent Sabharwal C. J. did prefer one question over the other, his method of interpretation was nothing more than what

[14] *Ibid*. para 35.

[15] *Ibid.*

may be regarded as a form of qualified silence – the willingness to overlook (whether deliberately or otherwise) an equally plausible alternative.

Let us now consider the substance of "due constitution." What does it mean? For Sabharwal C. J., to say that an Assembly has been "duly constituted" is to say that it has come into being. Contrary to this, can the phrase "duly constituted" represent other possibilities? In the provision where it appears, "duly constituted" may mean (a) that the election process has been successfully completed and (b) that we now formally know the members representing the various constituencies, i.e. we know the *composition* of the newly elected Assembly. If anything, the title of § 73 RPA – *Publications of results of general elections to the … State Legislative Assemblies* – affirms the possibilities I have just sketched out. The emphasis on the "publication of electoral results" suggests that the provision is more about closure and composition than anything else. But from (a) and (b), it does not necessarily follow that the Assembly has come into "being." We now have two alternatives for understanding "due constitution:" either that the Assembly has come into being or that it notifies the successful completion of the electoral process. Let us consider the consequences of these alternative possibilities by reading in the powers and functions of the Governor.

Under Article 172, the Constitution limits the tenure of an Assembly to a maximum of five years *from the date of its first meeting* unless sooner dissolved. An Assembly is as good as its tenure and one possible reading of Article 172 would suggest that the Assembly comes into being no earlier than its first meeting. Given that the term of an Assembly must be computed from the day of its first meeting, what is the consequence of interpreting "due constitution" in § 73 RPA as bringing an Assembly into being as Sabharwal C. J. did? Such an interpretation introduces a wedge between the "constitution" of the Assembly and the computation of its duration, i.e. it raises the possibility of an Assembly being in existence longer than five years. Sabharwal C. J. acknowledged this possibility: "In so far as the argument based on Article 172 is concerned, it seems clear that the due constitution of the Legislative Assembly is different than its duration which is five years - to be computed from the date appointed for its first meeting and no longer."[16] While Sabharwal C.J. may have

[16] *Ibid.*

acknowledged the wedge, he did not, I would argue, acknowledge the possible absurd consequences of the same. Given that the Governor does not have an obligation to convene the Assembly, what about a situation where the Governor neither convenes the Assembly nor dissolves it? Bear in mind that the Constitution does not prescribe a time frame for convening the first meeting of the Assembly. And in such circumstances it would be possible to have a "duly constituted" Assembly continue in office for 10 years or longer without ever meeting to transact legislative business. This may occur despite the explicit limitation of the tenure of any Assembly to no longer than five years. Elsewhere in his judgment Sabharwal C.J. said: "The interpretation which may lead to a situation of constitutional breakdown deserves to be avoided."[17] There is good reason to apply the standard to the very interpretation he proposes in his judgment.

Consequences For "Duly Constituted:" The Executive in a Parliamentary System

Let us once again consider the concept of a "duly constituted" Assembly Sabharwal C. J. proposed. What powers does this "duly constituted" Assembly have? It has *none.* What authority may it exercise? There is *none* that it can exercise. Under Article 188, "every member of the Legislative Assembly … shall, before taking his seat, make and subscribe before the Governor, … an oath or affirmation according to the form set out ... " In other words, no person notified as an elected representative is authorized to function as such before he makes an affirmation to uphold and protect the Constitution. Until they do so, members have no authority to act in the capacity of legislators including performing their most important function – enacting legislations. But such oath taking or affirmation only occurs during the first meeting of the Assembly. The "duly constituted" Assembly, it now turns out, has no "due authority:" it has no powers to function as an Assembly. What does it mean to say that an Assembly without authority to perform *any* of its constitutional functions is still an Assembly? Like a still – born child, Sabharwal's Assembly is as good as *dead*. In making this argument, I have admittedly adopted a functionalist conception of an Assembly – an Assembly is as good as the functions it is eligible to perform and that which

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[17] *Ibid.* para 38.

cannot perform any of its functions is not an Assembly. The C. J. may have had reasons against adopting such a functionalist conception. But if he did, he needed to say much more than he did in his judgment.

Thus far I have argued that the distinction between the "due constitution" of an Assembly and the computation of its tenure made no (i.e. little) sense. And secondly, I have argued that "duly constituted" in § 73 RPA could more appropriately be read as implying a successful closure of the electoral process and the declaration of the composition of the newly elected Assembly. How does this reading of the provisions affect the powers of the Governor in the aftermath of an election? After the election results have been notified, according to this reading, the Governor must work to actualize two processes. On one hand, the Governor *must* convene the Assembly to bring it into existence and on the other hand explore the possibility of appointing a stable government. If the convening of the first meeting coincides with a political party staking claim to form the Government as it usually will, the Governor only needs to follow the conventional procedure. Now consider a (highly unlikely) situation where no party stakes a claim to form the government after the election results have been notified. The duty to convene a notified Assembly I would argue is mandatory and *independent* of the willingness of any political party to form the Executive Government. What makes the duty mandatory? Consider, once again, the text of Article 176 (1): "At the commencement of the first session after each general election to the Legislative Assembly … the Governor *shall* address the Legislative Assembly." (Emphasis added) If the Governor must address the first session of the Assembly after *each* general election, then it necessarily assumes that there would at least one session of the Assembly. Given the mandatory character of the language in Article 176, one possible reading of the text would suggest that the Constitution assumes that a newly elected Assembly would meet at least once before it may be dissolved.

Contrary to the argument sketched out here, Sabharwal C. J. considered the highly unlikely scenario (of no party staking a claim to form the government) as a reason to reject the petitioner's argument about the mandatory convening of the Assembly to bring it into existence. He said: "The acceptance of the contention of the petitioners can also lead to a breakdown of the Constitution. In a given case, none may come forth to stake a claim to

form the Government for want of requisite strength …"[18] He added: "If petitioners' contention is accepted, in such an eventuality, the Governor will neither be able to appoint Executive Government nor would he be able to exercise power of dissolution. The Constitution does not postulate a live Assembly without the Executive Government … The interpretation which may lead to a situation of constitutional breakdown deserves to be avoided."[19]

Two observations may be made in response. First, it is about the use of qualified silence. Sabharwal C. J. appealed to the possibility of a "constitutional breakdown" for rejecting the petitioners' emphasis on the mandatory language of the provisions in Articles 172, 174 and 176. Earlier I had argued that the very argument proposed by the C.J. in explaining the meaning of "due constitution" was capable of producing absurd consequences. In other words, he was willing to take into consideration some absurd consequences but not others. This, then, is another form of qualified silence – the willingness to selectively consider consequentialist arguments. Secondly, part of the assertions quoted earlier, I would argue, is erroneous or at least based on erroneous premises. In concluding that the Constitution does not postulate a "live Assembly without an Executive Government," Sabharwal C. J. introduces an implied hierarchy in the Constitution: it is a functioning Executive Government that legitimizes (or validates) the Legislative Assembly. That is to say, Articles 172, 174 and 176 may be made operational only after Article 164 (dealing with the appointment of a Chief Minister) has been put to effect. What validates this implied hierarchy? Is there anything in the Constitution that makes the efficacy of Articles 172, 174 and 176 dependent on Article 164? If anything, in a representative democracy, it is the elected members of the Assembly that validate the Executive. It is the membership of and the responsibility to the Assembly that legitimizes the offices of a Council of Ministers.[20] "The Cabinet," as Walter Bagehot rightly pointed out, "is a board of control chosen by the legislature, out of persons whom it trusts and

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[18] *Ibid*. para 37

[19] *Ibid*.

[20] See Walter Bagehot, *The English Constitution* (Sussex Academic Press, 1997) pp. 9 – 12.

knows, to rule the nation … Its characteristics is that it should be chosen by the legislature out of persons agreeable to and trusted by the legislature."[21] The trust is often based on numbers: the person who commands the support of the majority in the Assembly proceeds to form the Cabinet. For our purposes, it is worth noting the sequence of origin: the Cabinet evolves from the Assembly and not the other way round. Sir Jennings was skeptical about the possibility of Parliament controlling the Government.[22] But even he did not deny the correctness of this origin. The Cabinet, he said, "existed because it could command a majority in the House of Commons."[23] And in this sense, Sabharwal C. J. was wrong to make the Assembly's existence depend on a functioning Cabinet.

What about the Cabinet's power to dissolve an Assembly? Does it make the Cabinet, conceptually speaking, superior to the Assembly? Once again, Bagehot was not unaware of the point. For him, though the Cabinet "is a committee of the legislative assembly, it is a committee with a power which no assembly would … have been persuaded to entrust to any committee. It is a committee which can dissolve the assembly which appointed it."[24] It is a creature that has the power of destroying its creators.[25] In its relation to the Legislature, the Executive is like the human that made the computer but cannot match its operational miracles. Therefore, to make the existence of the Assembly dependent on the presence of a Council of Ministers is to put the cart before the horse. It is the responsibility of the Assembly to work out a functional Executive and, in this sense, the assertion – "Constitution does not postulate a live Assembly without the Executive Government"[26] – I would argue, suggests a rather convoluted understanding of parliamentary democracy.

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[21] *Ibid* p. 9.

[22] Sir Ivor Jennings, *The Law and the Constitution* (5th ed., University of London Press, 1959) pp. 180 – 181. ("It is commonly asserted that the Cabinet system enables Parliament to control the Government. That may be true of France … It is not true in the United Kingdom. The Cabinet … formulates the policy, and Parliament must either accept the policy or risk a dissolution.")

[23] *Ibid.*

[24] n. 20 above, p. 10

[25] *Ibid.*

[26] n. 9 above, para 37.

High Courts in Contrast: The Fight Over "Due Constitution"

In rejecting the petitioners' arguments, Sabharwal C. J. also had an opportunity to consider two High Court decisions. I shall briefly lay out the two decisions while highlighting the method of silence that constructed the C. J.'s choice between two contradictory decisions. In *K. K. Aboo* v *Union of India and others*,[27] under very similar facts, the President having assumed the powers of the State Assembly and the Executive proceeded to dissolve the newly elected Assembly before it had an opportunity to meet.[28] In doing so, the President was working according to the powers conferred to him under Articles 356. In other words, the petitioners questioned the scope of the powers conferred to the *President* under Article 356 and argued that the power of dissolution of the State Legislature was not included in the same. The Judge rejected the argument and held:

> Article 356 (1) (b) empowers the President, whenever he is satisfied of a constitutional breakdown in the State, to issue a Proclamation declaring, inter alia, "that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament." *That necessarily implies a power to dissolve the State Legislature.* No resort therefore need be had by the President to the provisions of Article 356 (1) (a) read with Article 172 or Article 174 to dissolve the State Legislative Assembly. The power to dissolve the State Legislature is implicit in Clause (1) (b) of Article 356 itself.[29]

As is clear from the brief reference, *K. K. Aboo* dealt with the President's power to dissolve a State Legislature by a Proclamation under Article 356. And it was in that context that the Judge rejected the argument about the necessity of convening the Assembly at least once. Subsequently, in *Udai Narain Sinha* v *State of U. P.*,[30] a Division bench of the Allahabad High Court also considered the question of an Assembly's existence. The Eighth Legislative Assembly was due to expire in June 1985. Elections for the Ninth Legislative Assembly were completed in March 1985 and a notification under § 73 RPA was issued. After such notification, the Governor purported to "dissolve the Uttar Pradesh Legislative

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[27] AIR 1965 Ker 229.

[28] *Ibid*. para 1 – 3.

[29] *Ibid*. para 9 (emphasis added)

[30] AIR 1987 All 203.

Assembly with effect from 10th March 1985."[31] Given that the Governor's notice only mentioned "Uttar Pradesh Legislative Assembly," the petitioner argued that the Governor had in fact and in law dissolved the Ninth Assembly that had recently been notified. Rejecting this plea, the Court held the notification under § 73 RPA merely "created a legal fiction."[32] And because the "Constitution [did] not prohibit an interregnum between the dissolution of an existing … Legislative Assembl[y] and the coming into existence of a new Assembly … the purpose of the fiction appears to be to minimize the period of the non-functioning of the normal democratic process."[33] Dhaon J. added: "In the absence of the appointment of a date for the first meeting of the Ninth Assembly in accordance with Article 172(1) its life did not commence for the purposes of that Article even though it may have been constituted by virtue of the notification under Section 73 of the Act."[34] In so concluding, he did consider the observations of the Kerala Court in *K. K. Aboo.* Explaining the context in which the comments were made, Dhaon J. correctly pointed out that the observations were *obiter dicta*: the Judge was only called upon to decide the matter relating to the President's power under Article 356.[35]

As the two High Court decisions suggest, contradictory comments were made about the existence of Legislative Assemblies but in different contexts. In the former, the judge made some casual remarks while in the latter a Division bench fully explicated their reasoning for holding otherwise. From the available buffet of options, Sabharwal C. J., not surprisingly, chose the former. He explained the rationale for his choice thus: "In *K. K. Aboo,* a learned Single Judge of the High Court *rightly came to the conclusion* that neither Article 172 nor Article 174 prescribe that dissolution of a State Legislature can only be after commencement of its term or after the date fixed for its first meeting."[36] About the decision

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[31] *Ibid*. para 6.

[32] *Ibid*. para 9.

[33] *Ibid*. para 10.

[34] *Ibid.*

[35] *Ibid*. para 11.

[36] n. 9 above, para 36. (emphasis added)

of the Allahabad High Court, he said: "It was held by the Division bench that § 73 RPA only created a legal fiction for a limited purpose … *We are unable to read any such limitation.*"[37] The method is ingenious: he accepted the Kerala decision because it "rightly came to the conclusion" and rejected the Allahabad decision because he was "unable to read any such limitation." Notice that except for expressing his *opinion,* Sabharwal C. J. said nothing to explain his choice.[38] How had the Kerala Court "rightly come to the conclusion"? Why could he not read any such limitation like the Allahabad Court? Sabharwal C. J. gave no reasons: he merely *said* one was right and the other wasn't.[39] This, then, may be understood as the third form of qualified silence: using authority as a substitute for reason. As the Chief Justice of the Supreme Court, Y. K. Sabharwal had the authority to accept or reject any decisions of the sub – ordinate courts including the High Courts. And in approving *Aboo* over *Udai Singh,* he spoke through his authority rather than through reasons.

Conclusion

When does a Legislative Assembly come into being? Does it come into being when the Election Commission notifies its "due constitution"? Or does it come into existence when it meets for the first time? There is, to make a trite observation, no obvious answer. When confronted with it, Sabharwal C. J. did propose, what was for him, the right answer. His right answer, however, had enormous limitations: it led to absurd consequences, rested on arbitrary assumptions and depended on bare opinions. His method in constructing the rightness of his answer was both interesting and ingenious: he spoke as much through silence as he did through speech. And in so doing, Sabharwal C. J. introduced an implicit

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[37] n. 9 above, para 38. (emphasis added)

[38] Some explanation was, I would argue, essential given that the Allahabad Court had considered the Kerala decision and given reasons for rejecting it.

[39] The *Aboo* decision held been approved in another recent decision of the Supreme Court but in a *very* different context. See *Special Reference No. 1 of 2002*, AIR 2003 SC 87. Pasayat J., in another context, cited with approval this following paragraph from the *Aboo* case. "A Legislature can be summoned to meet only if it is in existence at the time. A dissolved Legislature is incapable of being summoned to meet under Article 174 of the Constitution. The question therefore is not whether the Legislature should or could have been summoned to meet, but whether its dissolution ordered by the President, is constitutionally valid." Sabharwal C. J. also made use of this observation by noting that the *Aboo* judgment had been upheld the Supreme Court on previous occasions too.

hierarchy that makes the existence of a Legislative Assembly dependent on a functioning Executive. *Rameshwar Prasad*, once again, shows why silence often illumines speech and why an understanding of silence, in many ways, must precede the understanding of speech.[40] Without a critical understanding of what the Supreme Court does not say (in the sense that it assumes, disregards or denies it), it may be difficult, if not impossible, for one to interpret what it *does* say.

[40] For a similar example see Shubhankar Dam, *Unburdening the Constitution: What Has the Indian Constitution Got to do with Private Universities, Modernity and Nation – States?* 48(1) Singapore Journal of Legal Studies 109 – 148 (2006).