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THE GENERAL EXECUTIVE POWER OF THE UNION OF INDIA AND THE COMMONWEALTH OF AUSTRALIA: A COMPARATIVE ANALYSIS

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Abstract The substantive content and ambit of the *general* executive power of "the Union" of India and of "the Commonwealth" of Australia, provided for in Article 53 and Section 61 respectively of their constitutions, is a most significant issue confronting constitutional law in both India and Australia. Reference is made to "general" executive power to distinguish it from those *specific* grants of power constitutionally vested respectively in the President and Governor-General. The relevant jurisprudence of the courts in both jurisdictions will be examined on a comparative basis in order to draw conclusions as to the respective merits of both. It will be seen that this issue touches upon fundamental questions relating to the constitutional regulation and limitation of executive power, the regulation of the relationship between the executive and parliament, and fundamental issues of civil liberty. Such a comparative approach may provide lessons for both jurisdictions, by way of emulation or avoidance, for the future direction of constitutional jurisprudence on this question.

I. INTRODUCTION

The substantive content and ambit of the *general* executive power of 'the Union' of India and of 'the Commonwealth' of Australia, provided for in Article 53 and Section 61 respectively of their constitutions, is perhaps the most significant issue confronting constitutional law in both India and Australia. Reference is made to 'general' executive power to distinguish it

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from those *specific* grants of power constitutionally vested in the President, or Governor-General, respectively. There is little textual guidance in these provisions to provide definitional clarity beyond the identification of the repositories of the power, that is, the President in India and the Queen in Australia – although the executive power of the Commonwealth is made 'exercisable' by the Governor-General as the Queen's representative. Section 61 goes somewhat further than Article 53 to state that the power "extends to the execution and maintenance" of the Constitution and the laws of the Commonwealth. The Indian Constitution, however, makes far greater provision for specific grants of power, and thus provides greater clarity not only to the substantive content of the power of the President and the executive government, but also to the limits and prohibitions on such power. In Australia, greater reliance must be placed on the implications drawn from the principle of responsible government, and on the nature of the sources of executive power for which the Constitution provides – some of these also being implications – to define executive power, its relationship with legislative power, the prohibitions and limitations on the power, and the extent of any prerogative and discretionary powers.

The comparative analysis attempted herein will focus on the different approaches adopted in the respective jurisdictions to determine the content and ambit of the *general* executive power, and to the relevant interpretational methodology dominant in each. It will thus seek to highlight for comparative purposes the differences that emerge between India, which is, broadly speaking, a Westminster-style jurisdiction that is also a republic, and Australia, which remains a constitutional monarchy that has inherited the common law powers of the Crown. In so doing, the article aspires to provide an introduction to the present state of constitutional law in Australia, particularly as shaped by recent landmark decisions, with respect to executive power. These developments, it will be seen, have aligned Australian issues (and solutions) with those faced in India. Lessons may be able to be drawn by way of emulation and avoidance.

The differences between the interpretational approaches in the respective jurisdictions are telling to a substantial degree upon the definition of the content of executive power, as well as upon the regulation of the relationship between the executive and the legislative branches. The latter touches upon such fundamental issues as the maintenance of legislative control over executive power, the prevention of the growth of pockets of executive immunity from legislative control, the self-definition by the executive of its own power, and, indeed, the undue aggrandizement by the executive of its own power. In this regard, the warning of Sir Owen Dixon in the *Communist Party* case is apposite:

> "History, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the

> executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected."[1]

At issue in that case was the validity of Commonwealth legislation that purported to outlaw the Communist Party of Australia and to impose certain civil disabilities on its members and affiliates on the basis that they posed a serious threat to national security. The Governor-General was authorised to make certain declarations with respect to organisations and persons that were relevant to the application of the legislation to them. The legislation was held to be invalid by Dixon J, and the majority of the High Court, because it could not be authorised by the defence power [Section 51(vi)], or any other legislative head of power provided for by the Constitution to the Commonwealth Parliament, at least in times of peace. The precise point of Dixon J's statement was not so much that democratic institutions need to be protected, generally speaking. It was rather that they need to be protected *from themselves*, especially from the exercise of executive power – "from dangers likely to arise from within the institutions to be protected", as historical experience has amply taught.[2] He noted that the executive power for which Section 61 provides may itself be abused to undermine the very polity of which it is an integral part.

Accordingly, he was the sole judge who held that there was implied in the Constitution a source of Commonwealth legislative power, beyond one defined by the executive power in Section 61, and any incidental legislative power in Section 51 (xxxix), to protect the polity, and to protect the system of representative and responsible government for which the Constitution provides. Moreover, only Parliament will undoubtedly be able to control and regulate executive action through its legislative power, as parliamentary supremacy over the executive is a fundamental tenet of responsible government in a Westminster-type system. Thus, the issue of the definition of the nature and ambit of the general executive power is fundamental to any understanding of the power of the executive government. It is also relevant to the regulation of its relationship with the legislature, whilst maintaining those protections against executive overreach and abuse of power.

II. A FUNDAMENTAL DIFFERENCE IN APPROACH

At its most succinct, the difference between the respective interpretational methods of India and Australia relating to the general executive power respectively in Article 53 and Section 61 can be stated thus: in India, generally speaking, an open 'residual' approach is adopted; that is, the content of the power is determinable by reference to the *residue* of power or functions,

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1 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187 ('*Communist Party*') (Dixon J).

2 *Ibid* 175.

beyond those which can be classified as "legislative" or "judicial". In contrast, in Australia, a limited 'regulated' approach is adopted, by which the substantive content of general executive power is determinable by reference to the Constitution and such legal sources as are provided for or otherwise incorporated therein, whether expressly or impliedly. These include those implications which may be drawn from responsible government, itself implied in the Constitution,[3] and from the fact that the Commonwealth is "a government of the Queen."[4] The imperative of the regulated approach is to seek positive definition strictly by reference to positive legal sources.

The difference in approach does have consequences, at least *prima facie*, with respect to the ambit of executive power, the extent to which it can be defined, and indeed, ultimately, the extent to which it is subject to legislation and judicial review. A *regulated* approach would tend to ensure that executive power is defined and regulated precisely by relevant sources of law, both in its substantive content, and in terms of the sphere in which it may operate pursuant to federal concerns. In Australia, these would constitute constitutional and statutory provisions, as well as the common law. Responsible government, being impliedly entrenched in the Australian Constitution, would tend to ensure that executive power cannot be defined in such a way, or be made exercisable in a sphere, that would place it beyond the control of Parliament to ensure parliamentary supremacy over the executive. To the extent that a regulated approach can achieve this, it will have considerable advantages over a residual approach. A *residual* approach, *prima facie*, would allow for the existence of a very wide and uncertain definition of executive power, which is capable of exercise in a very wide sphere, perhaps even overriding federal constraints. Such is the consequence of permitting a power to be defined purely residually, that is, simply by reference to that which is not 'legislative' or 'judicial'. Without a more precisely defined outer limit, this may tend to allow for a slow aggrandizement of the power – indeed even into a sphere beyond legislative (democratic) control – and for possible self-definition of its own power by the government itself, especially in extraordinary or emergency situations. There being no clear definition of the ambit of the power, a certain complacency in government may develop with respect to foreseeing circumstances in which it may need to exercise such power, and thus also to seek prior statutory (or constitutional) definition of the power to avoid uncertainty at the time it may need to be exercised. Indeed, it may actively avoid such statutory (or

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[3] *See Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146; *R v Kirby; Ex p Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 ('*Boilermakers' Society*'); *New South Wales v Commonwealth* (1915) 20 CLR 54, 89 ('*Wheat* case'); *Uebergang v Australian Wheat Board* (1980) 32 ALR 1, 32; Owen Dixon, *Jesting Pilate* (Sydney: Law Book Co 1965) 101; John Quick and Robert R Garran, *The Annotated Constitution of the Australian Commonwealth* (first published 1901, Legal Books 1976) 706, 707.

[4] L Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 Public Law Review 279, 280.

constitutional) definition if it fears that the legislature might adopt a restrictive approach with respect to it. Moreover, in the absence of a clearer definition of ambit which a regulated approach may provide, the process of judicial review of the exercise of the power becomes somewhat vexed under the residual approach. There will be no, or at least fewer, legally-discernible principles to enable a court to determine the constitutional validity of any exercise of power. In particular, if the matter in issue is one of high political moment, this may have the undesirable effect of drawing the court into political controversy. For the question arises as to how, a court can, in the absence of clearly defined legal limitations, second-guess an insistent government pushing for the exercise of extreme powers in extraordinary circumstances. The court will inevitably be drawn into the merits or otherwise of such action on subjective policy grounds, irrespective of how it may decide the particular case before it. Further, the court is not always best suited to determine, on this basis, the merits of a proposed government action, nor to determine the seriousness of any particular crisis or extraordinary circumstances, against which the necessity or appropriateness of any proposed government measures is to be judged. Moreover, if such is the case, and if it were permitted, it might result in permitting pockets of executive immunity from not only legislative control, but also, in substance, if not in form, from judicial review.

While unlikely in a mature democracy, this potential outcome should nevertheless not be discounted. On the other hand, and without discounting the above problems and dangers, a residual approach has the advantage of less rigidity, and greater flexibility, especially when most needed. It may therefore enable a more tailored government response to particular crises without being hindered and limited by rigid legal parameters. But herein lies the potential danger to the democratic polity. It persists not only when such residual power is in the hands of an overzealous executive, or one tempted to an excess of zeal, but also when it is in the hands of an executive which "never let[s] a crisis go to waste" in order simply to bolster its power at the expense of both parliamentary institutions and the courts.

The above differences, it is emphasised, are based purely on a *prima facie* analysis. It may not quite reflect the actual situation that may exist in India or Australia as a consequence of other constitutional and legal factors not mentioned above, that are unique to the constitutional circumstances of each, and that may significantly qualify the points made. For example, it is not always the case that definitional clarity can be achieved in Australia. Moreover, recent developments in the Australian High Court's jurisprudence have tended to compromise this regulated approach further, as will be seen below. There has also been some recent academic work, relevant to Australia, that has developed a new categorisation of some of the executive government's administrative capacities such that, if accepted, some form of limited residual approach may need to be adopted. This would provide parallels with the Indian approach.

Prima facie, the residual approach is less restrictive to executive power than the regulated one, permitting a greater expansiveness to the power – '*prima facie*' because much here will depend on the precise sources of the content of the power under the regulated approach.

This article will thus seek, first, to expand upon these different approaches by reference to the jurisprudence and case law of the respective jurisdictions, and to enhance the comparative benefit by critical evaluation of each. Second, it will examine the (novel) acceptance by a majority of the High Court of Australia of a notion of implied *inherent* executive power in Section 61, derived, generally speaking, from the Commonwealth's status as the government of an independent nation – a 'nationhood' executive power as noted in the landmark case of *Pape* v. *Commissioner of Taxation* ('*Pape*').[5] While it is important to understand this development for the impact it has had on Australian constitutional law, and indeed upon hitherto settled understandings,[6] the principal aim is to provide useful points of comparison with the position in India. Given that there is no exhaustive definition of this 'nationhood' power, and that recourse must be had to policy and otherwise subjective criteria in the determination of its content, this development gives rise to a number of issues.

Firstly, the question is to what extent it challenges the dominant regulated approach in Australia, and brings the Australian position more in line with the residual Indian approach. To the extent that it does, the above-mentioned comparative advantages with the regulated approach may be diluted – especially as these relate to the greater accountability to which the government is subject by virtue of parliamentary control of executive action and judicial review. Thus, secondly, as the power is sought to be derived from a positive legal source – 'nationhood' – it is pertinent to ask, to what extent it can be said that, in substance, that source is capable of providing legally discernible criteria to enable positive definition; and, if it cannot, instead permitting a broad executive whose limits are vague and uncertain, open to policy and subjective criteria in their determination, the same problems identified above with respect to the 'residual' approach will emerge.

III. BROADER CONSTITUTIONAL CONTEXT

To enhance appreciation of the comparative context, a number of preliminary points must be made. First, both jurisdictions have adopted a Westminster

[5] (2009) 238 CLR 1; confirmed in *Williams v Commonwealth (No 1)* (2012) 248 CLR 156.

[6] *See*, for example, Anne Twomey, 'Pushing the Boundaries of Executive Power – *Pape*, the Prerogative and Nationhood Powers'(2010) 34 Melbourne University Law Review 313; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 Sydney Law Review 253; PA Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments, Interpretational Methodology and Constitutional Symmetry' (2018) 37 University of Queensland Law Journal 191.

model of representative and responsible parliamentary cabinet government adapted to their respective model of federalism. The conventions, derived from the United Kingdom, which regulate the relationship between the formal repository of executive power and the government, and between the executive and the legislature more generally, remain influential in both jurisdictions; although it is noted that India, like Ireland (also a republic), has codified many of these in its Constitution, as has Australia, albeit to a lesser extent.[7] Principal examples include the requirement that the President or Governor-General act on the advice of responsible ministers,[8] who are themselves members of Parliament whose confidence they must maintain; and those discretionary reserve powers exercisable without, or contrary to, advice in those extraordinary circumstances. This is applicable where a ministry refuses to resign following a loss of confidence by the lower house of the legislature; or, where a government is acting illegally, contrary to the Constitution, thus enabling the President or Governor-General to dismiss it.[9] In Australia, it has been suggested that such core principles of responsible government have attained the status of binding legal principle, and are thus enforceable by the courts.[10]

A fundamental qualitative difference between the respective constitutions makes comparative analysis difficult – there is far greater prescription of executive power in the Indian Constitution, especially the powers exercisable by the President, when compared to those of the Governor-General.[11] In India, for example, the President is expressly provided with legislative powers, both delegated[12] and original,[13] as well as modest 'judicial' powers.[14] While in

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7 *See* Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: Clarendon Press 1966) 115-117.

8 *See* art 74 of the Constitution of India, and ss 62 and 64 of the Australian Constitution, read with the implication of responsible Government.

9 Shubhankar Dam, 'Executive' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 307, 326 – 330, and cases cited therein.

10 *See* especially *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, where it was held that certain principles could be implied from the precise form of representative and responsible government provided by the text and structure of the Constitution, which principles could then act as enforceable limitations on both the legislature and the executive. In this case, an implied freedom of political communication was so implied which could be used to invalidate laws to the extent that they burdened such communication without reasonable justification. Professor Lindell examined how this might apply to the principles derived from responsible government – *See* Geoffrey Lindell, *Responsible Government and the Australian Constitution – Conventions Transformed into Law?* (Federation Press 2004).

11 It is not possible within the scope of this paper, given its particular emphasis, to examine these in any detail, especially given the detail provided in this regard by the Constitution. Reference may be made to leading texts in this regard, eg, SS Subramani and MN Venkatachaliah, *DD Basu's Commentary on the Constitution of India* (9th edn, LexisNexis 2016), and GB Patnaik and Yasobat Das, *DD Basu's Introduction to the Constitution of India* (22nd edn, Lexis Nexis 2015).

12 *See* art 77 (3) and Dam (n 9) 324.

13 *See* art 123 and Dam (n 9) 323, 324.

14 *See* art 103 and Dam (n 9) 325.

both instances, these specific grants qualify the *general* executive power and limit it, in that its ambit is narrowed to the extent that these specific grants are sources of power, in Australia, far greater reliance must be placed on the provision providing for the general "executive power of the Commonwealth", that is, Section 61.

The other point of relevant distinction is the absence of a *legally* entrenched separation of powers in India; excepting of course such as is provided for by constitutional provisions and limitations, and any exclusive vesting of power in particular branches of government. The degree of separation, therefore, is determinable by reference to the express provisions of the Constitution.[15] In Australia, on the other hand, the High Court has held that such a legal separation can be implied from the separate vesting of legislative, executive, and judicial power in the Parliament, the Queen (the Governor-General), and the High Court (and other federal courts), respectively.[16]

The problem in Australia is that of managing the asymmetrical application of the doctrine in a system that entrenches responsible government, and the resulting conflict with the principle of parliamentary supremacy over the executive. For the separation of powers implies equality, and requires separateness of the branches, whereas responsible government implies hierarchy – parliamentary supremacy over the executive – and fusion of the legislative and executive branches, in that the ministry must be chosen from persons who are otherwise elected members of Parliament. This has been resolved to an extent by giving priority to responsible government when determining the relationship between the executive and legislative branches of government, in contrast to the separation of judicial power from these that has been applied very strictly.[17] In the precise context of Section 61, because of the entrenchment of the separation of powers, any interpretation of the power must seek to ensure that it remains subject to legislative control as required by responsible government, an issue that will be examined below when more detailed consideration is given to the executive 'nationhood' power.

On the other hand, both jurisdictions are federations, thus giving rise to issues relating to the ambit of central executive power *vis-à-vis* that of the States. Accordingly, in both India and Australia, it is necessary also to determine the sphere in which the central executive power may operate based on federal concerns, unlike unitary systems such as the United Kingdom and New Zealand. Where executive power or action is authorised by statute, the issue is not so much one of the content and ambit of executive power *per se* (this being

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[15] This is explained comprehensively in Subramani and Venkatachaliah (n 11) 6885-6898.

[16] *Boilermakers' Society* (n 3) 254.

[17] For a detailed explanation and analysis, *see* PA Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate' (2005) 8 (1) Constitutional Law and Policy Review 1.

determined by the statute), but rather of the extent to which the statute authorising it is itself within the *legislative* competence of the federal legislature as defined by the Constitution. The federal issue becomes more complex when considering executive power that derives directly or impliedly from constitutional sources, and does not therefore require further statutory authorisation.

IV. THE 'DEPTH' AND 'BREADTH' OF EXECUTIVE POWER

To appreciate this difference between the *substantive content* of the power and the *sphere* in which it may be exercised pursuant to federal divisions of power, Professor Winterton in his seminal monograph, *Parliament, the Executive and the Governor-General*, developed a very insightful analytical distinction between the 'depth and breadth' dimensions of non-statutory executive power in Australia and analogous federations.[18]

'Depth' is that dimension which is determinative of the precise actions that the executive may undertake without statutory authorisation. In this sense, it reflects the separation of powers dimension (between the executive and the legislature) in any constitution. Included in the depth dimension are those specific grants of power vested in the executive by a constitution, and which may be exercised without further statutory authorisation.

'Breadth', on the other hand, refers to the sphere in which this action may be undertaken having regard to the federal division of power between the central government and those of the States. It is concerned with the *subject matters* in respect of which the executive government can take action "having regard to the constraints of the federal system."[19] Breadth is determinable by primary reference to the legislative competence of the federal legislature. This is to ensure that the breadth of executive action does not extend beyond the subject matters of legislative power, thus making sure that legislative control and regulation over its exercise by government is consistent with the principles of responsible government and parliamentary supremacy.

This analytical approach is well-illustrated by the Australian case of *Barton* v. *Commonwealth*.[20] At issue was whether the Commonwealth had the constitutional authority to request from a foreign nation the extradition of a fugitive, and the detention of that fugitive pending extradition, in the absence of an extradition treaty with that nation. It was held that it did indeed have such

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[18] George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press 1983) 29, 30, elaborated upon in chs 2, 3. For a recent judicial application, *see Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 96 (Gageler J).

[19] *Ibid*. Gageler J expressly adopted this terminology from Winterton (n 18).

[20] (1974) 131 CLR 477.

authority, because the making of such a request came within the prerogative relating to foreign affairs, thus meeting the depth requirement; and the breadth requirement was met because the Constitution in Section 51(xxix) vested legislative power in the Commonwealth Parliament to make laws "with respect to…external affairs", thus the bringing the subject matter within the legislative competence of the Commonwealth.

The ensuing discussion on the general executive power in both India and Australia will make use of this analytical dichotomy, albeit that its particular application in each jurisdiction will of course differ.[21]

V. TEXTUAL COMPARISON AND ANALYSIS

The textual paucity of the respective provisions providing for the general executive power is obvious. Article 53 (1) of the Indian Constitution simply provides 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 this Constitution."[22]

The Australian analogue is only a little more helpful. Section 61 provides that: "The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."[23] [Emphasis added]

The final clause of Section 61 represents the major point of difference, in that it enables more direct reliance on the text in Australia to provide definition. 'Execution' refers to the power to execute the laws and the Constitution itself, as in India,[24] and is more straightforward. However, the question is whether the 'execution' limb of Section 61, when read with the 'maintenance' limb, adds anything more to the depth dimension than does Article 53 by its silence. In the *Communist Party* case,[25] Williams J was able to state that the "execution and maintenance" of the laws of the Commonwealth "must mean the doing and protection and safeguarding of something authorised by some law of the Commonwealth made under the Constitution."[26] He regarded the

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[21] As for the benefits of a comparative analysis along these lines, it is worth recalling the comments in 1996 by Kirby J of the High Court of Australia at the Indo-Australian Public Policy Conference in New Delhi in 1996. He lamented the "tragic neglect" of such comparative analysis between the two jurisdictions given that "[t]he similarities of our federal constitutions and common law techniques are sufficient to present many potentially fruitful analogies".

[22] Constitution of India, art 53(1).

[23] Constitution of the Commonwealth of Australia, s 61 (emphasis added).

[24] *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549, 12 : (1955) 2 SCR 225, 238-39.

[25] *Communist Party* (n 1).

[26] *Ibid*.

'execution' of the Constitution to refer to "the doing of something immediately prescribed or authorised by the Constitution."[27]

Thus, executive action can and must be undertaken to meet the obligations imposed on the Executive Government by the Constitution itself. Of foremost importance is the need to ensure that the essential institutions of the Commonwealth for which the Constitution provides are adequately funded and resourced. For example, the Constitution refers explicitly to several specific functions of the Governor-General, for example, the summoning, dissolving and proroguing of Parliament; the determination of the time for holding of its sessions and the holding of joint sittings (Sections 5 and 57); the issue of writs for general elections for the House of Representatives (Section 32); and the transmission of messages to the Parliament recommending the appropriation of money (Section 56). As the High Court pointed out in *Brown* v. *West*, "there is no doubt" that the Executive Government must facilitate the functioning of Parliament, by providing it with the necessary funding and administrative support.[28] By parity of reasoning, Section 61 likewise requires the Executive Government to facilitate the exercise of the judicial power of the Commonwealth by not only appointing federal judges (Section 72), but also by providing for the payment of judicial salaries, the administration of justice, the functioning of the courts, and the execution of judgments and orders. The Constitution also provides for the appointment of Ministers of State and the establishment of Commonwealth government departments to be administered under their authority (Sections 64 and 69), and requires the payment of certain salaries and allowances, such as those of the Governor-General and Ministers (Sections 3, 48, and 66). It similarly provides for the collection and control of customs and excise duties (Section 86), the payment of surplus revenues to the States (Sections 87, 89, 93, and 94), and the command-in-chief of the armed forces and whatever that may require (Section 68).[29] In addition, it is required to cover the expenditure involved in the collection of the revenue (Section 82). Thus, by reference simply to Section 61, it is possible to provide a precise textual constitutional source of power with respect to the government undertaking action to 'execute' that for which the Constitution provides.

As for 'maintenance', according to Williams this emphasised "the protection and safeguarding of something immediately prescribed or authorised" by the Constitution or Commonwealth laws.[30] However, it is necessary to determine

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[27] *Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 423 ('*Wool Tops*') (Knox CJ and Gavan Duffy J). This was adopted by Williams J in *Communist Party* (n 1) 230.

[28] (1990) 169 CLR 195, 201 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ). However, it was "not self-evident" that the executive power extended to the provision of pecuniary allowances to individual members of Parliament, "who may draw upon the benefit as they will" (at 201).

[29] Winterton (n 18) 31.

[30] *Communist Party* (n 1) 230 (Williams J).

what precise actions the Commonwealth Executive could undertake in this regard. As the executive power of the Commonwealth is vested in the Queen by Section 61, albeit being exercisable by the Governor-General, it is possible to make reference, as the Australian courts have done, to the prerogative powers and capacities of the Crown recognised by the common law, and, as appropriate, to be exercised by a body politic of limited powers.[31] The content and nature of these particular powers will be discussed in more detail below. Naturally, in India, by virtue of its being a republic, these powers could be no more than persuasive guidelines. However, sole reliance on the text of the 'maintenance' limb is of limited usefulness. Indeed, greater reliance has been placed on the fact that this limb indirectly incorporates the common law prerogatives and capacities – in their status as common law powers – than any source of power derived directly from it. However, without the need to rely on the prerogative, following the suggestion of Williams J above, 'protection' and 'safeguarding' would permit the government to take broad action protecting Australia from invasion or subversion, which power in any event would come within those common law prerogative powers relating to war, defence, and foreign relations, already incorporated in Section 61.[32] In the circumstances of war and such other extreme emergencies, it may be assumed, as with the relevant prerogative, that the power may be exercised in such a way as to override the legal rights of other sowing to the exceptional nature of the circumstances.[33]

It has also been argued that under the 'maintenance' limb, the Commonwealth may protect its own particular interests, reflected in the heads of Commonwealth legislative power contained in Sections 51 and 52, from domestic violence. This would include the protection of the mail, interstate trade and commerce, the right of an elector to vote in federal elections,[34] financial and trading corporations, banks and insurance companies, federal legislative, executive, judicial, administrative, and military institutions, public authorities, and statutory bodies.[35] In a statement apparently approved by Dixon J in *R* v. *Sharkey,*[36] Quick and Garran remarked:

> "If … domestic violence within a State is of such a character as to interfere with the operation of the Federal Government,

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31 *Ibid*.

32 *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 210 [31] (French CJ). *See* also Zines (n 4); HP Lee, *Emergency Powers* (The Law Book Company 1984) ch 3. The issue of the prerogative will be discussed in more detail below.

33 *See* also *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, which remain leading cases in this regard.

34 Quick and Garran (n 3) 964.

35 Zines (n 4) 289.

36 *R v Sharkey* (1949) 79 CLR 121, 151, discussed in relation to the 'legislative' aspect of the implied 'nationhood' power in Quick and Garran (n 3) ch 3, pt IV.3.

> or with the rights and privileges of federal citizenship, the Federal Government may clearly, without a summons from the State, interfere to restore order. … [T]he Executive Government [may] interfere to suppress by force a rebellion which cripples its powers."[37]

Section 119 does require the Commonwealth to protect every State from invasion and, in case of application from a State, from domestic violence. Absent State consent, the Commonwealth's power to address domestic violence is limited, and must be supplemented by reference to the prerogative. Beyond this, however, there is very little else than what can be drawn from the text of Section 61.

In the case of the Indian Constitution, the text of Article 53 provides little definitional guidance beyond requiring that the general executive power be exercised "in accordance with this Constitution". Article 53(2) does confer the supreme command of the defence forces upon the President, but because the exercise of such power "shall be regulated by law", the President is the formal repository of the power, the exercise of which is subject to legislation. However, there is nothing else in the Chapter on the Executive that further illuminates the actual substantive content of the *general* executive power. On the other hand, in the depth dimension, specific grants of power supplement the limited guidance provided by Article 53.[38] For example, Article 72 vests a power of pardon in the President.

That the President is merely the formal repository of the power is clearly confirmed by Article 74, which provides that the President must act in accordance with the advice of the Council of Ministers, headed by the Prime Minister. This, however, is subject to any discretionary powers implied from various provisions of the Constitution relating to the appointment of the Prime Minister, and to the dismissal of a government that has lost the confidence of the House, or is otherwise behaving illegally or unconstitutionally and has refused to resign or advise an election.[39] These discretionary powers are referred to as "reserve powers" in Australia.[40] They are, however, unique and exceptional powers, *sui generis*, reflecting the 'custodian' role of the President and the Governor-General, and informed by the principles of responsible government as they evolved originally in the United Kingdom. While relevant, they nevertheless constitute a discrete aspect of the executive power vested in the President.

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[37] *Ibid* 964.

[38] *See* Subramani and Venkatachaliah (n 11) 7022ff.

[39] *See Samsher Singh v State of Punjab* (1974) 2 SCC 831 : AIR 1974 SC 2192; and for detailed commentary, *see* Subramani and Venkatachaliah (n 11) 7025-7031.

[40] *See* Constitution of the Commonwealth of Australia, ss 5, 28, 57, and 64.

Other powers are contained within the 'Emergency Provisions' in Part XVIII, including the power to proclaim an emergency (Article 352), and other detailed powers. Such precise constitutional provision does not exist in the Australian Constitution, reliance having to be placed on the prerogative powers impliedly incorporated in Section 61, possibly an executive 'nationhood' power also implied therein following the *Pape* case, and, the power to protect Commonwealth institutions and interests based on a textual interpretation of Section 61 as discussed above. The power to pardon (Section 72) has already been mentioned. There are also significant executive powers relating to appointments, such as the power to appoint the Attorney-General (Article 76), the Comptroller and Auditor General (Article 148), and members of the Union Public Service Commission (Article 315) and of the Election Commission (Article 324). Moreover, the depth of the India's executive power extends to certain rule making powers, of principal importance being Article 77 (3), which authorises the President to make what are known as "Rules of Business", "for the more convenient transaction of business for the Government of India", and which, if contravened, can render *ultra vires* actions by Ministers and other executive officers.[41] There are powers to make rules for the joint sitting of the houses of Parliament (Article 118 (3)), for the conditions of service of the civil service (Article 309), and rules relating to the appointment of officials of constitutional bodies (Articles 148 (5) and 146 (1)). Indeed, Article 123 permits the President to promulgate 'ordinances' that are equivalent to parliamentary legislation. Although such power cannot be exercised unless certain conditions are met, it is not a power which can be found in the Australian Constitution. There are also certain adjudicative functions, such as with respect to determining whether a member of Parliament has failed to meet certain eligibility criteria set out in Article102 (Article 103).

Therefore, while both Constitutions do provide expressly for specific grants of power which provide relatively straight forward definitions of the depth of executive power, the determination of depth with respect to the *general* executive power in Section 61 and Article 53 involves more complex considerations. The respective positions in India and Australia will now be examined.

VI. THE 'RESIDUAL' APPROACH OF INDIA

That which is referred to herein as the 'residual' approach emerges with little divergence in the leading cases – and the leading commentaries – in India. This is exemplified in MP Jain's analysis. After setting out the specific powers, he notes that, in addition, Article 53 "confers executive power on the President in a general way":

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

> "Thus under Art. 53, the Central Executive has a large unspecified reservoir of powers and functions to discharge. The Constitution makes no attempt to define "executive power", or to enumerate exhaustively the functions to be exercised by the Executive, or to lay down any test to suggest as to which activity or function would legitimately fall within the scope of the executive power. The truth is that the executive power of a modern state is not capable of any precise or exhaustive definition."[42]

To explain this "unspecified reservoir of powers" reference is then made to the leading case of *Ram Jawaya Kapur* v. *State of Punjab,* where the Supreme Court confirmed that it "may not be possible to frame an exhaustive definition of what executive function means and implies."[43] From this flows the 'residual' approach: "Ordinarily the executive power connotes the residue of government functions that remain after legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitution or of any law."[44]

In that case, it was also confirmed that the exercise of executive power is not, generally speaking, dependent on prior legislative authorisation, excepting of course, as otherwise provided for by the Constitution (for example, in the case of the expenditure of public funds, which requires appropriation), or where its exercise would otherwise encroach on private rights.[45]

Despite the fact that the Indian Supreme Court regards the general executive power in its depth dimension to be a residue of power beyond the judicial and legislative, and thus defines it negatively or passively, other courts and commentators have nevertheless attempted some positive conceptual definition. Thus, in the *Ram Jawaya* case, it was stated that,

> "the executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State".[46]

Several questions arise here. What is the precise source of this determination relating to the depth of the power? Is it reflection on the notion of "executive" power in the abstract, purely conceptually, by some form of

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[42] J Chelameswar and DS Naidu, *MP Jain, Indian Constitutional Law* (8th edn, LexisNexis 2018) 183. *See* also Subramani and Venkatachaliah (n 11) 106-107 (emphasis added).

[43] *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549, 12 : (1955) 2 SCR 225, 238-39. Identical remarks were made in *Madhav Rao Scindia v Union of India* (1971) 1 SCC 85.

[44] *Ibid*.

[45] *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549 : (1955) 2 SCR 225, 238-39.

[46] *Ibid*.

deductive reasoning? Is it a reflection upon all the specific grants of power to the President in the Constitution and thus, inductively, drawing general conclusions? Is it simply based on reflection on the historical and contemporary role of the executive in modern Westminster-style polities? Or, is it simply an attempt to give some basic content based on the author's experience and general reflection as to what the residue of power might be once the judicial and legislative power has been removed? One can only speculate that it is any particular one, or a combination, of these questions, or, indeed, all of them. Herein lies the problem – the positive statement of content is not precisely based on positive legal sources, or on a set of purely legally discernible principles. Jain, for example, states that beyond the execution and administration of the law, it was a "primary" function of the Executive to "maintain law and order" as well as to engage in "multifarious activities." He did not provide, however, any more precise definition as to what action the executive may take in this regard except to say that, "[t]he Executive operates over a very large area and discharges varied and complex functions,"[47] and noting that the "modern state does not confine itself to a mere collection of taxes, maintaining law and order and defending the country from external aggression. It engages in multifarious activities."[48]

Similarly, the leading commentator, DD Basu, referred to the power to formulate policy to administer the State and its laws, to maintain order within, and security from without, the State.[49] In seeking to provide more positive content, he did not turn to the constitutional text. Rather, he referred to extra-legal and extra-constitutional sources, that is, to 'political writers' to summarize the classification of executive powers under the following heads:

(a) Administrative power, *i.e.*, the execution of the laws and the administration of the Government,

(b) Diplomatic power, *i.e.*, the conduct of foreign affairs,

(c) Military power, *i.e.*, the organisation of the armed forces and the conduct of war,

(d) Legislative power, *i.e.*, the summoning, prorogation, *etc.*, of the Legislature, and the initiation of and assent to legislation and the like,

(e) Judicial power, *i.e.*, the granting of pardons, reprieves, *etc.*, to persons convicted of crime.[50]

While some of these may be referenced to specific grants of power in the Indian Constitution, and indeed other constitutions, the point is rather that Basu was attempting a more general definition. The problem remains, however,

[47] Chelameshwar and Naidu (n 42) 182.
[48] *Ibid* 183.
[49] Subramani and Venkatachaliah (n 11) 7000.
[50] *Ibid* 7006.

that in the absence of any definition derived from constitutional or legal sources, it is very difficult, if not impossible, to ascertain whether the executive is constitutionally authorised to undertake any particular actions absent express constitutional or statutory authorisation.

It is indeed telling that the powers to which reference was made by these commentators do find some textual support in the Indian Constitution, such as, for example, the 'judicial' power to grant a pardon which is provided for in Article 72. Hence, the Constitution becomes the legal source of this power. However, this is not necessarily the case with all the above-mentioned powers. While one may speculate with the aid of political philosophy, historical usage, and contemporary experience, as to what precise actions are included in 'executive power', this cannot constitute an authoritative source of legal power. It is also of limited use when determining in any case whether a particular executive action in issue is authorized by law.

Such difficulties became apparent in the Australian case of *Ruddock* v. *Vadarlis*.[51] Despite the elaborate regulation, by the *Migration Act 1958* (Cth), of actions which the government may take to protect Australian borders, and to deal with unauthorised asylum seekers arriving by boat, the government nevertheless sought to rely on a general executive power in Section 61 to justify its actions in the instant case. It was used to justify the act of using the Australian Defence Force personnel to board a foreign vessel, the Norwegian ship *MV Tampa*, which had rescued a group of asylum seekers from their own sinking vessel, to detain them on the *MV Tampa* and to prevent further entry of that ship into Australian waters and ports. If the Federal Court here had adopted a residual approach, it would have been very difficult to deny the validity of the government's actions. However, the issue is whether it would it have been a satisfactory resolution of the *Tampa* case by simply saying that the government's coercive action was permitted under the general executive power in Section 61 because it involved neither legislative or judicial power.

The court rather sought guidance by reference to positive legal sources, albeit with the majority and minority judges diverging as to the sources that could be relied on. Taking the (hitherto) more orthodox approach, Chief Justice Black placed principal reliance on the common law prerogatives, incorporated in Section 61, to determine that while the common law did permit the government to regulate the border absent statutory authorisation, it did not permit the use of coercion against friendly aliens. The executive action in the present case was thus invalid, as it was not otherwise authorised by the relevant Act. In the majority, French and Beaumont JJ did hold the action to be valid, but could only do so by giving novel recognition to an executive 'nationhood' power, *beyond the common law prerogative*, derived directly from Section 61,

[51] *Ruddock v Vadarlis* (2001) 110 FCR 491.

and based on the exigencies of modern government; and protecting the borders was an essential element of national sovereignty.[52] The problem with this reasoning is that while sovereignty may well permit *a nation* to protect its borders, this does not mean that the executive of that nation may do so without statutory authorisation. The more precise issue is whether the legislature or the government of that nation has the power to use coercion to do so. Be that as it may, the point that is being made here is that the issue of validity was sought to be determined by recourse to positive legal sources, to the point of giving recognition to novel powers, as opposed to reliance on a residual approach.

The limitations of the residual approach are of course appreciated in India as the following example illustrates. One issue that has been faced in India is whether it is within power under the general executive power (Article 53) in its depth dimension for the government to carry on trading operations, to acquire, hold and dispose of property, or to enter into contracts. If one adopts the residual approach, a positive answer must be given, subject to constitutional prohibitions and limitations – and appropriation. But it would not be possible to take a positive approach and say that 'executive power' positively includes such actions. Adopting the residual approach, the Supreme Court in *Ram Jawaya* held that the Central Executive could enter into any trade or business, or dispose of property.[53] It is relevant to ask at this juncture what precise actions this entails, and whether it includes incorporating a company, or setting up some other business entity for these purposes. On the facts in issue in this case, it was submitted in argument that the executive power of the State, absent statutory authorisation, did not extend to carrying on the trade of printing, publishing, and selling textbooks for schools. The Court's rejection of this argument was simply based, it would seem, on the residual approach. However, the question is how this squares with DD Basu's statement that, "The written Constitution is the source from which all government power emanates; it defines its scope and ambit so that each functionary should act within his respective sphere."[54] While it cannot of course be said that the residual approach is contrary to the Constitution, nevertheless, it has to be asked whether this approach leaves too wide a scope for executive power, and hence, whether some more positive source of power is needed to resolve complex and controversial issues with greater precision.

This problem is compounded by the fact that 'judicial' and 'legislative' power are not necessarily closed categories exercisable exclusively by a 'judicial' or 'legislative' branch, as the case may be. There is always a degree of overlap at the edges. Therefore, one has to ask how confidently one can rely on the residue, if it is difficult, in the first place, to determine whether a particular

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[52] *Ibid* 543 (emphasis added).
[53] *Ram Jawaya Kapur v State of Punjab* (1955) 2 SCR 225, 235-236, 238-39.
[54] Subramani and Venkatachaliah (n 11) 7010.

action falls squarely with in the residue or the overlap.[55] It is pertinent to ask if the court is left with too much discretion in this regard, that is, a discretion which is exercisable by reference to criteria which are not necessarily legally discernible; and to what extent this complicates, or renders impossible, a court's task. Nevertheless, this approach has been adopted in a number of Indian cases,[56] and it would appear that in India the courts accept quite readily that, even without prior statutory authorisation, the executive validly "engages in multifarious activities" and "operates over a very large area and discharges varied and complex functions".[57]

In another Indian case, the Supreme Court stated that the executive may undertake action under the executive power for the promotion of social and economic welfare.[58] However, it is not clear what the precise legal source for this is, and what precise actions can be undertaken. Does this mean that the government can do anything (at least anything that is not 'legislative' or 'judicial'), subject to constitutional prohibitions, for the promotion of social and economic welfare? Of course, common sense and judicial restraint will ensure a measured response, and it is not always helpful to speculate about hypotheticals. It is sufficient, then, for present purposes, to state that the question remains open-ended in the absence of clear legal criteria to determine it. This may well be a reflection of the fact that the residual approach has the potential to encompass a very broad range of activity.

To a degree, the Supreme Court clarified the position when it endorsed the stance taken by the Allahabad High Court, which stated that, "[A]n act would be within the executive power, if it is not an act which has been assigned by the Constitution to other authorities or bodies, is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public."[59]

When the *Ram Jawaya* case was decided, while Article 298 expressly provided that the executive has the capacity to enter into a contract and to engage in the disposition of property, it did not expressly provide for the conduct of trade or business more generally, the latter having been the facts in issue in that case. Following the decision, Article 298 was amended in order expressly to provide that the executive power "shall extend to the carrying on of any trade or business." Accordingly, on similar facts to the *Ram Jawaya* case, reference could now be made to a specific grant of power.

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55 *See* Gerangelos (n 17).

56 Subramani and Venkatachaliah (n 11) 7022-2024, and cases mentioned therein.

57 Chelameshwar and Naidu (n 42) 183.

58 *Jayantilal Amratlal Shodhan v FN Rana* AIR 1964 SC 648, 655, (1964) 5 SCR 294.

59 *Motilal v Government of the State of UP* 1950 SCC OnLine All 197 : AIR 1951 All 257 ('*Motilal*').

It would be going too far to say that this amounted to an admission of the inadequacies of the residual approach. Nevertheless, that constitutional amendment was required does imply a certain acceptance of the limitations of the residual approach, and a preference for positive identification in the constitutional text. It may also reveal the tendency in India to resort to constitutional clarification when the validity of important government actions remains uncertain, especially when such actions are vital to efficient administration. Of course, the fact that resort can be had to constitutional amendment ameliorates the general problem associated with the residual approach. Further, the fact that the procedure to amend the Constitution is far less onerous than it is in Australia, where special majorities in a referendum procedure are required,[60] may engender greater tolerance for, and acceptance of, the absence of positive definition apparent in the residual approach. In other words, far more reliance can be, and therefore is, placed on specific constitutional grants of power, and on limits imposed by specific constitutional prohibitions. This is because there is a degree of confidence that any lack of precise definition can be addressed by constitutional amendment. This may help explain the impetus toward deriving content from positive sources of law in Australia, as opposed to adopting the residual approach.

VII. FEDERAL ISSUES

The precise federal sphere of operation of the general executive power *vis-a-vis* that belonging to the States, *i.e.,* the *breadth* dimension, is the concern in this section. In other words, the subject matters over which the respective executives may exercise their power, as opposed to the precise actions they may engage in, will be examined. The concern is not with the actual substantive content of the power.

In India, breadth is prescribed precisely by the Constitution. Thus, Article 73 provides that executive power "shall extend … (a) to the matters with respect to which Parliament has power to make laws." This is perfectly consistent with the principle of responsible government and parliamentary supremacy over the executive, that is, if it also constitutes an implied limitation that the executive power does not extend beyond that. However, this is subject to the proviso that this power "shall not", except as otherwise provided in the Constitution or in legislation, "extend in any State to matters with respect to which the Legislature of the State has power to make laws". This is determined by reference to the lists of the respective subject matters of legislative competence in Schedule VII. The Union, as per Article 246, thus has exclusive executive power with respect to matters in List I of Schedule VII. There is an express prohibition in Article 246 from exercising such power with respect

[60] Australian Constitution, s 128 requires, *inter alia*, a majority overall of all voters, plus a majority of voters in a majority of the States, for a referendum to amend the Constitution to succeed. Far more referendums have failed than have succeeded.

to the exclusive State subject matters contained in List II in Schedule VII. Moreover, unless otherwise provided, the executive power of the Union cannot be exercised with respect to those subject matters that are *concurrent* subject matters of both the Union and States, as are set out in List III of Schedule VII. Extending the breadth of central government power, Article 73(b) provides that such power extends to "the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty agreement."

While the position in Australia is similar, in that Commonwealth legislative competence remains the basic measure of breadth, a degree of confusion has arisen because this determination is achieved less by express statement in the Constitution than by the implications derived from responsible government and parliamentary supremacy over the executive; that is, the requirement that the legislative power must be able at all times to regulate and indeed abrogate (unless otherwise expressly provided for) any general executive power. Thus, reference is principally made to the express heads of legislative competence, mainly Section 51 (which contains thirty nine sub-sections providing for heads of legislative competence, concurrent with the States), and Sections 52 and 122. It is noted that the federal executive in Australia, unlike India, does have power over those subject matters in relation to which the States may concurrently legislate. To the extent that the Australian position on breadth was so determined, it remained relatively straightforward. Indeed, even those judges who otherwise gave a broad reading to the depth of the power warned that this did not mean that it may operate "outside the acknowledged heads of legislative power merely because these [government] programmes can be conveniently formulated and administered by the national government."[61]

However, this clear delineation has been complicated by the more recent recognition, as discussed earlier, of an executive 'nationhood' power within the depth dimension of Commonwealth executive power. By its very definition as a power derived from the status of the Commonwealth as the national government that enables it to take such action as only it could undertake efficaciously for the benefit of the nation, it tends to blur the distinction between depth and breadth. This is because it permits of the exercise of power in a *national* sphere, that is, one which cannot be determined simply by reference to express legislative heads of power provided for in the Constitution. Further, being a power based on *national* considerations, the issue is as to how it can be reconciled with the federal division of legislative powers between the Commonwealth and the States. If national interest or imperative is the point of reference, this does tend to compromise this division, or at least render it otiose, when a 'nationhood' power is being invoked.

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[61] *Victoria v Commonwealth* (1975) 134 CLR 81, 398 (Mason J).

Nevertheless, it remains the case that the constitutions of both India and Australia manifest the principle that the legislature is supreme over the executive, subject to the Constitution, and hence the sphere of operation of executive action is, generally speaking, determinable by reference to the sphere of legislative competence. Moreover, it remains the case that because the breadth issue is dealt with in greater detail, and expressly, in the Indian Constitution, it can be determined rather more precisely, and with less confusion, than is the case in Australia.

VIII. THE 'REGULATED APPROACH' IN AUSTRALIA

A. The Main Sources of Power

The 'regulated' approach in Australia seeks to determine the substantive content of the power, in its *depth* dimension, by reference to positive legal sources traceable to the Constitution. However, recourse to notions of residual power cannot be entirely avoided, which is a manifestation of the immense difficulty in attempting an exhaustive definition of executive power. This has not resulted in any serious support in Australian judicial reasoning or academic commentary for the residual approach. Even when suggested as a possibility, it is stated in very general terms, without much conviction, and not definitively.[62]

In the depth dimension, positive definition of the executive power of the Commonwealth is attempted by reference to the following main legal sources (apart from the above-mentioned specific grants of power and executive action otherwise authorised by statute):

a). the text of Section 61 and the "execution and maintenance" clause examined above from a purely textual perspective;

b). sources which are impliedly incorporated in Section 61, being the prerogative powers of the Crown and its non-prerogative capacities, as recognised by the common law, based on its juristic personality; and,

c). implications which can be drawn from the Constitution, including Section 61 – for instance, the principles of responsible government as they assist in defining the content and ambit of executive power, including any 'reserve' powers of the Governor-General, and, more recently,

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[62] *See*, for example, Sir William Harrison Moore's Lectures on Constitutional Law in the 1920's referred to in HE Renfree, *The Executive Power of the Commonwealth* (Legal Books 1984) 389. HE Renfree himself appears to have adopted such a residual approach in his book, *Ibid*. Nevertheless, Harrison Moore did not adopt that approach in his important work, H Moore, *The Constitution of the Commonwealth of Australia* (2nd edn, Legal Books 1977), where, acknowledging the difficulties in defining 'executive power', he emphasised the need to refer to the Constitution, and to the prerogative incorporated therein, to locate positive sources for the content of the power (ch III, 292). In other words, a regulated approach is adopted by him, despite his references to a residual approach.

the executive 'nationhood' power as recognized in the *Pape* case as deriving directly from Section 61.

If a particular executive action cannot be so derived, merely stating that it is within the residue of power left over from that which is 'legislative' or 'judicial' will not be enough, very generally speaking, to establish its constitutional validity.

B. The Definitional Problem as Understood in Australia

As noted above, the "execution and maintenance" clause in Section 61 is limited as a source of content in the depth dimension. While defence and national security could be said quite easily to fall within the ambit of federal executive power, as indeed has already been suggested from an interpretation of the 'maintenance' limb to Section 61, the precise content of permissible executive action remains cloudy; and cloudier still when one considers emergency situations. Thus, while the Commonwealth government has power to take whatever action is necessary, in a military sense, to repel the enemy in war, neither the ambit of the ancillary measures necessary for national security, nor the extent to which civil liberties and legal rights can be overridden in these circumstances, is clear.[63] Complications arise from unconventional circumstances such as those stemming, for example, from terrorist activity.[64] There are several considerations that arise here, such as to what extent the government can take action, including the use of coercion, forced detention, and the destruction of property, in emergencies short of war or insurrection. Perhaps it is the case that the criterion is not 'war' or 'insurrection' *per se*, but rather the existence of that type of emergency which threatens the very existence of the Commonwealth, its Constitution and its system of government. Dixon J invoked these kinds of considerations in the *Communist Party* case, although he was referring principally to *legislative* power, when he referred to "that power … which forms part of a paramount authority to preserve both its own existence and the supremacy of its laws necessarily implied in the erection of a national government".[65]

In the absence of precise textual guidance, the problem of definition becomes virtually intractable. The imperative in India to seek clarity by recourse to the specific grants of power to the executive is not merely essential in order to define the depth of the power, but also prudent. In Australia, even the more ample text of Section 61 is limited in its usefulness as numerous judicial statements have indicated, merely marking the external boundaries of

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[63] *See* George Winterton, 'The Relationship Between Commonwealth Legislative and Executive Power' (2004) 25 Adelaide Law Review 21, 26.

[64] Zines (n 4) 302.

[65] *Communist Party* (n 1).

power without providing much by way of definition.[66] Some Australian commentators, braver than their judicial counterparts, have attempted a more general definition that is quite similar to those emerging from India. For example, reference has been made to that power to govern the political state pursuant to its laws; to execute its laws, as distinct from enacting those laws, or adjudicating legal disputes; to form and implement the policies by which it is to be governed; and, to administer the state. The following is a useful modern Australian definition:

> "[T]he executive function is to administer the provisions of the law…[G]enerally…the executive government carries out a collection of administrative functions including the operation of public service facilities, the expenditure of public funds, the formulation of administrative policies and guidelines, the exercise of discretionary powers and the performance of instrumental tasks to implement laws."[67]

Another Australian commentator has 'broadly' defined 'the executive' as "the authority within the State which administers the law, carries on the business of government, and maintains order within, and security from without, the State."[68]

While these may be useful for an initial understanding, they emphasise the functional aspects of the power, without necessarily ascribing any precise substantive content to it. The second definition above implies that defence, and the maintenance of the peace, may be *inherently* executive functions. However, if that is so, it may be asked whether one could therefore add "the defence of the state from invasion and subversion, and the maintenance of its peace" to the general definition. A question would also arise as to whether it includes an even more general, though undefinable, discretionary power to take action in an emergency – natural disaster, pestilence, rebellion, acts of terrorism, and so on – in order to preserve the polity and to protect its people; or, taking one further step, whether one can add whatever power necessarily inheres in the sovereignty of the nation state based on the imperatives placed upon the government of such a state, that is, an inherent executive 'nationhood' power as appears to have emerged in Australia in the *Pape* case. This progression, it may have been noticed, is towards increasingly nebulous conceptions of the power. It is thus progressively more difficult to define with reference to legally

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[66] *Wool Tops* (n 27) 440-41, 431–433 (Isaacs J); *Davis v Commonwealth* (1988) 166 CLR 79, 92, 107 (Mason CJ, Deane and Gaudron JJ). Similar views were expressed in *R v Hughes* (2000) 202 CLR 535, 555; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 64–65, 126–127; and *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 197, 232. Winterton (n 18) 28.

[67] K Booker, A Glass and R Watt, *Federal Constitutional Law* (2nd edn, Butterworths 1990) 120.

[68] WA Wynes, *Legislative, Executive and Judicial Powers in Australia* (4th edn, 1970) 364.

discernible criteria, and also corresponds to an increasing reliance on subjective considerations and policy. The difficulty in attempting a definition based on a purely abstract conceptualisation becomes increasingly apparent.

The present writer, in agreement with others, has maintained that the fact that the government validly exercises a particular power in any particular polity from time to time is purely a function of the constitution, laws, conventions, and usages of that polity which pertain at the time the power is being exercised. It must be traced to positive sources of law, as opposed to abstract conceptualisations of 'executive power'. Indeed, the reason why the above-mentioned 'modern' definitions of executive power 'ring true' is not because they can be measured against a universally accepted standard of what constitutes such power. It is rather because their authors were adopting (and their readers were assuming) a particular point of reference – in this case, the organisation of government which pertains generally in Westminster-style jurisdictions and their analogues. It is based on certain assumptions – a distinction between governmental powers, such that legislative power and judicial power are sufficiently distinct concepts to enable one to speak separately of executive power, whether positively or even as a residue. In any event, the power may be 'defined' in a purely functional way (executing laws, administration, 'maintaining the constitution' and so on), without ascribing any substantive content to it. For it is from the laws it is executing, and the specific constitutional grants of power which it exercises, that such substantive content is most clearly derived. Otherwise, executive power remains "something of a mystery,"[69] in relation to which commentators have noted the "futility of attempting to define the ambit of… executive power by allusion to abstract notions of 'executive power'".[70] It is "barren ground for an analytical approach", and "a trackless waste", in the words of Professor David Gwynn Morgan.[71]

Even if precise constitutional provisions permit a certain level of definitional clarity, there is another aspect to executive power whose 'metaphysical' quality resists even the most rigorous techniques of positivist analysis, thus making a residual approach unavoidable at least at the highest level. This is the case even with the common law as it pertains to the prerogative power of the Crown.[72] Hence, the power is forever burdened with a certain lack of clarity at the edges. In *The Second Treatise of Government*, John Locke gave eloquent expression to this when he acknowledged that "it is impossible to foresee, and so by laws to provide for, all accidents and necessities,…[and] therefore there is a latitude left to the executive power, to do many things…which the laws do

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69 Winterton (n 63) 21.

70 Winterton (n 18) 70.

71 David Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet and Maxwell 1997) 272.

72 It is noted here that the very notion of the prerogative has certain nuanced differences, which also adds to the complexity.

not prescribe".[73] The power of which this latitude permits was famously called 'prerogative': "to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it".[74] It is noted that this must not be precisely equated with what is referred to as the prerogative at common law, for 'Locke's prerogative' was that special power that arose in circumstances of danger to the very existence of the polity.[75]

The exercise of such a power would (or should) arise only in very exceptional circumstances – emergencies threatening the welfare of the people (extreme situations of 'riot and pestilence', *etc.*), the very existence of the state or its system of government (war, invasion, rebellion, *etc.*), the state's ability to function as such, and so on. However, if these are already covered by the prerogative at common law, the contribution of 'Locke's prerogative' is not straightforward. First, it is an acknowledgement that in certain extreme circumstances, it is the executive government alone that can take efficacious action, unencumbered by the vagaries of seeking and obtaining parliamentary approval. Second, it is a recognition that there must be an element of trust in the government to act appropriately, specifically that it will always act in the 'public good'. Third, if Locke is suggesting that the executive may act without legal authorisation, or indeed contrary to law, the situation he is envisaging is akin to a situation of 'necessity', that is, an existential crisis where the very polity itself, and its constitution, are under threat. In other words, it is at a level akin to war, or perhaps even more so, civil war or rebellion. For 'Locke's prerogative' to apply, it would have to be a very extreme scenario. It could only ever be regarded as 'valid' (but, if purely discretionary, by what standard?) when exercised unambiguously (by what criteria?) 'for the public good'. This 'prerogative' aspect to the power, permitting of some virtually unreviewable discretion in those who wield it, will continue to ensure the elusiveness of any precise definition.

The guidance available to ensure some degree of government accountability when such a power is exercised is difficult to locate precisely. However, this issue is deserving of its own article, and is beyond the scope of the present enquiry. One may simply rely on 'first principles' here to state that the invocation of 'Locke's prerogative' or 'necessity' in this context should only occur as an absolute last resort when all other legal and constitutional means are exhausted; that the response must be proportional, and no more than is necessary, to the crisis being addressed; that the executive action taken is seen as only an interim measure until such time as the matter may be considered by

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[73] John Locke, *The Second Treatise of Government* (1690) in Peter Laslett (ed), *Two Treatises of Government* (Cambridge University Press 1988) 375.

[74] *Ibid*.

[75] For a detailed analysis of the different aspects to the concept of 'prerogative', see Thomas Poole, 'The Strange Death of the Prerogative in England' (2018) 43 Western Australia Law Review 42.

parliament; and, that the constitutional order is restored as soon as possible once the crisis is averted. Suffice to say, such principles may be gleaned from past situations relating to extra-constitutional or even, strictly speaking, unconstitutional, action to fill a vacuum arising within the constitutional order, civil war, or the imposition of martial law.[76] If nothing else, in the precise context of this article, this reveals that at some level it is impossible to avoid residual notions of executive power. For even where executive power may be highly regulated and limited by constitutional and legal principles, there will remain this element of residual power in extreme emergencies or vacuums in the constitutional order. Finally, to the extent that there is uncertainty as to the legality of the government's action in such circumstances, or even if it is clear that it is acting extra-constitutionally or even, strictly speaking, illegally, it must be asked whether or not it is better (especially if acting purely domestically), that this is acknowledged – in the hope of subsequent legislative or constitutional validation – as opposed to conceiving fancifully of some exaggerated constitutional authority just so that the government's legal virtue may be preserved.

Although the context of emergency powers provides the highest case giving rise to the 'mystery' of executive power, the mystery is certainly not limited to these. Indeed, it exists at the other end of the spectrum when considering even the most mundane and ordinary tasks of government, as will be seen below. To a significant extent, Australian constitutional law has not been able to avoid residual notions of executive power. Further, in the absence of legislative authorisation, whether one relies on the common law prerogatives of the Crown or an implied national executive power derived from Section 61, the limits to such a power in an emergency remain very difficult to discern. This position is ameliorated somewhat in India because of the greater prescription in its Constitution.

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[76] For a survey of various examples and relevant principles, *see* S de Smith and R Brazier, *Constitutional and Administrative Law* (7th edn, Hammersmith UK: Penguin 1994) 68-89, especially 73-74 on 'necessity', 121–133, and especially ch 27 at 564 on 'National Emergencies'. *See* also these works of HP Lee: *Emergency Powers* (n 32); 'Salus Populi Suprema Lex Esto: Constitutional Fidelity in Troubled Times' in HP Lee and Peter Gerangelos, *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (The Federation Press 2009) 53; and 'Of Lions and Squeaking Mice in Anxious Times' (2016) 42 Monash Law Review 1. *See* also O Gross and FN Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006); V Ramraj and A Thiruvengadam (eds), *Emergency Powers in Asia: Exploring the Limits of Legality* (Cambridge University Press 2010); Thomas Poole, *Reason of State, Law, Prerogative and Empire* (Cambridge University Press 2015) and HP Lee, PJ Hanks, and V Morabito, *In the Name of National Security: The Legal Dimensions* (Law Book Co 1995).

C. Sources of the Depth of Executive Power Impliedly Incorporated in Section 61

The definitional problems mentioned in the previous section can of course be ameliorated if recourse is principally had to legally discernible principles from the provisions of the Constitution. In Australia, the fundamental principle that the executive power of the Commonwealth is defined and limited by law was affirmed in early cases such as *Commonwealth* v. *Colonial Combing, Spinning & Weaving Co Ltd*,[77] in which Isaacs J stated that "the written words of the Constitution applied to Section 61 form the only necessary solving test".[78] It was the intention of the framers of the Constitution, subsequently acknowledged by courts and commentators alike that, in addition to incorporating responsible government into the Constitution, the Constitution would also incorporate those prerogative powers and non-prerogative capacities of the Crown recognised by the common law as suitable to the status of the Commonwealth of Australia, exercisable by the Commonwealth as a government of the Queen, subject to the Constitution and to federal limitations.[79] Thus, by judicial analysis of extra-textual, though not necessarily extra-constitutional, sources consistent with the text and incorporated therein, (often historical and sometimes English), it was possible to supplement the meagre text with established legal principles to enable a positive regulated approach.

Having been referred to as 'traditional conceptions',[80] there are numerous examples of use being made of these when considering Section 61. Dixon J, that most eminent of Australian jurists of the twentieth century, stated that the character of the 'broad division of power' for which the Constitution provides "is determined according to traditional British conceptions"[81]; or, as paraphrased by Professor Campbell, "conceptions founded in the common law of England and its overlay of constitutional convention".[82] Of course, reference is being made here to the principles of responsible government, and the common law prerogative powers and capacities. In *Cadia Holdings*, even following the recognition of a 'nationhood' power in the *Pape* case, French CJ interpreted Section 61 to "include…the prerogative powers accorded the Crown by the common law", and approved of Dixon J's reference to the "common law prerogatives of the Crown of England" being "carried into the executive authority

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77 *Wool Tops* (n 27).

78 *Ibid* 440.

79 *See* N Aroney and others, *The Constitution of the Commonwealth of Australia: History, Principle, Interpretation* (Cambridge University Press 2015) 434-442; Winterton (n 18) 23-24; Zines (n 4) 292.

80 *See Communist Party* (n 1) 230; and *Boilermakers' Society* (n 3) 276.

81 *Ibid*.

82 Enid Campbell, 'Parliament and the Executive' in L Zines (ed), *Commentaries on the Australian Constitution* (Butterworths 1977) 88.

of the Commonwealth".[83] Further, in relation to the provenance of these powers, reference has been made by Australian courts to English constitutional history and related common law developments; the 1688-89 settlement and the Bill of Rights; the historical subjection of common law powers and capacities to Parliament; and, to Lord Diplock's dictum that "[i]t is 350 years and civil war too late for the Queen's courts to broaden the prerogative".[84] Of course, the nature and content of the prerogative is presently determinable by reference to the Australian common law.[85]

The common law recognises two types of non-statutory powers in the Executive Government, maintaining Blackstone's distinction between the prerogative powers ('prerogative' as they are unique to the Crown), and the non-prerogative executive powers and capacities ('non-prerogative' as these are shared with other persons by virtue of juristic personality).[86] Each will be examined separately.

(a) The Prerogative Powers

While it is not denied that the precise content of the prerogative may remain difficult to ascertain in certain circumstances, many prerogatives and executive capacities are well-settled. As Professor Winterton observed, "the prerogative constitutes a substantial body of principles, rules and precedents, established over hundreds of years, the subject of considerable literature and heritage shared with comparable nations such as the United Kingdom, Canada, and New Zealand."[87] It provides a source of legally discernible criteria to determine the validity of executive action in circumstances where there is no relevant statute. Given the extraordinary nature of executive power, especially in emergencies relating to national security and the like, it is reassuring that its

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[83] *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195, 226, citing *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278, 304. *See* also *Williams v Commonwealth (No 1)* (2012) 248 CLR 156, 184-5 [22]; *Barton v Commonwealth* (1974) 131 CLR 477, 498; Winterton (n 18) 23-24; Zines (n 4) 280.

[84] *British Broadcasting Corporation v Johns* [1965] Ch 32 at 79. *See*, eg, Black CJ in *Ruddock v Vadarlis* (2001) 110 FCR 491, 501. An excellent manifestation of this approach is Gageler J's judgment in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

[85] For the value of an 'historical constitutional approach' as a basic interpretational methodology for s 61 and matters relating to executive power, *see* Peter Gerangelos, 'Section 61 of the *Commonwealth Constitution* and an 'Historical Constitutional Approach': An Excursus on Justice Gageler's Reasoning in the *M68* Case' (2018) 43 University of Western Australia Law Review 103, drawing on the work of JWF Allison in the United Kingdom, *The English Historical Constitution* (Cambridge University Press 2007).

[86] *Davis v Commonwealth* (1988) 166 CLR 79, 108 (Brennan J), and expressly adopted in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 97-8 [132], [133], [136]. This distinction was the basis of the judgments in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 and *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

[87] Winterton (n 63) 35.

principal source is a residue; that, being common law, it is inherently subject to legislation, and that its exercise may be but an interim measure pending legislation. Reliance upon it to determine the ambit of Section 61 executive power is consistent with a Constitution which maintains the supremacy of Parliament and provides for a system of responsible government – and hence, constitutional symmetry is preserved.

The more established prerogatives recognised by Australian courts include the following – conducting foreign relations,[88] executing treaties,[89] declaring war[90] and peace,[91] defending the nation (including in circumstances of rebellion, subversion and the stationing and control of the armed forces),[92] extradition,[93] and the appointment of diplomats.[94] Other prerogatives include the coining of money, the prerogative of mercy,[95] and the conferral of honours.[96] Excepting emergencies, such as war and other extreme events, the prerogative does not generally support the use of coercion, and the courts have generally tended to avoid giving recognition to a prerogative which may interfere with the life, liberty, or property of the subject.[97] During wartime, however, there appears to be a prerogative power to intern enemy aliens,[98] requisition ships,[99]

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88 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 644, adopted in *Barton v Commonwealth* (1974) 131 CLR 477, 498; *New South Wales v Commonwealth* (1975) 135 CLR 337, 379, 381, 503; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 210 [31].

89 *Victoria v Commonwealth* (1996) 187 CLR 416, 476–80 (‘*Industrial Relations Act* case’); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 193, 212, 213, 214, 223, 237–40, 249; *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 644, 683–4.

90 *Farey v Burvett* (1916) 21 CLR 433, 452; *Johnston Fear & Kinghan & The Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 314, 318, 325. *See* also *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75; *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508.

91 *See* the opinion of Sir Kenneth Bailey S-G examined in L Zines, ‘Commentary’ in HV Evatt, *The Royal Prerogative* (Law Book Co 1987) C6. (This was the published version of Evatt’s doctoral thesis at The University of Sydney, submitted in 1924.) *See* also L Zines, ‘The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth’ in Zines (n 82) 34.

92 *Marks v Commonwealth* (1964) 111 CLR 549, 564. *See Chandler v DPP* [1964] AC 763, 791, 796, 798, 800, 807, 814; *China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197, 214–15, 217, 227–8, 239.

93 *Barton v Commonwealth* (1974) 131 CLR 477.

94 *See* MH Byers S-G Opinion on Governor-General’s Instructions, September 5 1975, para 4(F), 14, cited in Winterton (n 18) 49, (n 38). Winterton opined that the Queen’s assignment to the Governor-General in 1954 of the power to appoint diplomats was “probably unnecessary”: 242, (n 38).

95 https://www.ag.gov.au/Crime/federal-offenders/Pages/appeals.aspx#royal-prerogative-of-mercy.

96 The Crown’s proprietary prerogatives in relation to certain metals was acknowledged in *Cadia Holdings v New South Wales* (2010) 242 CLR 195, 206–9 [21]–[29].

97 *See Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75, *A v Hayden* (1984) 156 CLR 532. A very useful and extensive catalogue of prerogative powers was provided by the United Kingdom Ministry of Justice in *The Governance of Britain, Review of the Executive Royal Prerogative Powers: Final Report* (2009).

98 *R v Bottrill; Ex parte Kuechenmeister* [1947] KB 41.

99 *The Broadmayne* [1916] P 64. Zines noted that during the Falklands War in 1982, a United Kingdom Order in Council provided for the requisition of ships subject to compensation:

and to destroy property to prevent it from entering enemy hands.[100] In relation to the requisition, damage, or destruction to property, compensation is generally payable.[101]

In emergencies short of war or its imminence, the extent of the prerogative is "remarkably abstruse" and uncertain.[102] The House of Lords postulated in *Burmah Oil Co (Burmah Trading) Ltd* v. *Lord Advocate* that the maintenance of public safety lies within prerogative power regardless of whether a state of war exists or is imminent.[103] In the words of Viscount Radcliffe, "[r]iot, pestilence and conflagration might well be other circumstances" which trigger the power.[104] These principles would most likely apply in Australia, whether as elements of the prerogative or along the more limited lines suggested in the textual interpretation of the 'maintenance' limb in Section 61.[105]

Despite a degree of controversy at the edges, it can be seen that reliance on the prerogative does provide a considerable supplement, by way of legally-discernible principles, to those non-statutory powers which the Commonwealth government may exercise.

(b) An Aside: 'Discretionary' or 'Reserve' Powers

As an important aside prior to an examination of the non-prerogative capacities, it is noted that those powers which in India are referred to as the President's 'discretionary' powers,[106] and in Australia as the Governor-General's 'reserve' powers – being powers that may be exercised without, or indeed contrary to, advice – are provided for expressly in the Constitution, notwithstanding that their origins lie in the historical prerogative powers of the English monarchs (for instance, the 'reserve' power to appoint and dismiss the prime minister, to dissolve the House of Representatives pursuant to Sections 5, 28, and 64, and to dissolve both the House and the Senate pursuant to Section 57). These, generally speaking, must be exercised consistently with the principles of responsible government, even though the Governor-General need not act on advice when exercising them; and, following the important case of *Lange* v. *Australian Broadcasting Corporation*, it may be the case

Zines (n 4) 287; *Motilal* (n 59).

[100] *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75.

[101] *Ibid*.

[102] Zines (n 4) 287, quoting Smith and Brazier (n 76) 566, (n 13).

[103] *Burmah Oil Co (Burmah Trading) Ltd v Lord Advocate* [1965] AC 75.

[104] *Ibid* 114–15.

[105] More controversially, the English Court of Appeal appears to have held that there exists a general prerogative to maintain or keep the peace in *R v Home Secretary; Ex parte Northumbria Police Authority* [1989] 1 QB 26. This is unlikely to be followed in Australia as it is a new power, not previously recognised by the common law according to leading commentators: *See* Zines (n 4) 287.

[106] Subramani and Venkatachaliah (n 11) 7025.

in Australia that the core principles, at least, of responsible government are legally enforceable.[107]

That these may be regarded as legally enforceable principles, subject to justiciability, is consistent with the fact that Australian courts have repeatedly interpreted the Constitution consistently with the basic principles of responsible government – that the Governor-General must act on the advice of the ministry; that the government be chosen from amongst those members of Parliament who have the confidence of the lower house of Parliament; and, that ministers are responsible individually, and the Cabinet collectively, to Parliament.[108] Early judicial reference was made to responsible government "pervading the instrument [the Constitution]".[109] Chief Justice Dixon, the champion of a *legal* separation of powers, including with respect to legislative and judicial,[110] referred to responsible government as "the central feature of the Australian constitutional system."[111] This accords with other judicial statements to the effect that the "Constitution and Government could not function without the implications of federalism and responsible government."[112] Quick and Garran, in their oft-quoted commentaries, stated that "for better or worse, the system of Responsible Government, as known to the British Constitution, has been practically embedded in the Federal Constitution, in such a manner that it cannot be disturbed without an amendment to the instrument".[113]

Generally speaking, and leaving complex questions of justiciability aside, in both India and Australia, the content of the discretionary or reserve powers of the President and the Governor-General, and the principles by which they must be exercised, are very similar. However, the greater textual prescription with respect to many of these powers in the Indian Constitution remains a source of difference.[114]

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[107] (1997) 189 CLR 520, 557–9. *See* Geoffrey Lindell, *Responsible Government and the Australian Constitution – Conventions Transformed into Law?* (Federation Press 2004) and *see* James Stellios, *Zines's The High Court and the Constitution* (Federation Press 2015) 369. In the case of the United Kingdom, *see* now the 'Brexit' cases, especially *R (on the application of Miller) v The Prime Minister*; *Cherry and Ors v Advocate General for Scotland* [2019] UKSC 41, relating to the power to prorogue Parliament.

[108] *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 364 (HC) (Mason J).

[109] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 146.

[110] George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (The Federation Press 1994) 85, 186–187.

[111] *Boilermakers' Society* (n 3) 275. *See* also the *Wheat* case (n 3) 89; Owen Dixon, *Jesting Pilate* (Law Book Co 1965) 101.

[112] *Uebergang v Australian Wheat Board* (1980) 32 ALR 1, 32 (Murphy J).

[113] Quick and Garran (n 3) 706–707.

[114] This issue of the discretionary or reserve powers from a comparative perspective deserves its own article and hence, because of the emphasis on general executive power here, it is mentioned in passing only for the sake of completeness.

(c) Non-Prerogative Capacities

The non-prerogative capacities refer to those powers or capacities which the executive may exercise by virtue of juristic personality, and are therefore not necessarily unique to the executive government. They include powers or capacities which may effect a change in legal relations – entering into contract, creating a trust, incorporating a company, disposing of property, conducting litigation, employing and dismissing staff, appointing agents,*etc*.[115] One of the most important Commonwealth capacities is the ability to enter into contracts.[116] The construction of facilities on its own land has also been regarded as such a capacity.[117] As Professor Adam Perry has pointed out, these can be referred to as *legal* powers because they may affect a change in legal relations.[118] Accordingly, consistently with the 'regulated' approach, reference is being made to legally discernible principles, as opposed to relying on residual arguments. Such powers not being *prerogative* powers, their exercise is subject to the general law.

With respect to the very important capacity of entering into contracts and spending, the High Court has, in the recent *Williams* cases, limited the depth of that power by requiring prior statutory authorisation for government contracts, the only exception being, very generally speaking, those contracts that are part of, or incidental to, the carrying out of the ordinary and well-recognised functions of government.[119] Like the recognition of the 'nationhood' executive power in *Pape*, this was a new development. This is reflected in the fact that the Court rejected 'the Common Assumption', that is, that widely held assumption which, in its mainstream version, maintained that the *non-statutory* executive capacity of the executive government to contract and spend could be exercised with respect to the subject matter that came within Commonwealth legislative competence, subject to the general law and appropriation. The majority reasoned that the non-statutory ambit ('depth') of this capacity could not simply be determined by equating it with that of a natural person, the Commonwealth being a federal polity with three branches of government. Hence, express statutory authorisation was required, with the above-mentioned exception.[120] At this stage, this qualified requirement for statutory authorisation

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[115] *See* Adam Perry, 'The Crown's Administrative Powers' (2015) 131 Law Quarterly Review 652, 660; Zines (n 4) 280.

[116] *Ansett Transport Industries Pty Ltd v Commonwealth* (1977) 139 CLR 54, 61, 113. *See* also *Kidman v Commonwealth* [1926] ALR 1, 2. For a detailed examination of this capacity, *see* Nick Seddon, *Government Contracts* (5th edn, 2013).

[117] *Johnson v Kent* (1975) 132 CLR 164, 170.

[118] Perry (n 115) 661.

[119] *Williams v Commonwealth (No 1)* (2012) 248 CLR 156 and *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

[120] The ramifications of these decisions would appear to apply only to the capacity to contract. They have been the subject of extensive academic commentary, much of it unfavourable, especially with respect to the rejection of 'the common assumption' which, even in the original case here, was originally accepted by all parties. A detailed analysis is not possible in

appears only to apply to the capacity to contract for reasons peculiar to contracts and, *inter alia*, in order to ensure that the federal government is limited more precisely to the spheres of its legislative competence in order to meet federal concerns.

The above list of capacities does not include all the non-statutory capacities that relate to those other more routine activities that governments engage in. It was limited, it may have been noticed, to those which effect a change in legal relations. However, when undertaking these other routine functions, including mundane administrative functions, the government may be acting in such a way so as not to affect legal relations. Into this category would fall the following Australian examples – conducting an enquiry,[121] and keeping directories of various sorts.[122] English examples include circulating written material,[123] consulting with officials,[124] placing wire taps,[125] and adopting policies and guidelines.[126]

The various non-prerogative capacities of government, of both types described above, have been very difficult to categorise. In certain respects, they challenge the general thesis herein based on the distinction between the regulated Australian approach with the Indian residual approach. Referring to the important distinction identified by Perry, this is due to the failure to draw the distinction between the 'non-legal administrative powers' or 'ordinary powers', that do not affect legal relations, and the former 'legal administrative powers', that do. This has resulted in their being labelled together under generic classifications, and referred to variously as the 'common law powers of the Crown', 'non-statutory powers', 'secondary prerogatives', 'spurious

this article, but *see*, Geoffrey Lindell, 'The Changed Landscape of the Executive Power of the Commonwealth after the *Williams* Case' (2012) 39 Monash University Law Review 348; Glenn Ryall, '*Williams v Commonwealth*—A Turning Point for Parliamentary Accountability and Federalism in Australia?' (2014) 60 Papers on Parliament Lectures in the Senate Occasional Lecture Series, and Other Papers 131; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 Sydney Law Review 253, 256; Shipra Chordia, Andrew Lynch and George Williams, 'Commonwealth Executive Power and Spending after *Williams [No 2]*' (2015) 39 Melbourne University Law Review 306; Gerangelos (n 6).

[121] *Clough v Leahy* (1904) 2 CLR 139. For reference to the examples contained in Notes 121 to 126, the author is indebted to Professor Lindell in his article Lindell (n 120) 362, 363, n 60, n 70.

[122] *MacDonald Pty Ltd v Hamence* (1984) 53 ALR 136, 138-41; *Taranto (1980) Pty Ltd v Madigan* (1988) 81 ALR 208; *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121.

[123] *R v Secretary of State for Health; Ex parte C* [2000] HRLR 400.

[124] *R (Shrewsbury & Atcham BC) v Secretary of State for Communities and Local Government* [2008] 3 All ER 548.

[125] *Malone v Metropolitan Police Commissioner* [1979] Ch 344.

[126] *R (New London College Ltd) v Secretary of State for the Home Department* [2013] 1 WLR 2358.

prerogatives', and the 'third source' of authority for government action.[127] More recently, Lord Sumption referred to these capacities as 'general administrative powers' of the Crown, "which are not exercises of the royal prerogative, and do not require statutory authority".[128] Further, while the source of these powers is often regarded as the common law, it is also sometimes said that the executive government is able to engage in these capacities for the simple reason that they are not prohibited by law – the 'residual freedom' argument.[129]

If this 'residual freedom' argument is accepted as the dominant explanatory model, the determination of the substantive content of government capacities would be based first – negatively or passively – on whether or not they are prohibited by law, and secondly, on whether or not they can be categorised as those judicial or legislative functions which, because of the separation of powers, cannot be exercised by the executive. It will be noticed that such an approach is contrary to the regulated approach which requires positive authorisation from a legal source of power. It also has certain features in common with the Indian approach. To the extent, if at all, that this is adopted by Australian courts, then it might be said that, with respect to the non-prerogative capacities at least, the approaches adopted in the two jurisdictions may tend to meld.

This will be avoided, however, if the important distinction developed by Professor Perry is applied by Australian courts. Perry has compellingly argued that as those administrative powers which do not affect legal relations are not *conferred* by law, albeit not being prohibited by it, they may not properly be described as 'common law powers'. It is more accurate rather to refer to these as '*non-legal* administrative powers', or simply, 'ordinary powers'. Only those capacities that do affect legal relations, that is, 'legal administrative powers', such as entering into contracts, disposing of property, *etc.*, should be referred to as 'common law powers'.[130] Thus, while the latter can be derived, very generally speaking, from a positive source of law, the former are simply *sui generis*. Clearly, the government, like natural persons and other legal persons, must engage in a range of purely administrative activities for the purposes of carrying out its obligations and general administration.

The comparative observation which can be made here, therefore, is that to the extent that these non-prerogative capacities that are *non-legal* administrative powers, or *ordinary* powers, are *sui generis*, the executive government is able to engage in them simply because they are not prohibited by

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[127] These various labels and their sources were very usefully collated by Professor Twomey (n 6) 317, n 25.

[128] *R (New London College Ltd) v Secretary of State for the Home Department* [2013] 1 WLR 2358, 2371 [28].

[129] Perry (n 115) 664.

[130] *Ibid*.

law; and, assuming that any one of these does not usurp legislative or judicial power, then the Australian approach here comes close to the 'residual' approach in India. Nevertheless, the important point of distinction is that this 'residual' rationale is very limited, applicable in Australia only to that minor class of executive capacities that are the 'non-legal administrative powers'. There remains a positive source for 'legal administrative powers', these being 'common law powers', and hence, the 'regulated' approach paradigm can be maintained.

(d) The Particular Qualities, Advantages of (and Limitations to), the Common Law Powers

While the prerogatives are powers recognised by the common law, there abides within them a certain quality which distinguishes them "as being out of the ordinary course of the common law."[131] This is a reflection of the particular history of executive power, especially as it developed through the various disputes over the prerogative between Parliament and the Stuart Kings in seventeenth century England. As the issue was decided in favour of Parliament, the prerogative was rendered subject to parliamentary control and legislation – a strange *prerogative* indeed, if it depends on the consent and forbearance of the legislature, but a 'prerogative' nevertheless. Those prerogative powers which were left in the hands of the Crown following the Revolution Settlement of 1688-89 were those which Parliament permitted it to retain, shaped largely by contemporary assessments of governmental necessity and expediency. Managing foreign affairs, entering treaties, and declaring war and peace, remain the classic examples. However, even these prerogatives were rendered, and still remain, subject to statutory control and abnegation.

As a consequence, one of the most important qualities of the prerogative is its residual character – "the residue of discretionary power left at any moment in the hands of the Crown".[132] It is not a dynamic area of the common law with many aspects of the prerogative having become subject to atrophy, and this is not necessarily a bad thing. Its second quality, an obvious corollary of the first, is that no new prerogatives can be created.[133] Moreover, being common law, these prerogative powers, together with the 'capacities', are inherently subject to statute, reflecting also, of course, the fundamental importance of parliamentary supremacy in a system of responsible government under the Constitution. As Professor Winterton put it, because the prerogative is subject to legislation,

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[131] *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 226 [87].

[132] *R v Secretary of State for the Home Department; Ex parte Fire Brigades Union* [1995] 2 AC 513, 573.

[133] *British Broadcasting Corporation v Johns* [1965] Ch 32, 79, quoted with approval by Black CJ in *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30].

"it can be seen as merely an interim measure of executive power until Parliament regulates the subject by legislation".[134]

An exercise of these powers is generally subject to judicial review,[135] leaving aside issues of justiciability. There are also those other ancient limitations which still apply – the prerogative cannot be used to permit a dispensation from the application of the law,[136] to create an offence,[137] or to impose a tax.[138] The courts have tended to avoid recognising a prerogative power which may interfere with the life, liberty, or property of the subject.[139] The prerogative will not permit the executive "to deprive a person of liberty", at least in times of peace, and there is "no inherent power to deport, extradite or detain".[140] Further, it was affirmed by the High Court that statutory authority is needed to support extradition of fugitive offenders from Australia.[141]

There are miscellaneous peculiarities to the prerogative which further enhance its susceptibility to legislative control, and these peculiarities may also not necessarily apply to the 'nationhood' power discussed below. Rather than simply abrogate a prerogative, it is far more common for Parliament to *displace* the prerogative with legislation granting the government powers similar to those conferred by the prerogative, or to provide for a statutory regime to accomplish the objectives which could otherwise be implemented under the prerogative. Thus, for example, if a statute was enacted that dealt extensively and exclusively with all issues relating to extradition in all cases whatsoever, then any relevant prerogative relating to extradition, as discussed in the *Barton* case above, would be overridden.[142] Such legislation supersedes the prerogative, and the Executive must exercise the powers conferred subject to the conditions in the statute – it cannot simply fall back on the prerogative.[143]

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134 Winterton (n 63) 35.

135 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453.

136 *Vestey v Inland Revenue Commissioners* [1980] AC 1148, 1195; *A v Hayden* (1984) 156 CLR 532, 580–2 (Brennan J); *Ridgeway v The Queen* (1995) 184 CLR 19, 54; *White v Director of Military Prosecutions* (2007) 231 CLR 570, 592 [37].

137 *Case of Proclamations* (1611) 77 ER 1352; *Davis v Commonwealth* (1988) 166 CLR 79, 112.

138 Bill of Rights 1688, art 4; *Bowles v Bank of England* [1913] 1 Ch 57, 84–5; *Wool Tops* (n 27) 433–4.

139 *See A v Hayden* (1984) 156 CLR 532.

140 *In re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36; *Barton v Commonwealth* (1974) 131 CLR 477; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 547. *See* now *Plaintiff M68/2015 v Minister for Immigration and Border Protection* 109 [175] (Gageler J) and 158 [372]-[373] (Gordon J), confirming similar statements made in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 567-8 [147]-[150], 595-600 [258]-[276].

141 *Vasiljkovic v Commonwealth of Australia* (2006) 227 CLR 614, 634–5 [49]–[50].

142 *Barton v Commonwealth* (1974) 131 CLR 477.

143 For a more detailed discussion of this and related cases, *see* Winterton (n 63) 42-49, where reference is made to the leading case, *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508, and related English and Australian cases.

(e) The 'Nationhood' Power

A turning point in Australian constitutional jurisprudence, and one posing a significant challenge to the hitherto dominant regulated approach, is the recognition by a majority of the High Court in the *Pape* case of some form of *inherent* non-statutory executive power in Section 61. This power was construed to derive generally from the status of the Commonwealth as a national government in circumstances where only it can efficaciously undertake action for the benefit of the nation.[144] In its formulation, the following statement by Mason J in the *AAP* case was very influential:

> "[T]here is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of [Section]51 (xxxix) [the incidental legislative power] and [Section]61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation."[145]

While the Court did not deny the continuing existence of the common law powers, for the majority of judges, these were no longer to be regarded as determinative of the ambit of the power in its depth dimension, such a role now being assumed by this inherent executive power based on national considerations.

This has been a controversial development, and the subject of, somewhat trenchant, critical evaluation.[146] Those aspects of the new power which challenge the hitherto dominant regulated Australian approach are best understood by juxtaposing the nationhood power with the above-mentioned common law prerogative powers, which, prior to *Pape*, had defined the ambit of the power in the depth dimension.[147] Aspects of the new power have also caused difficulties in the determination of the *breadth* dimension in the application of this new power, as noted above, making it difficult to sustain in a meaningful way.

The first concern with the 'nationhood' power is the element of vagueness which attends its definition. Beyond the general terms of the 'peculiarly adapted' formula, the power has not received any more precise definition. In the *Pape* case, for example, it was held by the majority[148] that the power

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[144] (2009) 238 CLR 1 (French CJ, Gummow, Crennan, and Bell JJ).

[145] *Victoria v Commonwealth* (1975) 134 CLR 81, 397 (emphasis added); however, it could be argued that this statement simply referred to the breadth of the power, not adding a new power in the depth dimension. This is argued in Gerangelos (n 6).

[146] *See*, eg, Twomey (n 6), and Gerangelos (n 6).

[147] Although, note the recognition given to the power in *Ruddock v Vadarlis* (2001) 110 FCR 491, by a majority of the Full Federal Court prior to *Pape*.

[148] By 4:3; French CJ, Gummow, Crennan, and Bell JJ Hayne and Kiefel JJ, Heydon J dissenting.

extended to provide a fiscal stimulus, subject to appropriation, by way of an *ex gratia* payment determinable by reference to an individual's taxable income in response to a serious financial crisis, such as was represented by the 'Global Financial Crisis' of 2008. Neither was a more exhaustive definition attempted, nor was it explored whether the power could be supported by either the common law prerogatives or capacities.[149]

Moreover, the reasoning of the majority was not uniform on this point. The narrower definition was that of French CJ, one limited very strictly to the facts:

> "[T]he executive power extends…to short term fiscal measures to meet adverse economic conditions affecting the nation as a whole, where such measures are on their face peculiarly within the capacity and resources of the Commonwealth Government."[150]

This French CJ distinguished from "a general power to manage the national economy".[151] No exhaustive definition was attempted – it was to be developed on a case-by-case basis. He also denied that he was referring to some kind of emergency power, or that here "under some general rubric such as 'national *concern*' or 'national emergency', the executive power was enlivened".[152] Perhaps it would have been better if he had, for that would have meant a very high threshold for its exercise. As it is, it appears to be available to deal with circumstances which, although may not be ordinary, need not be 'extraordinary'. While French CJ acknowledged the availability of the common law powers and capacities,[153] he noted that the additional component to the power derived from the fact that Section 61 "had to be capable of serving the proper purposes of a national government".[154] He did not explain why the prerogatives and capacities, together with the powers directly sourced in Section 61 as above-mentioned,[155] (which included the power to deal with emergency situations), did not already serve this purpose.

Moreover, the *breadth* dimension was left rather imprecise when the Chief Justice postulated the existence of "broadly defined limits to the power which must be respected and applied case by case".[156] He envisaged a more expansive conception of breadth – "it is difficult to see how the payment of moneys to taxpayers, as a short-term measure to meet an urgent national economic

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[149] Even though, arguably, the making of an *ex gratia* payment did come within the recognised common law capacities.

[150] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63 [133].

[151] *Ibid*.

[152] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 24 [10].

[153] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127].

[154] *Ibid*.

[155] *See* Section V above ("Textual Comparison and Analysis").

[156] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 60 [127].

problem, is in any way an interference with the constitutional distribution of powers".[157] It is unclear why it was "difficult to see" that there was no interference with the division of powers, if this power was being exercised beyond the heads of Commonwealth legislative competence.[158] The dissenting judges, for example, did not so easily come to this conclusion. This vagueness continues to plague the power and, it is submitted, is unavoidable, in that it cannot be remedied.

A subtle shift, however, can be discerned toward the view that the determinant of breadth is whether, *because of their unambiguously national character*, particular executive actions do not *interfere* in a more general, though not precisely specified, way with *the distribution* of powers between the Commonwealth and the States. However, if the end to which these activities are directed is national in character, then it must almost automatically follow that it does not undermine this distribution based on a broadly defined criterion of *non-interference*. The power may thus become self-defining at least insofar as breadth is concerned. Thus, French CJ made reference to the agreed facts to conclude that the precise measures taken by the government were "*rationally adjudged* as adapted to avoiding or mitigating the adverse effects of the global financial crisis affecting Australia as a whole".[159] This would appear to permit the Commonwealth executive some scope – although it is unclear how much scope – to determine the question in both depth and breadth dimensions, so long as its determination is a rational one as adjudged by the Court.[160] If French CJ was proposing a margin of appreciation test, it is not clear by what judicially manageable standard such a fundamental question was to be determined. Although his interpretation was otherwise very restrained, and did not appear to encourage a broad-based power based on general emergency considerations, once recognised, it becomes very difficult to restrain. There is no guarantee that other judges, let alone the government, will adopt a conservative disposition toward it – as was seen in the reasoning of the other majority justices in the same case.

The joint judgment of Gummow, Crennan, and Bell JJ gave recognition to a more expansive definition of the nationhood power, one which "enables the undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution, having regard to the spheres of responsibility vested in it".[161] The 'maintenance' limb in Section 61 conveys "the idea of the protection of the body politic or nation of Australia".[162] This is sugges-

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[157] *Ibid*.

[158] *See* Heydon J (in dissent), *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 182-183 [522].

[159] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 133 [63].

[160] In this regard, *see* the excellent discussion in Peter Hanks, Francis Gordon, and Graeme Hill, *Constitutional Law in Australia* (3rd edn, LexisNexis 2012) 221.

[161] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 83 [214].

[162] *Ibid*.

tive of a broad emergency self-protective power similar to that envisaged by 'Locke's prerogative' discussed above, although adopting a much lower threshold for its application, given that it was validly invoked in the circumstances of this case. With respect, vagueness also plagues the contours of the power envisaged by the justices. As this new inherent power is not a residue (like the common law powers), and remain sill-defined except in the most general terms that are even broader than those proposed by the Chief Justice, it has the potential for self-definition and aggrandizement.

Moreover, as was seen in the Chief Justice's reasoning, this power was said to derive directly from a constitutional provision, as opposed to being merely incorporated therein like the prerogative. Thus, it may not be as amenable to statutory regulation, and is certainly not vulnerable to abnegation.[163] This allows that which responsible government seeks to avoid –potential pockets of executive immunity from statute.

The conception of the power in the joint judgment conflates breadth and depth considerations in a way which seems to broaden the power even further than envisaged by French CJ, and in a way that might make the dichotomy otiose. Indeed, a precise consideration of breadth is not readily discernible in their reasoning. Initially, they appeared to consider that the particular 'spheres of responsibility' vested in the Commonwealth were relevant,[164] but they then affirmed that if the executive action satisfied the Mason implication, then it was, it seems, *ipso facto*, valid. Yet, Mason J was very concerned to emphasise that executive action be strictly limited by the subject matters of legislative competence, which *legislative* competence could be expanded by reference to national considerations, and as limited by his implication. However, by not emphasising this point sufficiently, the plurality suggested that it is not necessary to ask whether, as discrete questions, depth and breadth have been satisfied. The lack of a clear distinction between these dimensions was evident in the judges' conclusions that, "[i]t can hardly be doubted" that the financial crisis "concerns Australia as a nation". They regarded the financial crisis as being akin to a state of emergency such as a natural disaster, in relation to which only the federal government could adequately respond.[165] This confirms the point that breadth considerations are, thereby, seemingly met *ipso facto*. However, the issue remains that these are, in any event, political questions not best suited to judicial determination.

That apart, it may be the case that the definition will be developed conservatively, perhaps more as a facilitative capacity for national initiatives. This is

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[163] *See* eg, the position taken by JE Richardson, 'The Executive Power of the Commonwealth' in L Zines (ed), *Commentaries on the Australian Constitution* (Butterworths 1977) 82; and KW Ryan, quoted in Winterton (n 18) 99.

[164] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 83 [214].

[165] *Ibid* 89 [233] (emphasis added).

in contrast with its development as a power akin to an emergency prerogative power that may override existing legal rights, as, for instance, in the way of the common law war prerogative. However, this remains uncertain, and such precedents as do exist, principally the *Tampa* case, suggest that the potential use of the power may be broader than which would otherwise be permitted by the common law. It would also do well to note that the strong criticism of the majority decision in *Tampa* may restrain future developments permitting of coercion in the exercise of the power.[166]

Owing to its long history, it is not denied that reference to the prerogative has a certain archaic quality that may sound a discordant note within the modern constitutional lexicon.[167] However, the nationhood power remains presently hostage to policy and subjective criteria, and not best suited to judicial determination. Three of the seven justices in the *Pape* case, for example, were unable to agree that the Commonwealth could invoke any nationhood power to support the power it claimed on the facts.

Moreover, essential to the outcome of *Pape* was the seriousness of the financial crisis as it confronted Australia. This, however, was not contested in the case. However, if it had been, with respect, it is appropriate to ask if the High Court was best suited to determine this question as a preliminary to determining what action the Commonwealth government could validly undertake in response. The problematic aspect to all this remains the fact that the initial determination of this key question seemed to depend on the government's own assessment that there was a national crisis, and that it was the arm of government best adapted, and equipped, to respond.[168] It was thus, it seems, able to assert a kind of self-defining power (as suggested above) in circumstances which, while very serious, were not unambiguously so, and hence, not necessarily amenable to judicial notice, as was indeed the view of the minority judges.[169] How judges could second-guess this determination if the criteria are essentially determinable by reference to terms which may be set by the government itself, is problematic. It would seem that they are on much safer ground when they are able to determine, pursuant to legal criteria, *whether it is the government or the Parliament that has the legal authority to undertake the action proposed*, as opposed to the determination of the seriousness, or otherwise, of any apparent crisis.

Another main point of concern is that, unlike the common law powers which are inherently subject to statute, the extent to which any nationhood

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[166] *See* Zines (n 4) 291, which also refers to other academic criticism of the decision.

[167] *See* Bradley Selway, 'All at Sea - Constitutional Assumptions and the 'Executive Power of the Commonwealth'' (2003) 31(3) Federal Law Review 495. To others, it may seem a colonial remnant best left to atrophy – *see* Winterton (n 63) 34.

[168] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 91 [241] – [242].

[169] This was found throughout the respective reasoning in the judgments of Kiefel, Hayne, and Heydon JJ in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

power could be controlled or regulated by legislation, remains uncertain. The common law's inherent subjection to legislation includes the potential of legislative *abrogation* of particular powers, and hence any exercise of such powers "can be seen as merely an interim measure".[170] The same cannot be said of this new inherent nationhood power, derived as it is directly from Section 61, a constitutional provision. This renders the nationhood power more akin to a specific grant of power to the Governor-General. Therefore, unlike the common law powers, this power cannot be abrogated by Parliament, although, arguably, it could be regulated in a limited way.[171]

Nevertheless, all present indications from the Court would seem to suggest that there is little room to doubt that the principle of parliamentary supremacy over the executive would trump any arguments favouring even some small sphere of immunity for Section 61 executive power from legislative regulation. In this regard, the High Court may have done enough in *Brown* v. *West* where it stated:

> "What ever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute. A valid law of the Commonwealth may so limit or impose conditions on the exercise of the executive power that acts which would otherwise be supported by the executive power fall outside its scope."[172]

On the other hand, there is sufficient uncertainty to warrant, at least out of an abundance of caution, some more careful consideration of this precise question, especially as these views were expressed pre-*Pape,* and are not directly addressed to the nationhood power.[173]

A couple of observations may be made in respect of this nationhood power from an Indian perspective. Firstly, there is no indication that Indian courts have, or will accept, such a broad notion. Secondly, in light of the difficulties indicated above, if they were to consider doing so, the pitfalls indicated above in the Australian context may provide some salutary lessons. It may need to be considered whether such a power can be located within that residue of power beyond legislative and judicial power referred to in the *Ram Jawaya* case.[174] While there in no particular reason why it could not be so located, there is

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[170] Winterton (n 63) 35.

[171] *See* Aroney and others (n 79) 490–494.

[172] (1990) 169 CLR 195, 202; cited at *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 93 [122]. *See* to similar effect, *Victoria v Commonwealth* (1975) 134 CLR 81, 406; Winterton (n 18) 96; L Zines, *The High Court and the Constitution* (5th edn, The Federation Press 2008) 360.

[173] *See Final Report of the Constitutional Convention Vol 2* (AGPS: 1988) ch 4, and George Winterton, *We the People* (OUP 1994).

[174] *See* (n 43), and the accompanying text.

no reason to think that it would be necessary. Under the residual approach, no positive definition of power is needed. It is enough to examine the executive action in the particular case and then make the determination. There is no imperative upon the Court to provide any sort of positive, or indeed exhaustive, definition of the residue. Such positive statements as have been made by both Indian judges and commentators, examples of which have been cited above, are more by way of providing a general framework for understanding executive power.

The nationhood power is the product of a judicial disposition to seek positive definition of power in defined sources of law, albeit that in this instance it has resulted in uncertainty and vagueness rather than clarity. Whether it was a necessary development is another question, given the very broad range of power permissible in the depth dimension by the common law prerogatives and capacities, combined with those powers which could be derived directly from Section 61.

Reinforcing the point made above, perhaps this development can be explained by the immense difficulty in amending the Constitution in Australia. A greater burden thus falls on constitutional interpretation, as opposed to constitutional amendment, in order to clarify uncertain constitutional principles, and, to renovate, for want of a better term, the Constitution to better reflect present realities. A correct balance needs to be struck. It is in the very nature of a constitution to be a legal and political blue print for the organisation of a polity that is meant to last. It is no ordinary statute. Yet, it must be couched, and interpreted over time, in terms of sufficient generality that enables its continued efficacy in evolving circumstances, while maintaining fidelity to the original compact. The formula for the correct balance in either jurisdiction is not an issue that can be resolved herein. However, it can be observed that the easier recourse to constitutional amendment in India lessens the imperative to seek positive exhaustive definition in all circumstances with respect to executive power. This may explain why the Australian courts have resorted to positive definition in a new 'nationhood' power, whereas the Indian courts remain content, generally speaking, with residual notions.

IX. CONCLUSION

It is clear from this modest comparative examination of the two constitutions that the general executive power eludes attempts at exhaustive definition, irrespective of the precise interpretational methodology that is adopted. In Australia, this had been ameliorated to a certain extent because reference could be made to the common law prerogatives and non-prerogative capacities; specific constitutional grants of power to the Governor-General; and, the existence of the 'execution and maintenance clause' in Section 61 that enables some content to be derived directly from the text. These did indeed provide a

source of content to the executive power which could be tested by the courts pursuant to legally-discernible criteria, and also provided a source of power to deal with serious emergencies such as war, insurrection, *etc*. The Australian courts were thus able to resolve difficult issues of the constitutional validity of non-statutory executive action by adopting a 'regulated' approach. This meant that unless the government could find a positive support for its action in these sources, it could not validly undertake the action unless it could obtain statutory authorisation for it. Of course, this proposition could be frayed at the edges in circumstances of extreme emergency. There was also the problem of identifying a source of power for those 'non-legal administrative powers' or 'ordinary powers'. In this context, recourse to the residual power argument, in the sense that the powers were not prohibited by law, was referred to, but only in a very limited way.

Indian courts preferred to rely rather on a 'residual' approach, which thus avoided the need for positive or exhaustive definition. However, the result is that the definition of the general executive power in Article 53 may remain uncertain, and, without more precise limits, may be subject to further development and aggrandizement, especially in extraordinary circumstances. However, such uncertainty and development can be overcome more easily by recourse to constitutional amendment, unlike the situation in Australia. Moreover, given the far greater prescription of executive power overall in the Indian Constitution, especially with respect to the powers of the President, there are limits as to how far a residual approach to general executive power may go. On the other hand, given the continuing relevance of the common law powers, Australian courts do have more immediate recourse to legally-discernible principles to define the content of general executive power, in addition to (and despite the difficulties with) the 'nationhood' power, thus balancing the comparative Indian advantage of easier reliance on express constitutional prescription. This comparative advantage, at least on the basis of the criteria referred to above, has already been diluted by the Australian High Court's recognition of an executive nationhood power.