CHAPTER VII

STATE EXECUTIVE

SYNOPSIS

The State Executive consists of the Governor, who is the head of the State, and the Council of Ministers with the Chief Minister at its head.

The pattern of the State Executive is very similar to that of the Central Executive which is based on the fundamental principle of accountability of the Executive to the Legislature. Like the Centre, the States also have parliamentary form of government. Therefore, what has been said in Chapter III as regards the Central Executive is applicable to the area of the State Executive as well.

The constitutional provisions dealing with the State Executive are more or less word to word similar to the constitutional provisions dealing with the Central Executive except for some differences arising out of the fact while the Constitution confers some discretion on the State Governor, it confers none on the President.

Arts. 153 to 167 and 213 deal with the composition and powers of the State Executive.

A. ADMISSION TO THE EXECUTIVE ORGANS

(i) GOVERNOR

(a) SIGNIFICANCE OF THE GOVERNOR'S OFFICE

The Governor of a State plays a multifaceted role. He is a vital link between the Centre and the State. It is his duty to keep the Centre informed of the affairs of the State. This helps the Centre to discharge its constitutional functions and responsibilities towards the State.

The Governor is the constitutional head of the State. He appoints the Chief Minister and other Ministers and discharges several important functions in relation to the State Legislature. The Governor assures continuity in the State Administration, as having a fixed tenure, he stays in office while the Chief Minister may come and go from time to time.

The Governor acts as the agent of the Centre when a proclamation of breakdown of constitutional machinery in the State is issued under Art. 356.[1] The State Governor is thus a key functionary in the system envisaged by the Constitution.

(b) APPOINTMENT OF GOVERNOR

Each State has a Governor, but two or more States may have a common Governor [Art. 153]. The Governor is formally appointed by the President [Art. 155]. The President appoints the State Governor on the advice of the Prime Minister with whom, therefore, the effective power lies in this regard.[2]

The Constituent Assembly fully debated the merits and demerits of an elected *v.* nominated Governor and finally opted for the system of presidential nomination, rather than direct election, of the Governor because of several reasons:[3] For example—

(1) A nominated Governor would encourage centripetal tendencies and, thus, promote all-India unity. On the other hand, it was apprehended

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1. For discussion on Art. 356, see, *infra*, Ch. XIII, Sec. B.
2. IV *CAD*, 588-607.
3. VIII *CAD*, 455.

that "an elected Governor would to some extent encourage that separatist provincial tendency more than otherwise. There will be far fewer links with the Centre."[4]

(2) In a parliamentary system the head should be impartial, but a Governor elected by the direct vote of the people would have to be a partyman. On this point, it was stated in the Constituent Assembly:

> "He should be a more detached figure acceptable to the province, otherwise he could not function, and yet may not be a part of the party machine of the province. On the whole, it would probably be desirable to have people from outside, eminent in something, education or other fields of life who would naturally cooperate fully with the Government in carrying out the policy of the Government and yet represent before the public something above politics."

(3) Conflicts might arise between the Governor and the Chief Minister if both were to be elected by the people, for the former might claim to arrogate power to himself on the plea of his having been elected by the whole State as against the latter who would be elected only in a constituency which would be a small part of the State. It was stated in the Constituent Assembly:[5]

> "When the whole of the executive power is vested in the Council of Ministers, if` there is another person who believes that he has got the backing of the province behind him and, therefore, at his discretion he can come forward and intervene in the governance of the province, it would really amount to a surrender of democracy".

(4) The Governor being only a symbol, a figurehead, there would be no point in spending money in having him elected.[6]

The Constitution gives a *carte blanche* to the Centre in the matter of appointment of a State Governor. Under Art. 155, the ultimate responsibility to appoint the Governor rests with the Central Government. The Governor has a dual capacity—he is the Head of the State as well as the representative of the Centre in the State and he works as a channel of communication and contact between the State and the Centre. It is felt that with a view to ensuring the smooth functioning of the constitutional machinery in the State, it would be best to consult the State Chief Minister while appointing the Governor, and a convention has thus grown accordingly.

So long as there was one party rule at the Centre as well as in the States, the consultation was merely a formality and no difficulty ever arose in the matter of appointment of the Governor. During this period, the institution of the Governor remained largely dormant. But after the fourth general election held in February 1967, the political scene underwent a sea change as different political parties came in power in the States and the Centre. The appointment of Governors became a somewhat controversial matter, particularly in those States where the political complexion of the government differed from that at the Centre. These

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4. *Ibid.*
5. VII *CAD*, 455.
6. VIII *CAD*, 12, 424-556.

States apprehended that the Governor appointed by the Central Government, and holding office during the pleasure of the President (which means the Central Government), would function not objectively and impartially, but at the bidding of the Central Government to destabilize State Governments. These States claimed not only consultation, but rather their concurrence, in the matter of appointment of the Governor. The Centre has not accepted any such proposition. While the Centre consults the Chief Minister, it is not ready to concede a veto to him in the matter of appointment of the Governor. The Centre is not prepared to consult the State Cabinet as such and regards consultation with the Chief Minister as adequate.

For a smooth functioning of the Indian federal structure, it is necessary that the person to be appointed as the Governor should be such as to inspire confidence from both the Centre and the State concerned. The office of the Governor has now become a balance wheel of the Centre-State relationship. As the Governor has to discharge certain functions in the State as the Centre's representative independently of the State Government because of the Centre's ultimate responsibility to see that each State functions according to the Constitution,[7] it is not possible for a State to claim a final say in the matter of the Governor's appointment. But, at the same time, the Centre should not seek to force a person as Governor upon a State against its wishes otherwise relations between him and the State Government will always be strained.

A Study Team of the Administrative Reforms Commission has suggested that though the Chief Minister of the State should be consulted before a Governor is appointed, yet this should not dilute the primary responsibility of the Centre to appoint a competent and suitable person as Governor.[8]

Although one of the reasons to have a nominated Governor was to have an impartial head of the State, in practice, however, persons from political parties have been appointed Governors leading to stresses and strains between the Governor and the State Government as the Governor may belong to a party different from that of the State Government. For smooth sailing of the State Government, it may be advisable to have a non-political, non-party, man eminent in some walk of life as the State Governor. The Sarkaria Commission has suggested that Art. 155 should be amended so as to ensure effective consultation with the State Chief Minister in the Matter of appointment of the Governor.[9]

A citizen of India who has completed the age of 35 years is eligible to be appointed as the Governor [Art. 157]. Before entering upon his office, a Governor has to make and subscribe, in the presence of the Chief Justice of the State High Court, an oath or affirmation in the prescribed form. In the absence of the Chief Justice, the oath may be taken before the senior-most Judge of the High Court available at the time [Art. 159].

The Governor cannot be a member of a House of Parliament, or of the State Legislature, and if a member of a House, at the time of his appointment as the Governor, he has to vacate his seat in that House on the date on which he enters upon his office as Governor [Art. 158(1)].

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7. Arts. 355 and 356, *infra*, Ch. XIII.

8. *Report, Centre-State Relationship*, I. 285, Also see, *Lok Sabha Debates*, Nov. 16, 1967 and *Rajya Sabha Debates*, Nov. 20, 1967; *Report of the Administrative Reforms Commission*, 24.

9. *Report*, 124.

The Governor cannot hold any other office of profit [Art. 158(2)]. He is entitled to the free use of his official residence and also to such emoluments, allowances and privileges as Parliament may determine by law [Art. 158(3)]. The emoluments and allowances of a Governor cannot be reduced during his term of office [Art. 158(4)]. Where one person is appointed Governor of more than one State, his emoluments are allocated amongst the States in such proportion as the President may determine [Art. 158(3-A)].

(c) GOVERNOR'S PRIVILEGES

The Governor enjoys the same privileges as the President does under Art. 361 and he stands, in this respect, on the same footing as the President.[10]

Even where Governor's *bona fides* are questioned in the matter of exercise of his discretionary powers of appointment and dismissal of the Chief Minister, he cannot be called upon to enter his defence.[11] According to the Bombay High Court, "the Governor while taking decisions in his sole discretion, enjoys immunity under Article 361…"[12]

The Governor holds his office during the pleasure of the President under Art. 156. "Any *mala fide* actions of the Governor may, therefore, conceivably be gone into by the President."[13]

In *G. Vasantha Pai v. C.K. Ramaswamy,*[14] the Madras High Court has laid down that a combined reading of Arts. 154, 163 and 361(1) would show that the immunity against answerability to any Court is regarding functions exercised by the Governor qua-Governor and those functions in respect of which he acts on the advice of the Council of Ministers or in his discretion.

If the Governor appoints a person to a constitutional office who is not qualified for the purpose, the discretion of the Governor may not be challengeable because of Art. 361. But the authority of the appointee to hold the office can be challenged through *quo warranto.*[15] The fact that the Governor has made the appointment, does not give the appointee any higher right to hold the appointment. If the appointment is contrary to any constitutional provision, it will be struck down.[16]

(d) TENURE OF GOVERNOR

The basic rule is that a Governor holds his office during the pleasure of the President [Art. 156(1)], *i.e.*, as long as the Central Executive wants him in that office. Accordingly, the Central Executive can remove the Governor on any ground, as for example, bribery, corruption, violation of the Constitution, etc.

Subject to this overall condition, a Governor holds office for five years. He, however, continues to hold office even after the lapse of his term till his successor enters upon his office [Art. 156(2)]. Thus, a person once appointed a Governor continues to hold that office till his successor enters upon his office.[17]

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10. *Supra*, Ch. III, Sec. A(i)
11. For discussion on "Governor's Discretionary Powers", see, *infra.*
12. *Pratap Singh Raojirao Rane v. State of Goa,* AIR 1999 Bom 53.
13. *Ibid,* 66.
14. AIR 1978 Mad 342.
15. For discussion on *quo warranto,* see, *infra*, Ch. VIII, Sec. E.
16. *B.R. Kapur v. State of Tamil Nadu,* JT 2001(8) SC 40, at 66 : (2001) 7 SCC 231.
17. *K. Ballabh v. Commission of Inquiry,* AIR 1969 SC at 261.

The Governor may resign at any time by writing to the President [Art. 156(3)]. In a contingency for which the Constitution makes no provision, such as death of the Governor, the President may make such provision as he thinks fit for discharge of the functions of the Governor of a State [Art. 160]. Thus, the Chief Justice of the High Court can be appointed temporarily to discharge the functions of the Governor of the State.[18]

While there exist provisions in the Constitution for impeachment of the President, no such provisions exist concerning the Governor. The reason being that as he holds his office during the pleasure of the President, the Central Government can always recall him if the circumstances so require. A Governor is a political appointee, and when an appointment is made by the government on political considerations, it can also be terminated on political considerations.[19]

A glaring example of the Centre's absolute power to recall Governors was furnished in December, 1989, when the President, on the advice of the National Front Prime Minister V.P. Singh, asked all the Governors to tender their resignations, simply because they were appointed by the previous government belonging to another political party.

In *Surya Narain v. Union of India*,[20] the Rajasthan High Court upheld the dismissal of the Governor of Rajasthan (Raghukul Tilak) by the President.[21]

The Court pointed out that the Governor while discharging his functions works as a channel of communication and contact between the State and the Centre; the Governor is an appointee of the President and expressly holds office during his pleasure. The Governor thus has no security of tenure and no fixed term of office. Art. 156(3) is controlled by Art. 156(1). The President in exercise of his pleasure may cut short the five years term of the Governor. Consequently, the President can ask the Governor to resign or may terminate his term of office. The Governor may be removed by an expression of presidential displeasure before the normal term of five years and the presidential pleasure under Art. 156(1) is 'unjusticiable'.

It seems that sacking a State Governor is much easier than dismissing a Central Government employee. While both hold office during the pleasure of the President, a Government servant enjoys protection of Art. 311,[22] while a Governor enjoys no such protection.

The question of the status of a State Governor was again brought into focus by the summary dismissal of the Governor of Nagaland, Shri M.M. Thomas, on April 11, 1992. Earlier, the Governor had dissolved the State Legislative Assembly on the advice of the then Chief Minister retaining him as the care-taker Chief Minister till fresh elections could be held. The Governor had done so in exercise

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18. *Arun Kumar v. Union of India,* AIR 1982 Raj 67.

19. It has been held judicially that the appointment of a political appointee can be terminated without much formality as it is done purely on political considerations. See, *Om Narain Agarwal v. Nagar Palika, Shahjahanpur,* AIR 1993 SC 1440 : (1993) 2 SCC 242; *Dattaji Chirandas v. State of Gujarat,* AIR 1999 Guj 48.

20. AIR 1982 Raj. 1.

21. Raghukul Tilak assumed office as Governor on May 12, 1977, during the Janata regime. He was removed from office on Aug. 8, 1981, by the Indira Gandhi Government.

22. See, *infra,* Ch. XXXVI, for discussion on this topic.

of his power under Art. 174(2)(b)[23] without consulting the Centre before taking such an action. The Central Government did not approve of this action of the Governor. Accordingly, the Centre imposed the President's rule in the State under Art. 356 on April 2, and dismissed the Governor soon thereafter.[24] The Centre's justification for taking the action was that the Chief Minister had already lost his majority in the Legislature when he advised the Governor to dissolve the House.[25] The Opposition parties in Parliament described Centre's action as an attack on the federal character of the Constitution.[26]

The episode did bring to the forefront two issues of crucial importance to the Indian federalism:[27] (1) Is the Governor a constitutional authority in his own right or is he bound to seek the consent of the Centre before exercising the powers vested in him by the Constitution? (2) Use of Art. 356 in a State.

On the first question, theoretically speaking, as per the constitutional provisions, the Governor should be entitled to decide in his own judgment whether the powers vested in him by the Constitution should be exercised or not at a particular moment. Theoretically speaking, it should not be necessary for him to seek the Centre's consent to his proposed exercise of any such power. Therefore, in theory, in the instant case, the Governor may not have done anything wrong or improper in exercising his power under Art. 174 and dissolving the House. But, then, hitherto, the practice has developed in a different manner. Governors rarely act in their own judgment independently of the Centre's view. They usually act either at the behest, or with the consent, express or implied, of the Centre.[28]

This practice cannot be regarded as being in conformity with constitutional rectitude. Even politically this practice is not sound because the Central and State Governments may belong to different political parties and the decision of the Central Government in such a situation may have political overtones. Therefore, it will be best to leave the Governor who is the man on the spot free to decide as to how to exercise his constitutional powers as and when the situation arises.

On the other hand, in *Hargovind Pant v. Raghukul Tilak*,[29] the Supreme Court has ruled that the office of the Governor is not an employment under the Government of India, and so it does not fall within the prohibition of Art. 319(d).[30] Therefore, a member of the State Public Service Commission can be appointed as the Governor. The Court adduced the following reasons for this view : an employment

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23. *Infra,* Sec. C(b).

24. For discussion on Art. 356, See, *infra,* Ch. XIII.

25. On dissolution of a House, see, *supra*; Ch. II, Sec. I(c).

26. In October, 1980, the Centre dismissed the Tamil Nadu Governor, Prabhudas Patwari. This shows that the Prime Minister can use the President's pleasure under Art. 156(1) to dismiss a Governor from his office for political reasons without assigning any cause. See ***The Statesman,*** dated 31-10-1980.

27. For discussion on Federalism, see, *infra*, Chs. X-XVI.

28. In 1971, the Committee of Governors appointed by President Giri stated in its report that "the Governor as Head of State, has his functions laid down in the Constitution itself, and is in no sense an agent of the President… In the framework of the Constitution as it is conceived there is no power vested in any authority to issue any directions to the Governor".

This may be the formal position but, in practice, this assertion does not accord with the facts mentioned above.

29. AIR 1979 SC 1109.

30. *Infra*, Ch. XXXVI, Sec. K.

This provision prohibits appointment of a member of a Public Service Commission to any post under the Central or State Government.

can be said to be under the Central Government if the holder or the incumbent is under the control of the Central Government *vis-a-vis* such employment. The office of the Governor does not fall under this description. The office of the Governor is not an employment under the Government of India; the Governor occupies a high constitutional office with important constitutional functions and duties; he is not an employee of the Government of India; he is not subordinate or subservient or under the control of the Government of India, nor is he amenable to its directions, nor is he accountable to it for the manner in which he carries his functions and duties. According to the Court, Governor's "is an independent constitutional office which is not subject to the control of the Government of India".

The Supreme Court has observed further in this connection:

> "He is constitutionally the head of the State in whom is vested the executive power of the State and without whose assent there can be no legislation in exercise of the legislative power of the State."

What the Supreme Court has stated above is only the theoretical or the formal position of the Governor. In practice, things appear to be different because the Governor is appointed by the Centre, holds his office subject to its pleasure and can be dismissed by it at any time. This, in effect, is bound to compromise the Governor's independence of action. A Governor can adopt a stance not in accord with the wishes of the Centre only at his own risk.

Recently, the Patna High Court has explained the position of the Governor.[31] Reading Arts. 156 and 159(1) together, the Court has ruled that the five year term of a Governor is not a fixed term but it is subject to the "pleasure of the President". Therefore, a Governor can be shifted from one State to another even during the term of five years. The Court has observed in this regard: [32]

> "Thus, under Clause (3) of Art. 156 of the Constitution, it is apparent that five years term is subject to the exercise of pleasure by the President and the President of India is the best Judge for exercise of his pleasure to decide as to when and in what circumstances the term of a sitting Governor of a State should be reduced, or, instead of reducing the term, he may be transferred from one State to another or he may be asked to vacate the office."

The Court has also ruled that the President is not bound to give reasons for exercising his pleasure one way or other. The office of the Governor is not an employment under the Government of India. A Government servant cannot be dismissed without being given a right of being heard, the Governor can be removed from office under Art. 156(1) without being given a hearing for the President is the best Judge of when to withdraw his pleasure from the office of the Governor. The maxim of *audi alteram partem* does not apply to a Governor.[33] This means that the Governor need not be given a hearing, unlike a government servant, before being removed from his office. It remains, however, a moot point whether the State Legislature or Parliament can pass a resolution requesting the President to recall the Governor and what will be the operative force, if any, of such a resolution.

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31. *Indian Union Muslim League v. Union of India,* AIR 1998 Pat. 156.
32. *Ibid,* 160.
33. For discussion on this maxim, see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW, I,* Chs. IX and X. Also see, M.P. JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW,* Ch. VIII and IX.

Recently, the Central Government recalled the Governor of Tamil Nadu [Fathima Beevi, an ex-Judge of the Supreme Court], for having appointed Jayalalitha as the Chief Minister of the State under Art. 164(4) even though she was not qualified at the time to contest an election for the State Legislative Assembly. Later, the Supreme Court ruled that the appointment was unconstitutional.[34]

(ii) COUNCIL OF MINISTERS

On lines similar to the Centre, each State has a Council of Ministers, with the Chief Minister at its head.[35] The provision regarding the Council of Ministers is mandatory and the Governor cannot dispense with this body at any time [Art. 163(1)]. This proposition has now been reiterated by the Supreme Court which has held that the Council of Ministers continues to stay in office even when the Legislature is dissolved by the Governor.[36]

The function of the Council of Ministers is "to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion [Art. 163(1)].[37] The phrase "by or under" the Constitution means that the need to exercise discretionary power may arise from any express provision of the Constitution or by necessary implication.[38]

It has been judicially held that the Council of Ministers comes into existence to aid and advise the Governor as envisaged by Art. 163(1) as soon as the Chief Minister is appointed and sworn in by the Governor. More Ministers can be appointed in course of time. But, till then, the Chief Minister alone acts as the Council of Ministers to aid and advise the Governor. The Constitution does not prescribe any minimum or maximum number of Ministers as members of the Council of Ministers. Accordingly, there is nothing in the Constitution to prevent the Chief Minister from aiding and advising the Governor all by himself pending appointment of other Ministers and allocation of business among them. "The formation of the Council of Ministers is complete with the swearing in of the Chief Minister."[39]

(a) APPOINTMENT OF CHIEF MINISTER AND OTHER MINISTERS

Ordinarily, a Minister should be a member of the State Legislature. A basic feature of the parliamentary system of government is that all Ministers ought to be members of a House of State Legislature. This ensures accountability of the Council of Ministers to the Legislature.[40] However, a non-member may also be appointed as a Minister, but he would cease to be a Minister if he does not become a member of the State Legislature within six months [Art. 164(4)].

Under Art. 177, a Minister has the right to speak in, and participate in the proceedings of, a House of the State Legislature. This means that a Minister, even

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34. For discussion on this case, see, below.
35. See, *supra*, Ch. III, Sec. A(ii), under "Council of Ministers".
36. *K.N. Rajgopal v. M. Karunanidhi*, AIR 1971 SC 1551 : (1972) 4 SCC 733.
37. For a full discussion on this provision, see, *infra*, Sec. C, under "Governor's Discretionary Power".
38. *Samsher Singh v. State of Punjab*, AIR 1974 SC 2192 : (1974) 2 SCC 831.
39. *Dattaji Chirandas v. State of Gujarat*, AIR 1999 Guj 48, 57.
40. On this question, see, below.

though not a member of a House can participate in its proceedings but cannot vote.

Under this provision, a person who is not a member of any House may even be appointed as the Chief Minister[41] as the term 'Minister' in Art. 164(4) covers the "Chief Minister" as well. Therefore, there have been cases when non-members have been appointed as Chief Ministers. For example, Kamraj Nadar was appointed as the Chief Minister of Madras in 1954 although he was not a member of the State Legislature.

A few judicial pronouncements on the scope of Art. 164(4) may be taken note of here.

Shri T.N. Singh who was not a member of either House of the State Legislature was appointed the Chief Minister of Uttar Pradesh. The High Court rejected the challenge to his appointment in view of Art. 164(4) of the Constitution and the Supreme Court upheld the High Court. A non-member can be appointed as Chief Minister for a period of six months.[42]

A question of crucial significance has been considered by the Supreme Court in *S.R. Chaudhari v. State of Punjab.*[43] Shri Tej Prakash Singh was appointed as a Minister in the State of Punjab on the advice of Chief Minister, Sardar Harcharan Singh Barar, on 9-9-1995. At the time of his appointment as a Minister, he was not a member of the State Legislature. As he failed to get elected to the State Legislature, he resigned from the Council of Ministers after 6 months on 8-3-1996. This was in accordance with Art. 164(4). During the term of the same Legislature, there was a change in the office of the Chief Minister. The new Chief Minister, again appointed Tej Prakash Singh as a Minister on 23-11-96. He was a not a member of the Legislature at the time. A petition was filed for a writ of *quo warranto* against the Minister. The High Court dismissed the petition *in limine,* but, on appeal, the Supreme Court quashed the Minister's appointment. The Supreme Court stated that Arts. 164(1) and 164(4) should be so construed as to "further the principles of a representative and responsible Government." The Court refused to interpret Art. 164 in a literal manner on the "plain language of the Article". Instead the Court argued for a "purposive interpretation of the provision[44].

Referring to Art. 164, the Court observed that its scheme clearly suggests that ideally, every Minister must be a member of the Legislature at the time of his appointment. In an exceptional case, a non-member may remain a Minister for six months. Such a person must get elected to the House during the period of six months. If he fails to do so, he must cease to be a Minister. He cannot be re-appointed thereafter during the life time of the same Legislature by the same or even a different Chief Minister. The Court has observed:

> "The "privilege" of continuing as a Minister for six months without being an elected member is only a one time slot for the individual concerned during the

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41. For criticism of this practice, see, 13 *JILI* 376 (1971).

42. *Harsharan Verma v. Tribhuvan Narain Singh,* AIR 1971 SC 1331 : (1971) 1 SCC 616.
The Court reiterated this ruling in *Harsharan Verma v. State of Uttar Pradesh,* AIR 1985 SC 282 : (1985) 2 SCC 48.

43. AIR 2001 SC 2707 : (2001) 7 SCC 126.

44. *Ibid* at 2717.
Also see, *infra,* Ch. XL.

> term of the concerned Legislative Assembly. It exhausts itself if the individual is unable to get himself elected within the period of grace of six consecutive months... It is not permissible for different Chief Ministers, to appoint the same individual as a Minister, without him getting elected, during the term of the same Assembly... The change of a Chief Minister, during the term of the same Assembly would, therefore, be of no consequence so far as the individual concerned."[45]

To appoint a person repeatedly as a Minister while he is not a member of the Legislature would amount to subversion of the constitutional and democratic process. The Court further observed criticising the appointment of a non-member repeatedly as a Minister:[46]

> "By permitting a non-legislator Minister to be re-appointed without getting elected within the period prescribed by Art. 164(4), would amount to ignoring the electorate in having its say as to who should represent it—a position which is wholly unacceptable. The seductive temptation to cling to office regardless of constitutional restraint must be totally eschewed. Will of the people cannot be permitted to be subordinated to political expediency of the Prime Minister or the Chief Minister as the case may be, to have in his cabinet a non-legislator as a Minister for an indefinite period by repeated reappointments without the individual seeking popular mandate of the electorate."

Accordingly, the Supreme Court has expressed its "considered opinion" that—

> "It would be subverting the Constitution to permit an individual, who is not a member of the Legislature, to be appointed a Minister repeatedly for a term of "six consecutive months", without him getting elected in the meanwhile. The practice would be clearly derogatory to the constitutional scheme, improper, undemocratic and invalid."[47]

The Supreme Court has made another momentous pronouncement in *B.R. Kapur v. State of Tamil Nadu*[48] in relation to Art. 164(4). The matter arose in the following factual context. The nomination paper of Jayalalitha for election to the State Legislative Assembly was rejected. She had been convicted for certain offences under the Prevention of Corruption Act and the Indian Penal Code and sentenced to three years'rigorous imprisonment. She had appealed to the High Court against her conviction; the High Court suspended her sentence but not her conviction pending decision on her appeal. Accordingly, she was disqualified to contest an election to the House. As a result of the election, her party [AIDMK] won by a big majority and elected her as the leader. The Governor of Tamil Nadu appointed her as the Chief Minister under Art. 164(4) as she was not a member of the State Legislature at this time. Her appointment as the CM was challenged and the Supreme Court declared the same as null and void.

The crucial question was whether a person who is disqualified to be a member of the State Legislature could be appointed as a Minister or the Chief Minister under Art. 164(4). The Supreme Court argued in the negative. The Court has argued that it is implicit in Art. 164(4) [read along with Arts. 164(1) and (2)] that a Minister who is not a member of the Legislature must seek election to the Legislature and secure a seat therein, within six months of his appointment. If he fails

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45. *Ibid,* at 2718.
46. *Ibid,* at 2719.
47. *Ibid,* at 2720.
48. JT 2001 (8) SC 40 : (2001) 7 SCC 231.

to do so, he ceases to be a Minister. It, therefore, follows from this that a person appointed as a Minister should be one who can stand for election to the Legislature and satisfy the requirement of Art. 164(4). This means that he should be one who satisfies the qualification for membership of the State Legislature [Art. 173] and is not disqualified from seeking that membership by reason of any provision in Art. 191 on the date of his appointment as a Minister.

The idea underlying Art. 164(4) is that due to political exigencies, or to avail the services of an expert in some field, a person may have to be appointed as a Minister without his being a member of the State Legislature at the time of his appointment. He has 6 months for this purpose. This means that he should be a person who, when he is appointed, is not debarred from being a member of the Legislature. This means that he should be qualified to stand for the election to the Legislature and is not disqualified to do so. Art. 164(4) is not intended for the induction into the Council of Ministers of someone who is ineligible to stand for election to the State Legislature.

The Court has stated that it would be "unreasonable and anomalous to conclude that a minister who is a member of the Legislature is required to meet the constitutional standards of qualification and disqualification but that a Minister who is not a member of the Legislature need not." "Logically, the standards expected of a Minister who is not a member should be the same as, if not greater than, those required of a member".

If the Governor appoints a disqualified person to a constitutional office, the discretion of the Governor may not be challengeable because of Art. 361[49], but that does not confer any immunity on the appointee himself. The qualification of the appointee to hold the office can be challenged in proceedings for *quo warranto*.[50] If the appointment is contrary to any constitutional provision, it can be quashed by the Court.

The Supreme Court rejected the argument that Jayalalitha had people's mandate to become the Chief Minister of the State as is evidenced by her party having won at the election. The Court's reply to this argument is—

> "The Constitution prevails over the will of the people as expressed through the majority party. The will of the people as expressed through the majority party prevails only if it is in accord with the Constitution."[51]

The Chief Minister is formally appointed by the Governor [Art. 164(1)].[52]

Although under Art. 164(1), the Governor appoints the Chief Minister, the Constitution is completely silent as to the person who should be appointed as such. The basic rule followed for the purpose is that the leader of the majority party in the State Legislative Assembly should be invited by the Governor to form the Government. When no party has a clear-cut majority in the legislature, the appointment of the Chief Minister becomes problematic. A question has also been raised from time to time whether the appointment of the Chief Minister by the Governor is judicially reviewable. These questions have been discussed in

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49. *Supra*, Ch. III, Sec. A(i); Sec. A(i)(c).
50. *Infra*, Ch. VIII; see, *Kumar Padma Prasad v. Union of India, supra*, Ch. IV.
51. JT 2001 (8) SC at 66.
52. See, *supra*, Ch. III, Sec. A(iii)(b), on the appointment of the Prime Minister.

some detail later in this Chapter under the heading "Governor's Discretionary Powers".[53]

There is no convention to the effect that only a member of the Legislative Assembly should be appointed as the Chief Minister. Many a time, members of Lgislative Councils have been appointed as Chief Ministers, for example, C. Rajagopalachari in Madras and Morarji Desai in Bombay in 1952; C.B. Gupta in U.P. in 1960 and Mandal in Bihar in 1968. It is, however, realised that the Chief Minister should properly belong to the Lower House and so a Chief Minister from the Upper House seeks the earliest opportunity to get elected to the Lower House.

At times, while appointing the Chief Minister, the Governor imposes the condition that he should seek a vote of confidence from the State Assembly within a stipulated period. There is no specific provision in the Constitution enabling the Governor to require the Chief Minister to prove his majority on the floor of the House. The question has been raised whether in the absence of any such constitutional provision, can the Governor impose such a condition on the C.M.? The Patna High Court has ruled that the Governor can impose such a condition in his discretion. The underlying idea is to ensure that there is in office a Chief Minister who enjoys the confidence of the majority in the House. The principle of collective responsibility envisages that the Council of Ministers enjoys majority support in the House. When it is doubtful whether the Chief Minister enjoys majority support in the House or not, the Governor can call on him to seek a vote of confidence from the House. The Constitution specifically provides neither for a vote of confidence nor for a vote of no-confidence for or against the government in the House. But it would be preposterous to suggest that there can be no such vote because the Constitution is silent on the point. The entire constitutional scheme would collapse if Art. 164 is interpreted in such a manner.[54]

While the Chief Minister is appointed by the Governor in his discretion, other Ministers are appointed by the Governor on the advice of the Chief Minister. Therefore, in effect, the Ministers are the appointees of the Chief Minister [Art. 164(1)], though he does not have an absolute discretion in the matter as he has to keep party consideration in view.

The Congress Chief Ministers function subject to the supervision of the High Command of the Party which, to some extent, does compromise their independence of action. Similarly, the B.J.P. Chief Ministers function under the control of the Party's central leadership. This, of course, is an extra-constitutional practice.

In the States of Bihar, Madhya Pradesh and Orissa, there has to be a Minister in charge of tribal welfare, who may also be put in charge of the welfare of the Scheduled Castes and Backward Classes or any other work [Proviso to Art. 164(1)].[55]

The salaries and allowances of the Ministers are determined by the State Legislature by law [Art. 164(5)].[56]

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53. *Infra,* Sec. C.
54. *Sapru, Jayakar Motilal CR Dass v. Union of India,* AIR 1999 Pat. 221.
55. See, *infra,* Ch. XXXV.
56. Until so determined, they are to be as specified in the Second Schedule to the Constitution.

The provisions defining the tenure of the Council of Ministers in the States are parallel to those at the Centre. Thus, (i) the Council of Ministers in a State is collectively responsible to the Legislative Assembly [Art. 164(2)],[57] and not to the Legislative Council and (ii) the Ministers hold office during the pleasure of the Governor [Art. 164(1)].[58] The concept of the Governor's pleasure is discussed below. The Chief Minister can invoke the Governor's pleasure to dismiss an unwanted Minister.[59]

Article 177, noted above, which enables a Minister to participate in the proceedings of a House even if he is not a member thereof is designed to strengthen the principle of ministerial accountability to the Legislative Assembly. Ministerial responsibility means that the minister is able to answer in the House for every act of administration. The concept of ministerial responsibility ensures that the government is in line with the popular opinion.

Besides collective responsibility of the Cabinet, a Minister also has his individual responsibility. This matter has already been discussed earlier.[60]

(b) OATH OF OFFICE AND MINISTERS

Before a Minister enters upon his office, the Governor administers to him the prescribed oaths of office and secrecy [Art. 164(3)]. What happens if a Minister breaks the oath taken by him at the time of his induction into the office of the Minister?

A Minister (Mr. Balakrishna Pillai) in the Kerala Government was reported to have said at a public meeting that people should resort to terrorism and wage a war against the Central Government on the Punjab model to achieve their objectives. A citizen of India filed a petition in the High Court for issue of *quo warranto*[61] preventing the Minister from exercising the authority of his office on the ground that his speech amounted to a breach of the oath taken by him at the time of assuming office as a Minister and he thus forfeited his right to continue as a Minister. The Minister resigned his office. The Court however dismissed the petition.

In *K.C. Chandy v. R. Balakrishna*,[62] the Kerala High Court emphasized that when a Minister commits breach of his oath of office, it is for the Governor or the Chief Minister to decide whether he should remain in office. The Court said that it would be wrong to assume that no sanctity is attached to the oath taken before assumption of office. No Minister could enter upon his office without taking oaths of office and secrecy. The constitutional requirement of taking such an oath is not to be treated merely as another moral obligation. The oath of office is the prescription of fundamental code of conduct in the discharge of the

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57. For discussion on the concept of 'Collective Responsibility', see, *supra*, Ch. III, Sec. B(d).

58. *Supra*, Ch. III, Sec. A(iii)(d).

59. There have been a number of cases of dismissal of the Ministers in the States. For example, in 1964, the Punjab Governor dismissed a Minister on the Chief Minister's advice because he had misused his official influence.

On Nov. 18, 1973, the Governor of Himachal Pradesh dismissed a Minister on the advice of the Chief Minister : *The Times of India*, Nov. 19, 1973, p. 1.

60. *Supra*, Ch. III, Sec. B(e).

61. For discusison on *quo warranto*, see, *infra*, Ch. VIII, Sec. E.

62. AIR 1986 Ker 116.

Also, *K.Sukumaran v. Union of India*, AIR 1986 Ker. 122.

duties of the high office. Breach of this fundamental conduct of good behaviour may result in the deprivation of the office he holds. It is for the Governor or the Chief Minister to inquire whether there has been any breach of oath by a Minister. This is a matter to be decided under Art. 164(1) because the Minister holds his office subject to the pleasure of the Governor or the Chief Minister. It is not for a Court to embark on such an inquiry. The High Court also pointed out that breach of oath of office taken by a Minister is not a disqualification constitutionally listed under Art. 191 of the Constitution or specified under any law made by Parliament.[63]

After sometime, Pillai was reinducted as a Minister and again a writ petition was filed challenging his appointment. The writ petition was again dismissed by the High Court. The Court maintained that the question whether the Minister committed breach of oath could not be examined by it as "these are not matters which are open to judicial review. The intention of the founding fathers of the Constitution was to leave such matters to the good sense of the Chief Minister and the legislature with the general public holding a watching brief." Since the office of the Minister is held at the pleasure of the Governor or the Chief Minister "termination at their will may be the possible outcome of a breach of oath". Matters which are entirely within the realm of the "pleasure and unfettered discretion of the appointing authority" are not amenable to the jurisdiction of the High Court under Art. 226.[64]

To the same effect is the ruling of the Punjab and Haryana High Court in *Hardwari Lal v. Ch. Bhajan Lal*.[65] The Court has ruled that breach of oath by a Chief Minister does not give rise to any disqualification under Arts. 191 and 192. Similarly, breach of oath by him does not disqualify him from holding that office. The Constitution makes no provision as regards the consequences arising from breach of oath by a Minister. The Chief Minister is appointed by the Governor and he holds office during his pleasure. Arts. 191 and 192 exhaustively deal with and furnish a composite machinery regarding disqualification of a member of the Legislature. Therefore, a Court cannot issue any writ to remove a Chief Minister from office on the ground of breach of oath by him. It is for the Governor as the appointing authority to take cognisance of any such matter and not for the Court to terminate the tenure of a Minister on any such ground.

The Andhra Pradesh High Court has refused to issue *quo warranto*[66] to remove the Chief Minister from office because various allegations had been made against him. Power to terminate the tenure of office vests solely in the Governor.[67]

A code of conduct for Ministers (both Central and State) has been issued by the Government of India, Ministry of Home Affairs. The Government of Andhra Pradesh has also issued a code of conduct for Ministers. The High Court has ruled that these codes are not statutory in nature. Though they lay down rules of

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63. For disqualifications under Art. 191, see, *supra*, Chs. II and VI.

64. *Sukumaran v. Union of India*, AIR 1987 Ker. 212.
For discussion on Art. 226, see, *infra*, Ch. VIII, Sec. D.

65. AIR 1993 P & H 3.

66. See, *infra*, Ch. VIII, Sec. E.

67. *D. Satyanarayana v. N.T. Rama Rao*, AIR 1988 AP 62. Also see, *Ramachandran v. M.G. Ramachandran*, AIR 1987 Mad 207.
On this point see, *infra*, under "Governor's Discretionary Powers".

conduct which the Ministers have to observe, they are in the nature of guidelines and, therefore, the courts cannot enforce these codes against any Minister by issuing any writ.[68]

(c) INTERACTION BETWEEN THE EXECUTIVE AND THE LEGISLATURE

The pattern of interaction between the Executive and the Legislature in a State is similar to that existing at the Centre.[69] A few broad features of this may be recapitulated here.

The Ministers are members of the Legislature and responsible to the Legislative Assembly.[70] They stay in office so long as they are able to command the confidence of the majority in that House.

The Legislature has ample opportunities of criticising and shaping the policies of the Executive. It is a recurring process and opportunity is taken in this respect *inter alia* at the time of legislation, discussion of the Governor's speech and his messages and consideration of demands.[71]

Further, the Legislature is entitled to fix the emoluments of the Ministers.[72] The ordinance-making power of the Executive is also subject to legislative control.[73]

As at the Centre so in the States, the Executive also has ample opportunities to control the Legislature. It summons and prorogues the Houses and may dissolve the Assembly.[74] It initiates practically all legislation and enjoys a veto power over legislation.[75] It plays a leading part in discussion on financial matters in the Legislature and initiates all demands.[76]

B. WORKING OF THE EXECUTIVE

(a) CONDUCT OF GOVERNMENT BUSINESS

Arts. 154 and 166 regulate the working of the State Executive. Art. 166 relates to the conduct of business of the State Government and is couched in terms similar to those in Art. 77 and the same principles govern the interpretation of Art. 166.[77] The State being the author of a decision, cannot resile or go back on that decision merely because it was the order of the previous government. If the order of that government was not acceptable to the newly elected Government, it was open to it to withdraw or rescind the same formally. It is not open to the State to contend that the said decision did not bind it.[78]

The executive power of the State is vested in the Governor who exercises it either directly or through officers subordinate to him in accordance with the Con-

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68. *Vidadala Harinadhababu v. N.T. Rama Rao,* AIR 1990 AP 898.
69. See, *Supra,* Ch. III, Sec. C.
70. See, *supra,*
71. *Supra,* Ch. VI.
72. *Supra,* footnote 40.
73. Art. 213; *infra.*
74. *Supra,* Ch. VI, Sec. C.
75. *Supra,* Ch. VI, Sec. F(i), under "Legislation"
76. *Supra,* Ch. VI, Sec. F(ii), under "Financial Procedure".
77. *Supra,* Ch. III, Sec. B.
78. *State of Bihar v. Bihar Rajya MSESKK Mahasangh,* (2005) 9 SCC 129 : AIR 2005 SC 1605.

stitution [Art. 154(1)]. Parliament or the State Legislature may confer by law functions on any authority subordinate to the Governor [Art. 154(2)(b)].

The Governor is empowered to make rules for the more convenient transaction of the business of the State Government [Art. 166(3)]. Under these Rules, known as the Rules of Business, the government business is divided amongst the Ministers and specific functions are allotted to different Ministries.[79] Each Ministry can, therefore, issue orders or notifications in respect of functions which have been allocated to it under the Rules of Business.

All executive action of the State Government is expressed to be taken in the name of the Governor [Art. 166(1)]. This clause applies to cases where the executive action has to be expressed in the shape of a formal order or notification. It prescribes the mode in which an executive action has to be expressed. Orders and instruments made and executed in the Governor's name are to be authenticated in such manner as may be specified in the rules made by him. The validity of an instrument so authenticated cannot be called into question on the ground that it is not an order or instrument made or executed by the Governor [Art. 166(2)].

These provisions are synonymous with Arts. 53 and 77, discussed earlier, in relation to the working of the Central Executive.[80] Consequently, the earlier discussion can be adopted here. Common principles apply to the Central and State Executive in this regard.[81] The discussion here will apply *mutatis mutandis* to the Central Executive as well.

The Supreme Court has observed in *Barsay*[82] that Art. 77(1) is only directory. Similarly, Art. 166(1) is also directory in nature. Any non-compliance therewith, does not make the order invalid. Even if an order is not issued in strict compliance with the provisions of Art. 166(1), i.e. the words "by order", or "in the name of the Governor" are absent therein, it can be established by evidence aliunde that the impugned order was made by the appropriate authority. If an order is issued in the name of the Governor, and is duly authenticated in the manner prescribed in Art. 166(2), there is an irrebuttable presumption that the order or instrument is made or executed by the Governor. Any non-compliance with Art. 166(2) does not invalidate the order, but it precludes the drawing of any such irrebuttable presumption. This does not prevent any one from proving by other evidence that as a matter of fact the order has been made by the appropriate authority.[83]

No particular formula of words are required for compliance. Clause (1) does not prescribe how an executive action of the Government is to be performed; it only prescribes the mode in which such act is to be expressed. While clause (1) is in relation to the mode of expression, clause (2) lays down the ways in which the

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79. A typical Rule of Business runs as follows:
"The Governor shall, on the advice of the Chief Minister, allocate amongst the Ministers and Ministers of State the business of Government by assigning one or more departments to the charge of a Minister or a Minister of State".

80. *Supra*, Ch. III, Sec. E.

81. *Supra*, Ch. III, Sec. B.

82. *Major E.G. Barsay v. State of Bombay*, AIR 1961 SC 1762 at 1776 : 1962 (2) SCR 195.
Also, *Dattatraya Moreshwar v. State of Bombay*, AIR 1952 SC 181 : 1952 SCR 612, *L.G. Chaudhari v. Secy. L.S.G. Dept., Govt. of Bihar*, AIR 1980 SC 383 : 1980 Supp SCC 374. Cf an order in exercise of quasi-judicial power. *State of Maharashtra v. Basantilal*, (2003) 10 SCC 620 : AIR 2003 SC 4688.

83. *M/s. Laxmi Udyog Rock Cement Pvt. Ltd. v. State of Orissa*, AIR 2001 Ori. 51.

order is to be authenticated.[84] When there was no government order to pay compensation to terminated employee in terms of Art. 166, no action can be regarded as that of the State since Council of Ministers are advisers and, as Head of State, Governor is to act with aid or advice of Council of Ministers. Therefore, till advice is accepted by Governor, views of Council of Ministers do not get crystallized into action of State.[85]

An order initiating departmental proceedings under the M.P. Civil Services Pension Rules was executed in the name of the Governor and was duly authenticated by the signatures of the Under Secretary to the Government of Madhya Pradesh. The Supreme Court ruled in *State of Madhya Pradesh v. Yashwant Trimbak*,[86] that the order could not be questioned in any Court on the ground that it was not made or executed by the Governor. The bar to judicial enquiry with regard to the validity of such order engrafted in Art. 166(2) would be attracted. "The signature of the concerned Secretary or Under Secretary who is authorised under the authentication rules to sign the document signifies the consent of the Governor as well as the acceptance of the advice rendered by the concerned Minister".

In an earlier case, *State of Bihar v. Rani Sonabati Kumari*,[87] considering the question with reference to a notification issued under s. 3(1) of the Bihar Land Reform Act, 1950, the Supreme Court held:

> "The order of Government in the present case is expressed to be made "in the name of the Governor" and is authenticated as prescribed by Art. 166(2), and consequently the validity of "the order or instrument cannot be called in question on the ground that it is not an order or instrument made or executed by the Governor".

Even when an order is issued by the Secretary to the Government without indicating that it is by order of the Governor, the immunity in Art. 166(2) would be available if it appears from other material that in fact the decision was taken by the Government.[88]

In *Yashwant Trimbak*,[89] there was another point also involved. According to the Pension Rules, departmental proceedings against a retired employee could not be instituted without the "sanction of the Governor". It was argued that the rule envisaged sanction of the Governor himself but the Court rejected the argument. The Court argued that the order of sanction for prosecution of a retired government servant is an executive act of the government. Under Art. 166(3), the Governor may frame rules of business and allocate all his functions to different Ministers except those functions which the Governor discharges in his own discretion. The expression 'business of the Government of the State" in Art. 166(3) comprises functions which the Governor is to exercise with the aid and advice of the Council of Ministers including the functions which the Governor has to exer-

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84. *J. P. Bansal v. State of Rajasthan* (2003) 5 SCC 134 : AIR 2003 SC 1405.
85. *Ibid.*
86. AIR 1996 SC 765 : 1996 (2) SCC 305.
Also, *Gulabrao Keshavrao Patil v. State of Gujarat*, (1996) 2 SCC 26; *Mohansingh Tanwani v. State of Maharashtra*, AIR 2002 Bom. 39.
87. AIR 1961 SC 221 : 1961 (1) SCR 728.
88. Also see, *Municipal Corp. of Delhi v. Birla Cotton Spinning & Weaving Mills*, AIR 1968 SC 1232 : 1968 (3) SCR 251.
89. *Supra*, footnote 86.

cise in his own subjective satisfaction as well as statutory functions of the State Government. Therefore, excepting the matters to be discharged by the Governor in his discretion, "the personal satisfaction of the Governor is not required and any function may be allocated to Ministers". Therefore, the decision taken by the Council of Ministers (to whom the function has been allocated under the Rules of Business) to sanction prosecution of the retired government servant is valid and does not suffer from any legal infirmity.[90]

The Supreme Court has observed in *Trimbak*:[91]

> "Therefore, excepting the matters with respect to which the Governor is required by or under the Constitution to act in his discretion, the personal satisfaction of the Governor is not required and any function may be allocated to Ministers."

In *Shamrao v. State of Maharashtra,*[92] the Supreme Court has ruled that the statutory functions and duties vested in the State Government may be allocated to Ministers by the Rules of Business framed under Art. 166(3) of the Constitution.

Rules of authentication prescribe the persons who can sign the orders of the government. When an order is expressed in the name of the Governor and is authenticated by an officer authorised to do so under the Rules, it becomes an order of the government and cannot then be called in question on the ground that it was not an order made or executed by the Governor.

The Courts have held that the provisions regarding the form [Art. 166(1)] are directory and not mandatory; even a substantial, and not necessarily a strict, compliance with these requirements would suffice to confer the immunity on the order.[93] Every executive decision need not be expressed in the form laid down in Art. 166(1). An order not conforming with the required form would not be *prima facie* invalid. Though it might not claim immunity from being challenged on the ground that it was not made by the Governor, yet it is possible to uphold its validity if extraneous evidence shows that the decision was taken by a competent authorityunder the Rules of Business.[94] Thus, an order confirming preventive detention made in the name of the Government, but signed on behalf of the Secretary to the Government of Bombay, has been held valid.[95] The Court concluded that there was ample evidence to show that the decision had in fact been taken by the appropriate authority, and that the infirmity in the form of authentication did not vitiate the order. It only meant that the presumption could not be availed of by the State.

In *State of Bombay v. Purushottam Jog Naik,*[96] in the body of the order in question, the 'satisfaction' was shown to be that of the Government of Bombay; at the bottom of the order the 'Secretary to the Government of Bombay, Home Department' signed it under the words "By order of the Governor of Bombay". It

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90. Also see, *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *supra,* Ch. III, Sec. B.
91. AIR 1996 SC 765, at 769.
92. AIR 1964 SC 1128 : 1964 (6) SCR 446.
93. *Anand Kumar v. State of U.P.,* AIR 1966 All 545.
94. *Chitralekha v. State of Mysore,* AIR 1964 SC 1823 : 1964 (6) SCR 368*; Relly Susan Mathew v. Controller of Entrance Exams., Trivandrum,* AIR 1997 Ker 218, 223.
95. *Dattatraya v. State of Bombay,* AIR 1952 SC 181 : 1952 SCR 612.
Also see, *State of Rajasthan v. Spripal Jain,* AIR 1963 SC 1323 : 1964 (1) SCR 475.
96. AIR 1952 SC 317 : 1952 SCR 674.

was argued that the order was defective as it was not expressed to be in the name of the Governor within the meaning of Art. 166(1) of the Constitution and so was not protected by Art. 166(2). Rejecting the contention, the Supreme Court said:

> "In our opinion, the Constitution does not require a magic incantation which can only be expressed in a set formula of words. What we have to see is whether the substance of the requirements is there".

In *P. Joseph John v. Travancore-Cochin*,[1] a show-cause notice issued under Art. 311 was impugned on the ground that it was not in accordance with Art. 166. The notice was issued on behalf of the Government and was signed by the Chief Secretary to the Government. Under the Rules of Business, the Chief Secretary was in charge of the portfolio of "Service and Appointments" at the Secretariat level in the State. The Court ruled that the said notice was issued in substantial compliance with the directory provisions of Art. 166.

Mere notings in the file by the officers and the Minister which were not communicated to the person concerned, cannot be held to be an order of the government. For an order to be effective it must be expressed in the name of the Governor [Art. 166(1)], authenticated in the manner provided in Art. 166(2), and communicated to the person concerned.[2] Inter-departmental communications also cannot be regarded as orders of the government.[3]

In *Chitralekha v. State of Mysore*,[4] an order of the Mysore Government expressed through a letter from the Under Secretary, Mysore Government, though not conforming with Art. 166, was not quashed by the Supreme Court as it was not denied by any one that it was an order made by the Government. An order of the Government withdrawing certain amenities from the employees issued in the form of a letter signed by the Under Secretary to the Government was held to be a valid order under Art. 166 as the decision in question was taken by the Minister of the Department concerned who was empowered under the Rules of Business to take such decision.[5]

Merely because the Chief Minister informed the press conference about a decision taken by the Council of Ministers the previous day, it cannot be said that there was an order of the government in terms of Art. 166(1). Before a decision of the Council of Ministers amounts to an order of the government, it should fulfil two conditions *viz.*: (1) it has to be expressed in the name of the Governor [Art. 166(1)]; and (2) it has to be communicated to the persons concerned. Until these conditions are fulfilled, it only remains a tentative order and the government is competent to reconsider the matter and take a fresh decision.[6]

As a matter of form, legislation usually confers powers on the 'Governor' [or the 'President'], or the 'State Government', [or the 'Central Government']. The government being an impersonal entity has necessarily to function through a hu-

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1. AIR 1955 SC 160 : 1955 (1) SCR 1011.

2. *Bachhittar Singh v. State of Punjab*, AIR 1963 SC 395 : 1962 Supp (3) SCR 713.
For a comment on the case see, 5 *JILI* 418 (1963).
Also see, *State of Bihar v. Kripalu Shankar*, AIR 1987 SC 1554 : (1987) 3 SCC 34.

3. *Ghaio Mal v. Delhi*, AIR 1959 SC 65 : 1959 SCR 1424.

4. AIR 1964 SC 1823 : 1964 (6) SCR 368.

5. *M.V. Srinivasa v. State of Andhra Pradesh*, (1997) 6 SCC 589 : AIR 1997 SC 3008.

6. *State of Kerala v. A Lakshmikutty*, AIR 1987 SC 331 : (1986) 4 SCC 632.
For a fuller discussion on this question, See, M.P. JAIN, *INDIAN ADM. LAW, CASES AND MATERIALS*, II, Ch. XIV, Sec. F, 1550-1564.

man agency. According to S. 3(60) of the General Clauses Act, the term 'State Government' means a Governor, and the 'Central Government' means 'President'. However, no one expects that the 'Governor' or 'President' should discharge all the functions personally.

The Rules of Business lay down who has to take what decision. Usually, these Rules enable the Minister-in-charge of a department to dispose of cases coming before him; and the Minister is also authorised to make standing orders, and to give such directions as he thinks fit, for disposal of cases in his department. In practice, therefore, the Governor rarely passes any executive order himself, except where a matter falls within his discretion.[7]

At times, a statute may itself provide for delegation of power by the government. Generally speaking, such a statutory provision is supplementary, and does not exclude making of decisions according, to the Rules of Business, and both co-exist.

Even when the statute formally requires the 'satisfaction' of the 'Government', 'Governor' or the 'President', for taking an action, action can be taken in the usual manner, without the personal satisfaction of the Head of the State[8], by the officers authorised to take decisions under the Rules of Business.[9]

Under a statutory regulation, an appeal from an order of the State Public Service Commission passed by it in disciplinary proceedings against an employee lay to the Governor. Rejecting the argument that the appeal ought to be heard by the Governor himself, and not by the State Government, the Supreme Court observed in the following case[10] that hearing of such an appeal is "not one of those functions which the Governor is required to exercise in his discretion under any of the provisions of the Constitution. The Governor has therefore to act on the advice of the State Government." Accordingly, the appellate power in the instant case could be exercised in accordance with Art. 166 of the Constitution.

Under S. 68(c) of the Motor Vehicles Act, a draft scheme to nationalize certain bus routes was prepared and published. The scheme was challenged on the ground that the 'opinion' requisite under the Act, was formed not by the State Government but by the Secretary of Labour to the Government. The argument was that the functions under the Motor Vehicles Act relate to the Transport Department, and the requisite satisfaction under the Act could be formed either by the Council of Ministers, or the Minister to whom the business under the Act had been allocated under the Business Rules, but not by the Secretary, and that, too, by one who was not the Head of the Transport Department to which the functions in question had been assigned.

In the above case, the Supreme Court rejecting the argument held that under Art. 166(3), the Governor can allocate any function, barring those which fall within his discretion, to any Minister or official. Therefore, Business Rule 23A

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7. *Infra,* Sec. C.

8. *Godavari v. State of Maharashtra,* AIR 1964 SC 1128 : 1964 (6) SCR 446; *C.M.P. Co-operative Societies v. State of Madhya Pradesh,* AIR 1967 SC 1815 : 1967 (3) SCR 329.

9. *Ishwarlal v. State of Gujarat,* AIR 1968 SC 870. Also, *Mohan v. State of West Bengal,* AIR 1974 Cal 25; *Bijaya Lakshmi Cotton Mills v. State of West Bengal,* AIR 1967 SC 1145 : 1967 (2) SCR 406.

10. *U.P.P.S. Commission at Allahabad v. Suresh Chandra,* AIR 1987 SC 1953 : (1987) 4 SCC 176.

under which the Secretary in question had been empowered to take the decision was valid. The Court emphasized that in a well-planned administration, most of the decisions are taken by civil servants, and the primary function of the Minister is to lay down policies and supervise administration and not to burden himself with day to day administration.

The Governor is essentially the constitutional head; the administration of the State is run by the Council of Ministers. But, in the very nature of things, it is impossible for the Council of Ministers to decide each and every matter which comes before the government. So, Rules of Business are made under Art. 166(2) for the convenient transaction of government business. Even a Minister is not expected to burden himself with the day to day administration. His main function is to lay down policies and programmes of his Ministry. Decisions in specific cases are thus taken by officials under the Rule of Business.

A civil servant takes a decision not as a delegate of his Minister but on behalf of the government. He takes decisions under the Business Rules as a 'limb' of the government and not as a person to whom the power of the government has been delegated. When functions entrusted to a Minister are discharged by an official, there is, in law, no delegation because constitutionally the official's decision is that of the Minister.[11] Any type of power—administrative, *quasi*-judical or legislative—conferred on the Head of the State or the Government can be discharged by civil servants according to the Business Rules.[12]

Under Art. 311(2)(*c*), a civil servant can be dismissed without an enquiry if the President or the Governor, as the case may be, is satisfied that in the interest of the State, it is not expedient to hold such an inquiry. It has been held by the Supreme Court that under Art. 311(2)(*c*), the personal satisfaction of the President or the Governor is not necessary. The satisfaction of the Governor for the exercise of powers or functions [other than his discretionary functions] required by the Constitution is not the personal satisfaction of the Governor but is the satisfaction in the constitutional sense under the Cabinet System of government. The President/Governor acts in this matter, as in any other matter, on ministerial advice. The matter can be disposed of according to the Rules of Business.[13]

The Supreme Court has recently sounded a note of warning to the bureaucrats exercising powers of the government. The Court has observed that "senior officers occupying key positions" who take decisions on behalf of the government "are not supposed to mortgage their own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law."[14]

The Collector issued a notification under section 4(1) of the Land Acquisition Act for acquiring certain land. After hearing objections under section 5A, he forwarded his report to the government for appropriate decision. The Revenue De-

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11. *A Sanjeevi v. State of Madras,* AIR 1970 SC 1102 : (1970) 1 SCC 443.

12. *Gullapalli N. Rao v. State of Andhra Pradesh S.R.T. Corp. (The Gullapalli* case), AIR 1959 SC 308 : 1959 Supp (1) SCR 319.

13. *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *supra.*
Also see, *Bhuri Nath v. State of J&K,* AIR 1997 SC 1711, 1721 : (1997) 2 SCC 745.
For discussion on Art. 311(2)(c), see, *infra,* Ch. XXXVI.

14. *Tarlochan Dev Sharma v. State of Punjab,* AIR 2001 SC 2524, 2531 : (2001) 6 SCC 260.
Also see, *Anirudh Sinhji Jadeya v. State of Gujarat,* AIR 1995 SC 2390 : (1995) 5 SCC 302.

partment decided not to proceed with the acquisition, and, accordingly, in a letter requested the land acquisition officer to take necessary proceedings accordingly. The Ministry of Urban Development disagreeing with the view of the Ministry of Revenue moved the Chief Minister to have the issue re-examined. Before any decision was taken, the Revenue Department again requested the land acquisition officer to take further action as requested above. As no action was taken by the land acquisition officer, the appellants approached the High Court and the matter ultimately came before the Supreme Court. Referring to Arts. 166(1) and (2), the Supreme Court ruled in the instant case,[15] that there was no final decision taken by the Minister of Revenue.

It appeared from the Business Rules that both the departments were entitled to deal with the subject of land acquisition and valuation thereof. According to the Instructions issued under the Rules of Business where the subject of a case concerns more than one department, no order is to be issued unless all departments concerned have examined the case. If the departments disagree, the case may be submitted to the Chief Minister for orders for laying the case before the Cabinet. So the decision of the Revenue Minister was not final because the other department did not agree with it. According to the Instructions, when the matter was brought to the Chief Minister, who holds the ultimate responsibility and is accountable to the people, he should place the decision before the Cabinet and then the Chief Minister could take the decision. Therefore, in the instant case, no final decision had been taken by the Chief Minister whether to drop or proceed with the acquisition.

Articles 77 and 166 do not in reality amount to any delegation of power. The decision of a Minister or an officer under the Rules of Business is regarded as the decision of the President or the Governor.

A properly expressed and authenticated order, though not challengeable on the ground that it has not been made or executed by the Governor, may, nevertheless, be challenged on other grounds,[16] as for example, *inter alia*: the condition precedent to the making of the order has not been fulfilled, or that the principles of natural justice have not been observed where it was necessary to do so,[17] or that it has not been made in accordance with law, or that it has not been made by the person authorised to do so under the Rules of Business, or that it does not correctly reflect the actual decision taken by the government,[18] or that the discretion has not been exercised properly.[19] This aspect of the matter falls legitimately under the scope of Administrative Law.[20]

There are, however, certain powers conferred by the Constitution on the Governor or the President which cannot be entrusted to anybody and the Governor or the President, as the case may be, has to sign the order himself. A few examples of such powers are: ordinance-making power;[21] power to give assent to Bills;[22]

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15. *Gulabrao Keshavrao v. State of Gujarat,* (1996) 2 SCC 26.
16. *Benoy Krishna v. State of West Bengal,* AIR 1966 Cal. 429; *Parkash Chand v. Union of India,* AIR 1965 Punj. 270.
17. The *Gullapalli* case, *supra.*
18. *E.P.Royappa v. State of Tamil Nadu,* AIR 1974 SC 555 : (1974) 4 SCC 3.
19. *King Emperor v. Sibnath,* AIR 1945 PC 156.
20. JAIN, *A TREATISE ON ADMINISTRATIVE LAW,* I, Ch. XIX.
Also see, JAIN, *CASES & MATERIALS ON INDIAN ADMINISTRATIVE LAW,* III, Ch XVI.
21. *Supra,* Ch. III, Sec. D(ii)(d); *infra,* Sec. D(ii)(c).
22. *Supra,* Ch. II, Sec. J(i)(c); Ch. VI, Sec. F(i).

President's proclamation of emergency under Art. 352;[23] President's proclamation of taking over a State Government under Art. 356,[24] or to declare a financial emergency under Art. 360.[25]

As has already been noted earlier, the President acts on the aid and advice of the Council of Ministers and the same is true of the functions of the Governor except those which he has to exercise in his discretion. Wherever the Constitution requires satisfaction of Governor for exercise of any power or function such satisfaction is not the personal satisfaction of the Governor but the satisfaction in the constitutional sense under the cabinet system of government. The Governor exercises all his powers and functions by or under the Constitution on the aid and advice of the Council of Ministers, save in limited spheres where Governor is required to exercise his functions in his own discretion.[26]Thus, apart from a few of the President's functions, mentioned here, and the Governor's discretionary functions discussed below, all other functions can be discharged under Arts. 77 and 166.

C. GOVERNOR'S DISCRETIONARY POWERS

The concept of the Governor acting in his discretion or exercising independent judgment is not alien to the Constitution. The normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it. But there are exceptions under which the Governor can act in his own discretion. Although some of the exceptions were pointed out, they are not exhaustive.[27]

(1) The Governor is required to discharge certain functions in his "discretion" "by or under the Constitution".

This envisages that the Governor's discretionary powers need not be express but may be necessarily implied.

(2) In the discharge of these functions, he is not required to seek the "aid and advice" of his Council of Ministers.

(3) Whether a function falls within his "discretion" or not, it is the Governor who decides the matter in his "discretion".

(4) The Governor's decision under (3) above is final. He is the sole and final judge whether any function is to be exercised in his discretion or on the advice of his Council of Ministers.

(5) The validity of any thing done by the Governor is not to be called in question on the ground that "he ought or ought not to have acted in his discretion".

It was felt necessary by the makers of the Constitution to confer discretionary power on the Governor for two main reasons: (*i*) the Governor has to serve as an

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23. *Infra,* Ch. XIII.
24. *Ibid.*
25. *Ibid.*
26. *Pu Myllai Hychho v. State of Monogram,* (2005) 2 SCC 92 : AIR 2005 SC 1537.
27. *M.P. Special Police Establishment v. State of M.P.,* (2004) 8 SCC 788.

agent of the Central Government in the State; and (*ii*) he is an important link between the Centre and the State to maintain the unity and integrity of the country.[28]

Under the Constitution, there are several categories of action which the Governor may take in his discretion, *viz.* :

(1) Art. 200 requires him to reserve for the President's consideration any Bill which in his opinion derogates from the powers of the High Court;

(2) To reserve any other Bill [Art. 200];

(3) To appoint the Chief Minister of the State;[29]

(4) Governor's report under Art. 356;[30]

(5) Governor's responsibility for certain regions such as the Tribal Areas in Assam and responsiblities placed on the Governor's shoulders under Arts. 371A, 371C, 371E, 371H.[31]

In all other matters, the Governor, like the President, acts on the advice of his Council of Ministers.

In the matter of grant of sanction to prosecute a Chief Minister or a Minister the Governor is normally required to act on the aid and advice of the Council of Ministers and not in his own discretion. It is also presumed that a high authority like the Council of Ministers will normally act in a bona fide manner, fairly, honestly and in accordance with law. Where as a matter of propriety the Governor may have to act in his own discretion, or where bias is inherent or manifest in the advice of the Council of Ministers or, on those rare occasions where on facts the bias becomes apparent or the decision of the Council of Ministers is shown to be irrational and based on non consideration of relevant factors, the Governor would be right to act in his own discretion and grant sanction. Similar would be the situation if the Council of Ministers disables itself or disentitles itself from giving such advice. In appropriate facts and circumstances, the Governor may exercise in his own discretion otherwise it would lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted.[32]

It is well settled that the exercise of administrative power will stand vitiated if there is a manifest error on record or the exercise of power is arbitrary. In the M.P. Special Police etc.[33] The office of the Lokayukta was held by a former Judge of the Supreme Court. It is difficult to assume that such a high authority would give a report without any material whatsoever. No law is intended to be laid down in this behalf however. Each case may be judged on its own merits. When the Council of Ministers takes a decision in exercise of its jurisdiction, it

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28. VIII *CAD,* 489, 495.
29. *Supra,* Sec. A(ii)(a).
30. *Infra,* Ch. XIII.
31. See, Ch. IX, *infra.*
32. *M.P. Special Police Establishment v. State of M.P.,* (2004) 8 SCC 788.
33. *M.P. Special Police Establishment v. State of M.P.,* (2004) 8 SCC 788.

must act fairly and reasonably. It must not only act within the four corners of the statute but also for effectuating the purpose and object for which the statute has been enacted where the decision of the Council of Ministers was ex facie irrational and based on non consideration of relevant matters the Governor can decide on his own discretion and grant sanction. whereas the decision of the Governor was not.

So long as one party (*i.e.*, the Congress) with very stable majorities was in office in all the States as well as the Centre, the office of the Governor was not regarded as very significant. Liaison between the States and the Centre was conducted to a large extent at the party level. In fact, doubts were raised whether the Governor's office served any useful purpose, so that Prime Minister Nehru had to explain the role of the Governors to dispel the sense of their futility.[34] He said that they played a useful role which might become very important on occasions. A Governor was a factor in bringing various groups and parties together. He could do a great deal to lessen tensions. He could not obviously overrule the government but his advice was always available. If in some vital matters, the Governor thought that there was a breach of the Constitution, he could refer it to the President. Normally speaking, decisions were of the government but the government should keep an intimate touch with the Governor and consult him formally or informally. The importance of the Governor's office was partly constitutional but largely conventional. Much depended on the personality of the Governor.

But, with the emergence of the multi-party system in the wake of the fourth general elections, the office of the Governor has become more directly involved in the constitutional process and has assumed significance both as a link between the Centre and the States as well as for maintaining an effective constitutional machinery within the States. In this process, the Governor's office has also become controversial, as whatever decision a Governor takes, whether as the representative of the Centre, or the constitutional Head of the State, he becomes a centre of controversy, for one or the other political party feels dissatisfied and thus criticises him and attributes to him partisan motives. This also brings the Central Government into controversy, for the Governor being an appointee of the Centre, and holding his office during its pleasure, is regarded as the Centre's creature, and the disgruntled political group criticises the Central Government as well for exercise of his discretion by the Governor.

The repercussions and reverberations of decisions taken by the Governors are often heard in Parliament.[35] A Governor's decision may at times lead to a sort of confrontation between the Centre and the States which affects the federal balance to some extent. The Central Government usually takes the formal position that the Governor is free to take a decision in the discharge of his function, that it does not dictate to him one way or the other, and though he may seek advice from the Centre, the final decision rests with him.

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34. Press Conf., Nov. 7, 1958, reported in *The Hindustan Times*, Nov. 8, 1958, p. 6.

35. On Nov. 15, 1967, a motion disapproving the Central Government's action "in using the institution of Governors of States not as instruments of proper functioning of the Constitution but as agents of the party in power at the Centre.....", was discussed in the Lok Sabha.

Also see, *Lok Sabha Debates*, July 20, July 28 and Dec. 4, 1967; (1968) *JI, Const. & Parl. Studies, II*, 98.

Much of the controversy arises around the use of discretionary powers by the Governors, especially the power to appoint the Chief Minister, to dismiss the ministry and to dissolve the House. These powers are exerciseable by the Governor as Head of the State. Controversy also arises with respect to the use by the Governor of his power to recommend to the President the imposition of his rule under Art. 356. The Governor exercises this power as the Centre's representative in the State—a matter discussed later in the book.[36]

As regards the constitutional text, Governor's powers with regard to the State Legislature and the Ministry are couched practically in the same terms as those of the President. Like the President, the Governor is also enabled to keep himself informed of the administrative developments in the State; and like Art. 78,[37] Art. 167 makes corresponding provisions. Thus, the Chief Minister is obligated to communicate to the Governor all decisions of the Council of Ministers relating to the State administration and proposals for legislation [Art. 167(a)], and to furnish such other information to him as the Governor may call for regarding administration of the affairs of the State and proposals for legislation [Art. 167(b)].[38] Further, if the Governor so requires, the Chief Minister will submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister without reference to the Council of Ministers [Art. 167(c)].[39]

This provision, as has already been explained, does not vest the Governor with a power to overrule a ministerial decision, but is designed to strengthen the principle of collective responsibility. It is merely a matter of caution that a decision which in the opinion of the Governor is such as requires the *imprimatur* of the whole Cabinet, and not of a single Minister alone, should so receive it. No individual Minister should take an important decision behind the back of his colleagues and thus bind them without their knowing anything about it. If this happens very often, the principle of collective responsibility will be sapped of its vitality.

To a great extent, the Chief Minister himself should be able to manage his colleagues and enforce the important constitutional principle of collective responsibility.

The Governor's power is the last safety valve to preserve and promote that principle. Commenting on Art. 167, the Sarkaria Commission has observed:[40]

> "The options available to the Governor under Art. 167 give him persuasive and not dictatorial powers to override or veto the decisions or proposals of his Council of Ministers relating to the administration of the affairs of the State. At best they are powers of giving advice or counselling delay or the need for caution and they are powers which may be used to build bridges between the Government and opposition."

The function of the Council of Ministers is to 'aid and advise' the Governor in the exercise of his functions, even when functions are conferred on the Governor

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36. *Infra.* Ch. XIII.
37. *Supra*, Ch. III, Sec. B.
38. *Supra*, Ch. III, Sec. B.
39. *Supra*, Ch. III, Sec. B.
40. *Report*, 116.

by legislation,[41] except in so far as he is required to exercise his functions *in his discretion* by or under the Constitution [Art. 163(1)]. The implication of Art. 163(1) is that in the exercise of his discretionary powers, the Governor does not have to seek ministerial advice. Governor's discretionary functions thus lie outside the area of ministerial responsibility.

The expression "by or under" the Constitution used in Art. 163(1) has a wide import. The Constitution may not expressly provide that a particular function is to be exercised by the Governor in his discretion. Still, the tenor or the context of the provision may show that the function is one which the Governor is to exercise in his discretion. If any question arises whether a matter falls within the Governor's discretion or not, the decision of the Governor in his discretion is final, and the validity of anything done by the Governor in his discretion cannot be called in question on the ground that he ought or ought not to have acted in his discretion [Art. 163(2)].[42]

No Court is entitled to inquire whether any, and if so what, advice was tendered by the Ministers to the Governor [Art. 163(3)]. This constitutional provision, which is paralled to Art. 74(2),[43] prohibits an inquiry in respect of two matters: (1) whether any advice was given to the Governor by the Council of Ministers; and (2) if an advice was given what was that advice? The clause applies when no advice has been given as well as when an advice has been given.

Vesting the Governor with discretionary powers was justified in the Constituent Assembly on the ground that "the provincial governments are required to work in subordination to the Central Government," "the Governor will reserve certain things in order to give the President opportunity to see that the rules under which the provincial governments are supposed to act according to the Constitution or in subordination to the Central Government are observed."[44]

While the Governor, like the President, usually acts on ministerial advice, the Governor is not bound to seek such advice in his discretionary area, and he discharges such functions to the best of his judgment.[45] The question of the scope of the Governor's discretionary powers has been raised over and over again during the last several years. It is also a matter of vital importance for the proper functioning of the Indian federal polity.

Comparing Art. 74(1) with Art. 163(1) several significant points of difference become noticeable between the Governor and the President.

(1) Under Art. 74(1), no discretion is left with the President. He is bound by ministerial advice in all his functions. On the other hand, under Art. 163(1), Governor receives "aid and advice" from his Council of Ministers only in those functions which lie outside his 'discretion'.

Prima facie, the use of the word 'discretion' for the Governor, but not for the President, indicates that while the Constitution envisages the possibility of the Governor acting at times in his discretion, *i.e.*, independently of the Ministers, no such possibility has been envisaged for the President. Therefore, it can be said

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41. *Ram Nagina Singh v. S.V. Sahni*, AIR 1976 Pat 36.
42. *Supru Jayakar Motilal C.R. Das v. Union of India*, AIR 1999 Pat 221.
43. For discussion on Art. 74(2), see, *supra*, Ch. III, Sec. B.
44. DR. AMBEDKAR, VIII *CAD*, 502.
45. *Samsher Singh v. State of Punjab, supra.*

that the Governor is expected to play a somewhat more activist role than the President, and, to this extent, the Governor differs from the President.

(2) After the 42nd Constitutional Amendment enacted in 1976,[46] ministerial advice has been made binding on the President [Art. 74(1)], but no such provision has been made with respect to the Governor.

Article 163(1) only says that there shall be a Council of Ministers "to aid and advise" the Governor except in so far as he acts in his discretion. Unlike Art. 74(1), Art. 163 does not bind the Governor in accordance with the advice of the Ministers even in the exercise of his non-discretionary functions. But that would hardly make a difference. The position is similar to what existed at the Centre before the amendment of Art. 74(1) in 1976 by the 42nd Constitutional Amendment. Ordinarily, therefore, the Governor acts on the advice of his Ministers except when the function is within his discretionary area.

(3) While the President can require the Council of Ministers to reconsider the advice given by it, and he is bound to act in accordance with the advice given after reconsideration, there is no such provision in the case of the Governor. This also indicates that a Governor may have certain functions to discharge independently of ministerial advice.

The Governors' Committee has clarified the position thus: "..... even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently."

The Constitution expressly mentions only a few functions which a Governor exercises in his discretion.[47] As to what other functions fall within this category has been left vague and flexible; the Constitution provides no guidelines for deciding this and, in effect, the final judge of the matter is the Governor himself.[48]

Article 163 making reference to Governor's discretion has been phrased in rather wide and general terms. It means that in exercising his powers, the Governor may find that action under a particular article in the Constitution by necessary implication requires him not necessarily to act on the advice of his Council

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46. For a summary of the provisions of this Amendment, see, *infra*, Ch. XLII.

47. Under Schedule VI, certain discretionary functions are conferred on the Governors of Assam, Meghalaya, Tripura and Mizoram for the purpose of administration of Tribal Areas in these States. Para 9(2) refers to a limited matter of a possible dispute with regard to the share of royalties to be handed over to a District Council of an autonomous District.

Under Art. 239, a State Governor can be appointed as the Administrator of an adjoining Union Territory and in the administration of the Union Territory, the Governor does not have to act on the advice of his Council of Ministers in the State.

Under Art. 371, the President may by order provide for any special responsibility of the Governors of Maharashtra and Gujarat in respect of Vidarbha, Marathwada, Maharashtra, Saurashtra, Kutch and the rest of Gujarat.

Under Art. 371A, a special responsibility has been placed on the Governor of Nagaland for certain purposes and, in the discharge of these functions, he shall, after consulting his Council of Ministers, exercise his individual judgment as to the action to be taken.

Also see, Art. 371D. See, *infra*, Ch. IX.

48. On Governor's Discretionary Power, see, M.P. SINGH, Governor's Power to Dismiss Ministers or Council of Ministers—An Empirical Study, 13 *JILI* 612 (1971); SETALVAD, *UNION-STATE RELATIONS* (1974).

of Ministers but in his own judgment. On this point, the Governors' Committee has observed: [49]

> "Thus, even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently. It is however realised that, in the scheme of our Constitution, such occasions will be extremely rare."

The constitutional provisions regarding the Governor's appointment, tenure, functions, etc., show that the Governor holds a dual capacity. On the one hand, he is the constitutional Head of the State and is, thus, a part of the State apparatus. On the other hand, he is the representative of the Central Government in the State and, thus, provides a link with the Centre. From this angle, the Governor's position differs from that of the President who functions merely as the constitutional Head at the Centre.

As the representative of the Centre, the Governor has to serve as the eyes and ears of the Centre and so has to act in his discretion in certain matters. One such matter is reservation of Bills passed by the State Legislature for the assent of the President [Art. 200]. In doing so, the Governor may not always be in agreement with his Council of Ministers. The Governor may be justified to reserve a Bill for Presidential sanction, even if his Council of Ministers advises otherwise, if, in his opinion, the Bill in question would affect the powers of the Union or contravene any provision of the Constitution. Obviously, the State Ministry is not expected to tender any advice to the Governor to reserve a Bill for the Presidential assent (except when the Constitution specifically makes it obligatory to do so). The Governor will, therefore, have to exercise his discretion in the matter whether he should assent to a Bill or reserve it for President's assent.[50] He must reserve the Bill where the Constitution stipulates President's assent.

Under the second proviso to Art. 200, it is obligatory for the Governor to reserve a Bill for President's consideration if, in his 'opinion', if it becomes law, it will so derogate from the powers of the High Court as to endanger the position which that Court is designed to fill by the Constitution.[51] The words 'in his opinion' are very suggestive. It suggests that the Governor has to decide the matter in his discretion. In other cases, the Governor may reserve the Bill if he thinks it to be against the larger interests of the concerned State or India as a whole.

In 1982, the Governor of Jammu and Kashmir refused to give assent to the controversial Resettlement Bill earlier passed by the Legislature and returned the Bill to the House for reconsideration. In his statement, the Governor detailed several constitutional, legal and other reasons for his not giving his assent to the Bill. He said that if he had given his assent to the Bill, it would have paved the way for a severe and grave threat to the security, integrity, solidarity and sovereignty

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49. *Report*, 20.
On November 26, 1970, the President appointed a Committee of Governors to study certain aspects pertaining to the 'Role of Governors'. The Committee submitted its report in 1971.

50. *Supra*; also, *infra*, Part IV, Ch. X.

51. *Supra*, Ch. II.

of the country.[52] Obviously, the Governor took this action in his discretion for the State Government was in favour of the Bill becoming the law.[53]

An important matter in which the Governor acts in his discretion is making a report to the President under Art. 356 invoking President's rule in the State because of the breakdown of the constitutional machinery therein.[54] Nor can the Ministry be consulted by the Governor while making a report to the Centre under Art. 356 for the failure of the constitutional machinery in the State may be because of the conduct of the Council of Ministers itself and, therefore, the Governor must, of necessity, and in the very nature of things, exercise his own judgment in this matter.

Then there are a large number of matters with regard to which the Centre can give directions to the States under the Constitution and presumably the Governor may be required to perform some functions under these directions.[55]

In a situation when there arises a conflict between the Governor's roles as the Centre's representative and as the constitutional head in the State then, undoubtedly, the former obligation should take precedence over the latter. This is the direct result of his being the nominee, and holding his office during the pleasure, of the Central Government. One of the reasons for the Constituent Assembly to adopt the system of centrally-nominated, rather than elected, Governor was that he would keep the Centre in touch with the State and would remove a source of possible 'separatist tendencies'.[56] Therefore, exercise of discretionary powers by the Governor as the Centre's representative is constitutionally justifiable.

The more difficult problem, however, is regarding the functioning of the Governor in his discretion as the Head of the State. The position here is somewhat vague. According to the Supreme Court, the Governor is essentially a constitutional head and the administration of the State is run by the Council of Ministers.[57] But this observation does not conclusively repudiate the view that there may be some area where the Governor may take a decision which may not have been suggested to him by the Council of Ministers, or he may not be bound automatically to follow ministerial advice.[58]

It is now fairly well-established that the Governor nominates members to the Legislative Council[59] on ministerial advice. Though the formal power to convene and prorogue the House vests in the Governor, he does so only when advised by the Chief Minister and not himself *suo motu*. The reason for this convention is that it is the Chief Minister alone who can provide the Assembly with business to transact.

(a) APPOINTING CHIEF MINISTER

Again, in the matter of appointing the Chief Minister, the constitutional provision [Art. 164(1)] confers discretionary power on the Governor[60] which is non-

52. The Hindu, Int'l ed., Oct. 2, 1982, p. 4.
53. For Governor's Assent to Bills, see, *supra*, Ch. VI.
54. See, *infra*, Ch. XIII, Sec. B, under 'Emergency'
55. *Infra*, Ch. XII.
56. VII *CAD*, 12, 454-6; also see, *supra.*
57. *A. Sanjeevi v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443.
58. See *Samsher's* case, *supra*.
59. *Supra*, Ch. VI, Sec. B(i).
60. *Supra*, Ch. VII, Sec. A(ii)(a).

justiciable. Because of the immunity granted to the Governor under Art. 361, he is not answerable to the Court even on the ground of *mala fides.*[61] As the Governor holds his office during the pleasure of the President, the question of *mala fide* action of the Governor can be gone into by the President, *i.e.*, the Central Executive. This position has been clarified by the courts in a number of cases.

According to the Calcutta High Court,[62] the Governor in making the appointment of the Chief Minister under Art. 164(1) "acts in his sole discretion", and that the "exercise of his discretion by the Governor cannot be called in question in writ proceedings in High Court". Thus, in the matter of appointment of the Chief Minister, the Governor does not act on the advice of the Council of Ministers. It is for the Governor himself to make such inquiries as he thinks proper to ascertain who among the members of the Legislature ought to be appointed as the Chief Minister and who would be in the position to enjoy confidence of the majority in the State Assembly.

In *S. Dharmalingam v. His Excellency Governor of Tamil Nadu,*[63] the appointment of the Chief Minister was challenged. The Madras High Court ruled that in appointing the Chief Minister, the power exercised by the Governor was wholly within his discretion and the Court could not interfere in the matter relating to his discretion. The Court observed in this connection:

> "Certain powers are available to the Governor under Art. 163, which he could exercise in his sole discretion. With regard to the action pertaining to his sole discretion, the immunity of the Governor is absolute and beyond even the writ jurisdiction of the High Court. The power of the Governor with regard to the appointment of the Chief Minister is a power which falls in his sole discretion and therefore the Court cannot call in question the same."

The Gauhati High Court has also ruled that the Governor is the "sole and exclusive authority" to appoint a Chief Minister. The Governor as the Head of the State, "is the sole judge to ascertain as to who commanded the support of the majority in the Assembly".[64] The Court has observed:

> "The repository of power to appoint Chief Minister and the Council of Ministers or to withdraw the pleasure contemplated under Art. 164(1) and/or dismissal of the Ministry are exclusive pleasure-cum-discretion of the Governor.... It follows, therefore, that the right of the Governor to withdraw pleasure, during which the Ministry holds office, is absolute, unrestricted and unfettered."

Where the Chief Minister of a coalition ministry resigned, but the Governor asked the Ministry to continue in office until alternative arrangements could be made, and the United Front then elected another leader who was then asked to form the government, the Gauhati High Court in *R.K. Nokulsana Singh v. Rishang Keising*[65] refused to issue *quo warranto*[66] to remove the Ministry from office, because the Assembly was not in session and no one could say whether they did not command support of the majority in the Assembly. The Chief Minister is

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61. *Supra*, Sec. A(i)(c).
62. *Mahabir Prasad Sharma v. Prafulla Chandra Ghose*, AIR 1969 Cal. 198.
63. AIR 1989 Mad 48.
Also see, *G. Vasantha Pai v. C.K. Ramaswamy*, AIR 1978 Mad 342; *Madan Murari Verma v. Choudhuari Charan Singh*, AIR 1980 Cal 95; *supra*, Ch. III.
64. *Jogendra Nath v. State of Assam*, AIR 1982 Gau. 25.
65. AIR 1981 Gau 47.
66. For *Quo warranto*, see, Chapter VIII, Sec. E.

appointed by the Governor (Art. 164) and there is no constitutional bar of any kind on his choice as to whom to appoint as the Chief Minister. The only effective check is that the Ministry shall fall if it fails to command a majority in the Assembly. So long as the Chief Minister and other Ministers enjoy the pleasure of the Governor, no writ of *quo warranto* can be issued by the High Court.

In the matter of appointment of the Chief Minister, the Governor is not required to act on the advice of the Council of Ministers. However, the over-all affective limitation on his discretion is that he is to appoint a person as Chief Minister who will be able to enjoy a majority support in the Assembly. If the Ministry is not able to command a majority support in the House, it will fall. If a party enjoys a clear majority in the Assembly, the Governor's task is more or less mechanical and non-discretionary, as he has to call upon the leader of the majority party to form the government.

His task, however, becomes difficult, and even controversial, when no party has clear majority in the Assembly, and when loyalties of the legislators undergo frequent changes making the political picture in the State fluid and confused. In such a situation, the Governor's role may become crucial as it often becomes a matter of importance as to who is invited first to form the government, for the party in power could hope to gain accretion to its strength by winning over the loyalties of some legislators with a flexible conscience. In such a fluid situation, the Governor has to take a decision, after making such enquiries as he thinks proper, as to the person who will be in a position to command a majority in the Assembly and invite him to form the Government.[67] For example, the role of the Haryana Governor in appointing the leader of the Congress (I) as Chief Minister came in for a lot of criticism. Congress (I) was not the largest group in the Assembly but its leader was appointed as the Chief Minister; he was later able to attract a few members from other parties and thus managed a majority for himself.

At times, while appointing the Chief Minister, the Governor imposes the restriction that he should seek a vote of confidence from the House concerned. A question has been raised whether the Governor can do so because the Constitution does not specifically refer to anything like a vote of confidence. Does the Governor act beyond his powers while imposing any such condition? The Patna High Court in *Sapru*[68] has answered the question in the negative. The Court has invoked two constitutional features to support such a condition, *viz*., (1) collective responsibility of the Council of Ministers to the House;[69] and (2) discretionary nature of the Governor's power to appoint the Chief Minister.

The principle of collective responsibility includes within its ambit the rule that the Council of Ministers must enjoy majority support in the Legislative Assembly and it includes both a vote of confidence and a vote of no confidence for or against the Ministry. Where there is doubt about the Chief Minister enjoying the majority support in the House, the Governor is entitled to call upon him to prove his majority in the House. This serves two purposes, viz.,: (1) it assures the Governor that his choice of the Chief Minister was right; and (2) it satisfies the elec-

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67. See, *REPORT OF THE GOVERNORS' COMMITTEE*, 14, 28 (1971).
68. *Sapru Jayakar Motilal C.R. Das v. Union of India*, AIR 1999 Pat 221.
69. For discussion on the principle of collective responsibility, see, Ch. III, Sec. B(d), *supra.*

torate that the Chief Minister enjoys majority in the Assembly. The High Court has observed:[70]

> "… the Constitution does not make any reference either to a vote of confidence or to a vote of no-confidence, and it would indeed be preposterous to suggest that since the Constitution does not refer to these, in a parliamentary form of Government there can be no vote of confidence or vote of no-confidence for or against the Government. The entire constitutional scheme envisaged a parliamentary form of government with a cabinet system would be defeated if such a construction is put on the provision of Article 164 of the Constitution…"

On the whole, however, it is advisable to evolve suitable conventions in this regard to make the Governor's role in the matter of appointing the Chief Minister less activist, non-political and non-controversial. In 1971, an effort was made in this respect when the Committee of Governors[71] suggested the following guidelines for guidance of the Governors in the matter of appointing the Chief Minister:

(1) Where a single party commands a majority in the Assembly, the Governor is to call upon its leader to form the government.

(2) It is not incumbent on the Governor to invite the leader of the largest party (not in majority) to form the government. The ultimate test for the purpose is not the size of a party but its ability to command a majority in the House.

(3) If before the election, some parties combine and produce an agreed programme and the combination gets a majority after the election, the commonly chosen leader of the combination should be invited to form the government.

(4) If no party is returned in a majority at the election and, thereafter, two or more parties come together to form the government, the leader of the combination may be invited to form the government.

(5) The leader of a minority party may be invited to form the government if the Governor is satisfied that the leader will be able to muster majority support in the House.

(6) Ordinarily, an elected member of the Legislature should be chosen as the Chief Minister. A non-member or a nominated member of the Legislature ought not to be appointed as the Chief Minister except in exceptional circumstances. In any case, he should become an elected member of the Legislature as soon as possible.

(b) DISSOLVING THE HOUSE

Another bone of contention has been the question of dissolving the House. As has already been discussed,[72] some discretion has now come to be conceded to the Governor in this area. He is to take a decision to dissolve or not to dissolve the House on a consideration of the totality of circumstances. He may refuse to accept the advice of the Ministry which has lost the majority support if in his view an al-

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70. AIR 1999 Pat., at 228.
71. *Supra.*, footnote, 49.
72. *Supra*, Ch. VI, Sec. E.

ternative stable government can be formed. The Governor may, however, be bound to accept the advice for dissolution by a Ministry having a majority support.[73]

The discretionary element in the matter of dissolution can be reduced if, as suggested earlier,[74] a convention is adopted to grant dissolution to a defeated Chief Minister if he had a majority earlier. There is however great reluctance in the public to hold frequent elections as holding of an election in India is a very costly proposition. Therefore, dissolution of the Assembly ought to be resorted to only as a last resort. This enhances the discretion of the Governor instead of reducing it. This also encourages the cult of defection of members from one party to another.[75]

(c) DISMISSAL OF MINISTRY

A very controversial question regarding the Governor's discretion is his power to dismiss the Ministry. As at the Centre, so in a State, the Council of Ministers is collectively responsible to the Legislative Assembly and holds office during the Governor's pleasure.[76]

A non-controversial use of the Governor's power is the dismissal of a Minister who has lost the confidence of the Chief Minister, or the dismissal of a Ministry which has demonstrably lost majority support in the Legislative Assembly, but, instead of respecting the verdict, refuses to vacate the office. Such a step vindicates the normal working of the parliamentary form of government as well as promotes constitutionalism as it is against democratic norms that a cabinet which has lost confidence of the majority in the House should continue to remain in power.

This also amounts to a breach of Art. 164(2) which insists that the Council of Ministers is collectively responsible to the Legislative Assembly. How can a Ministry which has lost confidence of the House be said to be collectively responsible to the House. Here the Governor is not really exercising any personal discretion for the decision has already been taken by the House and he is merely implementing the same.[77] Such a use of the Governor's power will be very rare in practice for a Ministry losing majority support usually resigns except when the Ministry is defeated in the House on a snap vote.

The Calcutta High Court has ruled that if the Council of Ministers refuses to vacate the office of Ministers, even after a vote of no confidence has been passed against it in the Legislative Assembly of the State, it will then be for the Governor to withdraw the pleasure during which the Council of Ministers holds office.[78]

When a Ministry enjoying the majority support, however, acts to thwart the Constitution, or makes a mockery of the democratic and parliamentary institutions, or infringes a specific constitutional obligation, *e.g.*, it fails to convene the

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73. *Governors' Comm. Rep*. 60.
74. *Supra*, Ch. II, Sec. I(c).
Also see, ARC, *Report on Centre-State Relationship*, 30 (1969).
75. On Anti-Defection Law, see, Ch. II, *supra*, Sec. F.
76. For a detailed discussion on the concept of 'Collective Responsibility, see, *supra*, Ch. III, Sec. B(d).
77. *Supra*, Sec. A(ii)(c) AIR 1969 Cal 198.
78. *Mahabir Prasad Sharma v. Prafulla Chandra Ghose*, *supra*, footnote 62.

Legislature within six months of the last session, recourse may be had to the Presidential power under Art. 356.[79] It may not be possible for the Governor to use his own power to dismiss the Ministry in such a situation, for then he will have to install another Council of Ministers and it may not be possible for him to do so when the dismissed Ministry had majority in the House.

There is also the knotty problem of options open to a Governor when the government in office, enjoyed majority support once, but loses that in between the two sessions of the Legislature. Should the Governor take action to dismiss the Ministry, or wait till the Assembly meets and votes the Ministry out?

The most dramatic exhibition so far of the Governor's discretionary power to dismiss the Ministry has been in West Bengal. A United Front Ministry, a conglomeration of 14 parties having no common policy or programme, took office in March 1967 with Ajoy Mukherjee as the Chief Minister. The parties had fought elections separately, but combined together after the elections with the dominant purpose of keeping the Congress (which had been in office since 1947) out of power.

On November 2, 1967, a few members defected from the UF, formed a new party under the leadership of Dr. P.C. Ghosh, and informed the Governor that they had withdrawn support from the Ministry. The Congress Party informed the Governor that it would extend support to a new Ministry if formed by the leader of the new party. Doubts about the majority support to the UF Ministry were now raised. The Governor impressed on the Chief Minister the imperative need of calling an early session of the Assembly, but the Ministry wanted to delay convening the House by six weeks. Consequently, the Governor dismissed the Ministry and installed another Ministry on November 21, 1967, under Ghosh as the Chief Minister. The Governor based his action on the Ministry losing majority support in the Assembly. He emphasized that it was constitutionally improper for a Ministry to continue in office after losing confidence of the majority in the Assembly. In case of doubt on this point, the proper course for the Ministry would have been to seek a vote of confidence on the floor of the House without delay. The Governor could not appreciate the reasons advanced by the Chief Minister to delay calling the Assembly to test the standing of the Ministry. He felt that to deal effectively with the multifarious problems faced by the State, it was imperative that a Ministry clearly enjoying majority support should be in office.

The constitutional crisis did not, however, come to an end with this step. To test whether the new Ministry enjoyed majority support in the House, the Governor convened the House on the advice of the Chief Minister, but the Speaker adjourned the House when it met.[80] Ultimately, President's rule had to be imposed in West Bengal.

The Governor's action in dismissing the UF Ministry naturally raised a hue and cry in the country. Opinions about its constitutional propriety were divided. The Central Home Minister asserted in both Houses of Parliament, on November 30, 1967, that it was within the constitutional competence of the Governor to dissolve the Council of Ministers when in his judgment the previous government had lost majority support in the Assembly. He also maintained that the Governor

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79. *Infra*, Ch. XIII.
80. *Supra*, Ch. VI, Sec. D(a).

had acted in his discretion and not under any directive from the Centre. This statement was approved by both Houses of Parliament on December 4, 1967.

From a purely legalistic angle, on February 6, 1968, the Calcutta High Court dismissed a petition for a writ of *quo warranto*[81] against the new Chief Minister Ghosh on the ground that under Art. 164(1), the Ministers hold office during the Governor's pleasure and no restriction or condition has been imposed upon the exercise of the Governor's pleasure. The Governor has "an absolute, exclusive, unrestricted and unquestionable discretionary power to dismiss a minister and appoint a new Council of Ministers". The Court asserted that the "withdrawal of the pleasure by the Governor is a matter entirely in the discretion of the Governor" and that "the exercise of the discretion by the Governor in withdrawing the pleasure cannot be called in question in this (writ) proceeding".[82]

The High Court clarified that the provision in Art. 164(2) that the Ministers shall be collectively responsible to the Legislature does not fetter the Governor's pleasure during which the Ministers hold office. It only means that the Council of Ministers is answerable to the Assembly and a majority in the Assembly can at any time express its want of confidence in the Council of Ministers. But this is as far as the Assembly can go, it has no power to remove or dismiss a Ministry. If a Ministry does not vacate office, after the passage of a vote of no-confidence against it by the Assembly, it is then for the Governor to withdraw his pleasure during which the Ministry holds office and the discretion of the Governor is "absolute and unrestricted".

This legalistic position has been confirmed by other High Courts that the Governor has discretionary power to dismiss the Chief Minister. Thus, the Gauhati High Court has held that under Art. 164(1), Ministers hold office during the pleasure of the Governor. "The exercise of the pleasure has not been fettered by any condition or construction or restriction". The Governor as the appointing authority can withdraw his pleasure and dismiss a Chief Minister. The power to appoint or dismiss the Chief Minister or the Ministry are exclusive pleasure-*cum*-discretion of the Governor. The Constitution lays down no procedure or imposes no fetter as regards the dismissal of a Chief Minister by the Governor whose right to withdraw his pleasure, during which the Ministers hold office, is "absolute, unrestricted and unfettered".[83] "Withdrawal of pleasure is entirely in the discretion of the Governor and the Governor alone. The Assembly can only express its want of confidence in the ministry; the Assembly cannot go further than that; it has no power to remove or dismiss the Ministry. "The power of removal or withdrawal of pleasure is entirely and exclusively that of the Governor." This is an area which is prohibited to the Court because of Art. 163(2).

In *Karpoori Thakur v. Abdul Ghafoor*, the Patna High Court refused to issue a writ against the Chief Minister asking him to resign because he had lost the confidence of the House. The petition was filed by a few members of the House. The High Court said that the Council of Ministers was responsible to the whole

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81. For discussion on *Quo Warranto*, see, *infra*, Ch. VIII, Sec. E.

82. *Mahabir Prasad Sharma v. P.C. Ghosh. supra*, note 68.
For a comment on the case see, 12 *JILI* 127 (1970).
Also, M.P., SINGH, Governor's Power to Dismiss Ministers or Council of Ministers—An Empirical Study, 13 *JILI*, 612 (1971).
Also see, *supra*, Ch. VI under "Speaker" of the Assembly.

83. *Jogendra Nath Hazarika v. State of Assam*, AIR 1982 Gau 25.

House and not to a few members only. Also, there is no rule of law that a Ministry must resign on being defeated in the House. That is a political matter and the Governor has power to dismiss the Ministry.[84]

The Bombay High Court has come to a similar conclusion.[85] The Governor of Goa dismissed the incumbent Chief Minister [P] and appointed [W] as the new Chief Minister. The ex-Chief Minister P challenged the Governor's order through a writ petition alleging *mala fides* on the part of the Governor. The High Court refused to interfere. Dismissing the writ petition as not maintainable, the High Court said that the matter of dismissing and appointing the Chief Minister is one which the Governor discharges in his own sole discretion and without the aid and advice of the Council of Ministers and is, therefore, not open to judicial review. Governor's discretion is restricted only by the paramount consideration of command of majority in the House. With regard to the action pertaining to the Governor's sole discretion, his immunity under Art. 361 is absolute and beyond the writ jurisdiction of the Court.[86] The Governor is not answerable to the Court even in respect of a charge of *mala fides* in connection with his official acts. The Court pointed out that as the Governor holds office during the pleasure of the President (Art. 156), the President may conceivably go into any allegation of *mala fides* against the Governor. An effective check is that the Ministry will fall if it fails to command a majority in the State Legislative Assembly.

This, however, is the legalistic position. In practice, the Governor must keep certain matters in view while exercising the power, the basic consideration being that the Governor is to use his powers to promote, not to thwart, responsible government in the State.

The Bengal episode can hardly be regarded as healthy in a parliamentary system as it creates an unfortunate precedent that the Governor may dismiss a Ministry in his discretion. Such episodes ought to be avoided in the interest of smooth working of the Constitution. It is thus necessary to evolve certain conventions in this respect. The crisis would have been averted had the Ministry resigned, or called an early session of the House to test its strength as was suggested by the Governor. Had the Ministry followed any of these courses, the democratic traditions and values would have been strengthened in the country. Undoubtedly, it is unconstitutional for a Ministry to remain in office after losing majority support, and it is under an obligation to remove the cloud of doubt on its support in the House by seeking its verdict at the earliest. But the important question still remains whether the Governor should invoke his discretion in such a situation or bide his time till the Assembly meets and decides the issue one way or other.

One plausible view may be that it is unconstitutional for the Governor to keep a Ministry in office about which he feels sure that it no longer enjoys majority support, and he is under an obligation to dismiss it and put another Ministry in office instead. The Governors' Committee has asserted that "where the Governor is satisfied, by whatever process or means, that the Ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove his majority within the shortest possible time. If the Chief Minister shirks

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84. AIR 1975 Pat 1.
85. *Pratapsingh Raojirao Rane v. Governor of Goa,* AIR 1999 Bom 53.
86. For discussion on Art. 361, see, *supra*, Ch. III, Sec. A(i).

this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative Ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as *prima facie* proof of his no longer enjoying the confidence of the Legislature. If then, an alternative Ministry can be formed which, in the Governor's view, is able to command a majority in the Assembly, he must dismiss the Ministry in power and install the alternative Ministry in office."[87]

But this course of action is full of many hazards and pitfalls and places a heavy responsibility on the Governor. Whenever a Governor takes any such action, he is bound to become the centre of a big political controversy. His action may be characterised as politically motivated. He may make an error of judgment. Not only the Governor, but the Central Government also is drawn into the vortex of political controversy. If the newly installed Ministry fails to secure majority support in the House, the Governor's action would be politically indefensible, and he may have no other choice but to resign his office. Such an action on the Governor's part may also encourage defections from one party to another as the defectors may hope to become ministers in the new Ministry. In the final analysis, it is the House which is the ultimate arbiter on the question of confidence of majority support of a Ministry and it is there that the Governor's action has to be vindicated.

In the Bengal case, when fresh elections were held, the U.F. won a majority and again formed the Ministry and this led to the Governor's resignation from office. A Governor should, therefore, act with extreme care and circumspection in such a crucial matter. All said and done, the soundest democratic convention in this regard would appear to be that, but for the extreme and exceptional situations, the Governor may not use his discretion and wait till the Assembly gives its verdict. At times, even minority Ministry may remain in office with the support or sufferance, of some groups in the House. Lastly, there cannot be a gap of more than six months between the two sessions of the Legislature and, therefore, the fate of the Ministry in the House cannot remain in suspense for longer than six months in any case.

The Administrative Reforms Commission has suggested that when a question arises as to whether the Council of Ministers enjoys majority support in the Assembly, the Governor may *suo motu* summon the Assembly to obtain the verdict if the Chief Minister does not advise him to convene the Assembly. The Central Government has refused to endorse this suggestion.[88]

On February 21, 1998, the U.P. Governor dismissed the Kalyan Singh Government and installed in office another person (Jagdambika Pal) as the Chief Minister. The Governor's plea was that the Kalyan Singh Ministry had lost its majority in the Legislative Assembly because of defection of some of its supporters. There was no vote of no-confidence passed against the Kalyan Singh Government nor was the Government asked to go to the Assembly to seek a vote of confidence. The action of the Governor was widely criticised as amounting to trampling upon democratic conventions and the Governor misusing his position for partisan ends.[89]

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87. *Report,* p. 45.
88. *Report on Centre-State Relationship,* 28.
89. *The Hindu Int'l Ed.,* Feb. 28, 1998, p. 8.

A writ petition was filed in the Allahabad High Court on February 23, 98, challenging the action of the Governor. Following *Bommai*,[90] the Allahabad High Court overturned the Governor's action, restored the Kalyan Singh Government and left it open to the Governor to convene a session of the State Legislative Assembly to prove its majority.[91] Then, the newly installed Chief Minister approached the Supreme Court. The Court directed that a special session of the Assembly be summoned which would have the only agenda to have a composite floor test between the two contending parties in order to ascertain who out of the two contesting claimants of Chief Ministership enjoys a majority in the House.[92] The floor test was held as directed by the Supreme Court and Kalyan Singh won the day.

It becomes clear from the above-mentioned decisions of the High Courts and the Supreme Court that the Governor's discretion to dismiss the Chief Minister is exercisable only if the Chief Minister loses his majority in the Assembly and this has to be ascertained only on the floor of the House and not in the chambers of the Governor. It is very clear now that the Governor's pleasure is to be exercised for promotion, and not for supplanting, the democratic parliamentary system. The Governor ought not to exercise his pleasure at his own whim and fancy but only after a floor-test in the Assembly. Thus, the Governor's discretion to dismiss the Ministry has been effectively restricted by judicial pronouncements.

(d) NEED FOR GOVERNOR'S DISCRETIONARY POWERS

In an *obiter*, the Madras High Court in *Mathialagan v. Governor of Tamil Nadu*,[93] has propounded the view that the Governor has no discretionary power, except the Governor of Assam under Rule 9(i) in Schedule VI, and that the exception in Art. 163(1) does not apply or govern the interpretation of any other Article pertaining to Governor's function. This is too restrictive a view and cannot be accepted because of many considerations. It goes counter to what the other High Courts have said in many cases.[94] It makes the exception to Art. 163(1)otiose and redundant. Due importance has not been attached by the Madras High Court to Art. 163(2) which empowers a Governor to decide in his discretion whether in any matter he is required to act in his discretion or not.

The Articles pertaining to the Governor have to be interpreted in the light of Arts. 163(1) and (2) and, hence, they cannot be interpreted, in every situation, *pari passu* with the Articles applying to the President, as in his case the Constitution does not in express terms confer any discretion. This distinction cannot be ignored between the President and the Governor.

There is also a practical reason as to why a Governor should have a greater latitude than the President. The governments in the States have been somewhat unstable, and have often suffered from the curse of defection. The Governor acts also as the Centre's representative in the State, and while the President's rule can be imposed in a State under Art. 356, it cannot be done at the Centre where a Ministry must always remain in office. Because of these factors, it is possible to treat a Governor on a somewhat different footing than the President. The Gover-

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90. For full discussion on this case, see, *infra*, Ch. XIII, Sec. B.
91. *The Hindu Int'l Ed.*, dated February, 28, 98, p. 1.
92. *Jagdambika Pal v. Union of India*, AIR 1998 SC 998 : (1999) 9 SCC 95.
93. AIR 1973 Mad 198, 217.
94. *Supra.*

nors' Committee has observed in this connection, "Thus even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently".[1]

The Court cannot take cognizance of an offence committed by a public servant under Ss. 161, 164 and 165, I.P.C., and under the Prevention of Corruption Act, without the previous sanction of the State Government. A question has been raised whether or not to accord sanction to the prosecution of the Chief Minister, the Governor should, as a matter of propriety, necessarily act in his own discretion and not on the advice of the Council of Ministers? The better opinion seems to be that in this matter, the Governor ought to act in his discretion, for, how can the Chief Minister advise the Governor whether he should be prosecuted or not on a charge of corruption. [2] It is the Governor who appoints the Chief Minister and he can dismiss the C.M. in his discretion. It is, therefore, justifiable that the state Governor should accord sanction to prosecute the Chief Minister on a charge of corruption.

What about a Minister? Who should be the authority to accord sanction to prosecute a Minister? Theoretically, the Governor appoints and can dismiss a Minister but he does so on the advice of the Chief Minister and, thus, the Governor's role in this matter is only formal or passive. Therefore, the question is whether the Governor can sanction prosecution of a Minister in his own discretion, or he should act in this matter on the advice of the Chief Minister. If it is the latter, then it will be extremely difficult to prosecute a Minister for it is difficult to envisage the C.M. to advise prosecution of a Minister appointed by him. Partisan and political considerations are bound to crop up for it will be politically inexpedient for a C.M. to admit that there has been a corrupt Minister in the Cabinet. Therefore, it seems to be necessary that in this matter also, the Governor acts in his discretion. In any case, if the Governor decides to act in such a matter in his discretion, then under Arts. 163(1) and (2), his decision cannot be challenged in any forum.

The only way to reduce the occasions for the Governors to exercise their discretion is to evolve acceptable conventions to take care of various situations which arise.[3] A danger in a Governor deciding matters according to his wisdom is that there may thus arise in the country uncertainty and lack of uniformity in constitutional practices as different Governors may respond differently to identical or near identical situations. The Governor's activist and discretionary role can be minimised if all political parties accept some healthy conventions, follow sound democratic behaviour, and play the game in an even-handed manner without trying to bend the Constitution to serve their own immediate political interests. Also, it goes without saying that the Governor has to use, if at all, his discretionary power to promote, and not to thwart, sound democratic parliamentary government, the principle of responsibility of the Executive to the Legislature and government according to the Constitution.

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1. *Report*, 20.
2. *State of Maharashtra v. Ramdas Shrinivas Nayak*, AIR 1982 SC 1249 : (1982) 2 SCC 463.
3. On 'Conventions' see, *supra*, Ch. I. Also see, Ch. XL, *infra.*

The Administrative Reforms Commission suggested in 1969 that some guidelines should be evolved to enable exercise of these discretionary powers by the Governor for the purpose of preserving and protecting democratic values. The Commission felt that the guidelines are necessary to secure uniformity of action and eliminate all suspicions of partisanship or arbitrariness.[4] However, the Central Government considered this recommendation of the A.R.C. and decided against framing any guidelines. The Government felt that the best course would be to allow conventions to grow up.[5]

Presently it seems that a convention has come into existence that in case of doubt whether the Ministry enjoys the confidence of the House or not, the Governor requires the Chief Minister to seek a vote of confidence from the House. For example, there was in office a coalition Government in the State of U.P. consisting of B.J.P. and B.S.P. under the Chief Minister belonging to B.J.P. When in October, 97, the B.S.P. withdrew its support from the Government, the Governor required the Chief Minister to seek a vote of confidence from the House and Chief Minister Kalyan Singh was able to win such a vote.[6] Again, in Gujarat, when the Congress withdrew its support from the Waghela Government in October 97, the Governor refused to dissolve the Assembly as advised by the Chief Minister but asked the Chief Minister to seek a vote of confidence from the House.

The J&K Legislature passed an Act constituting a board of management for the Vaishno Devi Shrine with the Governor as the *ex-officio* chairman. Interpreting the Act, the Supreme Court ruled in *Bhuri Nath v. State of Jammu & Kashmir*[7] that the Legislature entrusted the powers to the Governor in his official capacity but he was not to act on the advice of the Council of Ministers as the executive head of the State. The State Governor "is required to exercise his *ex officio* power as Governor to oversee personally the administration, management and government" of the shrine, its properties and funds.

Under an Act passed by the Haryana Legislature, the State Governor was appointed as the Chancellor of a University. In *Hardwari Lal*,[8] the High Court ruled that the Act intended that the State Government, as such, ought not to interfere in the affairs of the University, and that the State Government could not give advice to the Governor in the discharge of the functions as the Chancellor. In this capacity, the Governor acts in his discretion and not on the aid and advice of his Council of Ministers.

Ultimately, one point about the governor's discretionary power needs to be emphasized, viz. that the discretionary power has been vested in the governor to deal with any unforeseen situation which may arise in the state. In exercising his power the governor must always act to promote and protect the institution of the parliamentary form of government and not to take arbitrary decisions. While seeking to exercise his discretionary power, the governor is to keep in his view the sole criterion whether his decision will promote or thwart parliamentary system in the State.

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4. *Report on Centre-State Relationship,* 25.
5. *The Times of India,* March 14, 1975.
6. Also see, *supra,* footnote 92.
7. AIR 1997 SC 1711, 1722 : (1997) 2 SCC 745.
8. *Hardwari Lal v. G.D. Tapase, Chandigarh,* AIR 1982 P&H 439. Also, *Kiran Babu v. State of Andhra Pradesh,* AIR 1986 AP 275.

(e) GOVERNOR'S POSITION IN NON-DISCRETIONARY AREA

Besides the specific matters mentioned above, what is the position in matters where the Governor receives advice from his Council of Ministers. Art. 163 does not clarify the position between the Governor and his Council of Ministers in the non-discretionary area.[9] Is the Governor bound to act on the advice of the Council of Ministers? In the opinion of the Governors' Committee, the position is as follows: [10]

> "Even in the sphere where the Governor is bound to act on the advice of his Council of Ministers, it does not necessarily mean the immediate and automatic acceptance by him of such advice. In any relationship between the Governor and his Council of Ministers, the process of mutual discussion is implicit, and the Governor will not be committing any impropriety if he states all his objections to any proposed course of action and asks the Ministry to reconsider the matter. In the last resort he is bound to accept its final advice, but he has the duty, whenever necessary, to advise the Ministry as to what he considers to be the right course of action, to warn the Ministry if he thinks that the Ministry is taking an erroneous step and to suggest to it to reconsider the proposed course of action. In the process of advice and consent, there is ample room for exchange of views between the Governor and the Council of Ministers even though he is bound to accept its advice."

The above statement assimilates the position of the Governor *vis-a-vis* his Council of Ministers (in the non discretionary area) to that existing between the President and his Council of Ministers under Art. 74.[11]

D. FUNCTIONS AND POWERS OF THE EXECUTIVE

(i) JUDICIAL POWER

The Constitution confers certain powers on the State Government which may be characterised as 'judicial' in nature.

The State Executive has power to appoint judges to the subordinate Courts in the State [Art. 233-237].[12] Besides, the question whether a member of the State Legislature has become subject to a disqualification or not is formally decided by the Governor [Art. 192].[13]

POWER TO GRANT PARDON

The Governor is empowered to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends [Art. 161]. This power of the Governor is very much similar to the power of the President under Art. 72, discussed earlier.[14] Article 161 of the Constitution confers upon the Governor of a State similar powers in respect of any offence against any law relating to a matter to which the executive power of the State extends. The power under Arts. 72 and 161 of the Constitution

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9. *Supra,* Sec. A(i); Sec. B.
10. *Report,* 20.
11. On this point, see, *supra,* Ch. III, Sec. B.
12. For a detailed discussion on these provisions, see, *infra,* Ch. VIII, Sec. G.
13. *Supra,* Ch.VI, Sec. B(iii).
14. *Supra,* Ch. III, Sec. D(i).

is absolute and cannot be fettered by any statutory provision. But the president or the Governor, as the case may be, must act on the advice of the Council of Ministers.[15] The State Government has full freedom in exercising the power of clemency, which is a matter of policy, and even excluding a category of persons which it thinks expedient to exclude as long as there is no insidious discrimination involved.[16]

As discussed earlier,[17] the Governor's powers, under any law in force, to suspend, remit or commute a death sentence have been saved by Art. 72(3). A power to suspend the execution of a sentence or remit the whole or any part thereof has been conferred by S. 432(1), Cr.P.C., 1974 on the State Government. Under S. 433(1), Cr.P.C., the State Government is authorised to commute a sentence, including that of death, into a less rigorous sentence. Art. 161 is of much wider amplitude than S. 401, Cr.P.C., for while under the former the State Government can give an absolute and unconditional pardon, the latter does not empower it to do any such thing. In any case, the power given under Art. 161 cannot be fettered by any statutory provision. Because of Arts. 72 and 161, the power of the Governor to grant pardon, etc., overlaps, to some extent, with the similar power of the President, particularly in case of a death sentence.[18]

The appellant was sentenced to three years' imprisonment. After about 16 months, the government remitted his sentence. Under the Representation of the Peoples Act, a person sentenced to imprisonment for not less than two years is disqualified from being a candidate at an election. The question was whether the appellant was qualified to be a candidate. In *Sarat Chandra Rabha v. Khagendra Nath*,[19] the Supreme Court answered in the negative. The effect of remission is to wipe out the remaining part of the sentence which has not been served and, thus, in practice, the sentence is reduced to that already undergone. In law the remission does not touch the order of conviction by the Court and the sentence passed by it. Thus, in the instant case, the sentence of three years' imprisonment is not affected and the appellant remains disqualified although he may not have to undergo the full sentence.

In *Nanavati v. State of Bombay*,[20] the Supreme Court discussed some aspects of this power. Nanavati, a high naval officer, was found guilty of the offence of murder and was sentenced to life imprisonment by the Bombay High Court. The Governor of Bombay suspended the sentence till the disposal of his appeal by the Supreme Court and directed that he be detained in the naval jail.

The action of the Governor raised a storm of public protest as it was characterised as an interference with the course of justice. However, the High Court upheld the Governor's order. It ruled that the power of pardon, reprieve, suspension of sentence, etc., under Arts. 72 and 161, could be exercised before, during or after trial, as the words of these provisions were wide. These contained no limitation as to the time at, the occasion on, and the circumstances in which, the powers conferred by these provisions might be exercised.

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15. *State (Government of NCT of Delhi) v. Prem Raj*, (2003) 7 SCC 121 : (2003) 8 JT 17.
16. *Govt. of A.P. v. M.T. Khan*, (2004) 1 SCC 616 : AIR 2004 SC 428.
17. *Ibid.*
18. *Dy. I.G. of Police v. Raja Ram*, AIR 1960 AP 259; *Parkasho v. State of Uttar Pradesh*, AIR 1962 All. 151.
19. AIR 1961 SC 334 : 1961 (2) SCR 133.
20. AIR 1961 SC 112 : 1961 (1) SCR 497.

Thereafter, Nanavati sought special leave of the Supreme Court to appeal from the High Court's sentence of life imprisonment. The Court has made a rule under Art. 145, requiring a petitioner, sentenced to a term of imprisonment, to surrender to his sentence before his petition is heard unless the Court otherwise orders.[21] Nanavati claimed an exemption from the rule in view of the Governor's order suspending his sentence. The Court pointed out that while exercising its powers under Art. 136, it could either pass an order of suspension of sentence or grant of bail pending the disposal of the application for special leave to appeal.[22] This power of the Court overlaps with that of the Executive to suspend the sentence during pendency of the special leave.

Applying the rule of harmonious construction of the power of the two organs so as to avoid the conflict between them, and the ambit of the power of the Executive being wider and that of the Court being narrower, it must be held that the Executive could not suspend the sentence during the time the matter is *sub judice* in the Court. The Governor may grant a full pardon at any time, even when the case is pending in the Court, but the suspension of the sentence for the period when the Supreme Court is seized of the case could be granted only by the Court itself and not by the Governor. The Supreme Court held in effect that the Governor's order suspending the sentence could operate only till the matter became *sub judice* in the Court on filing the petition for special leave to appeal, and no further. Thereafter, it is for the Court to pass such order as it thinks fit. The Court refused to grant to Nanavati the exemption he prayed for.[23]

Several cases have come to light showing that, at times, the power to grant pardon is misused by the State Governments. In *Swaran Singh*,[24] D, an MLA of the U.P. Assembly, was found guilty of murdering one J. He was convicted and sentenced to imprisonment for life. Within a period of two years, the Governor of U.P. granted remission of the remaining long period of his life sentence. The family members of the deceased challenged the action of the Governor in the High Court and the matter ultimately reached the Supreme Court which quashed the Governor's action. The Supreme Court found that when the Governor passed the remission order, certain vital facts concerning D were not placed before the Governor. For example, the same Governor had earlier dismissed a petition from D for remission of his sentence and this fact was not disclosed when the second petition was moved after only few months. It was not disclosed to the Governor that D was involved in five other criminal cases of serious offences; his conduct in the prison was far from satisfactory and that out of two years and five months he was supposed to have been in jail, he was in fact on parole during the substantial part thereof.

Referring to *Kehar Singh*,[25] and *Maru Ram*,[26] the Court stated that judicial review of the Governor's decision under Art. 161 is not exercisable on the merits except within strict limits defined in *Maru Ram*, *viz.*: "all public power, including constitutional power, shall never be exercisable arbitrarily or *mala fide*, and ordinarily guidelines for fair and equal execution are guarantors of valid play of power". The Court stated in *Swaran Singh*:

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21. For Art. 145, see, Ch. IV, Sec. I(f), *supra.*
22. For discussion on Art. 136, see, *supra*, Ch. IV, Sec. D.
23. Also see, *State v. Nanavati,* AIR 1960 Bom 502.
24. *Swaran Singh v. State of U.P.*, AIR 1998 SC 2026 : (1998) 4 SCC 75.
25. *Supra*, Ch. III, Sec. D(i).
26. *Maru Ram v. Union of India*, AIR 1980 SC 2147 : (1981) 1 SCC 107; *supra*, Ch. III.

> "The bench stressed (in *Maru Ram*) the point that the power being of the greatest moment, cannot be a law unto itself but it must be informed by the finer canons of constitutionalism.... If such power [under Art. 161] was exercised arbitrarily, *mala fide* or in absolute disregard of the finer canons of constitutionalism,[27] the by-product order cannot get the approval of law and in such cases, the judicial hand must be stretched to it."[28]

In the instant case, when the Governor was not posted with material facts, "the Governor was apparently deprived of the opportunity to exercise the powers in a fair and just manner. Conversely the order now impugned fringes on arbitrariness".

The Court therefore quashed the Governor's order and remitted the case back to the Governor for reconsideration and pass a fresh order in "the light of those materials which he had no occasion to know earlier".

Again, in *Satpal v. State of Haryana*,[29] a BJP leader sentenced to life imprisonment in a murder case was pardoned by the Governor of Haryana. The Supreme Court ruled that the Governor was not properly advised and had exercised his power "without applying his mind" and, accordingly, quashed the clemency order. The Court observed:

> "… the conclusion is irresistible that the Governor had not applied his mind to the material on record and has mechanically passed the order just to allow the prisoner to overcome his conviction and sentence passed by the Court".

Rejecting the plea of the Government that the power of pardon and remission of sentence is executive in nature, the Court stated:

> "There cannot be any dispute with the proposition of law that the power of granting pardon under Art. 161 is very wide and does not contain any limitation as to the time on which and the occasion on which and the circumstances in which the said power could be exercised. But the said power being a constitutional power conferred on the Governor by the Constitution is amenable to judicial review on certain limited grounds".

The Court pointed out the following grounds on which the Court could interfere with an order passed under Art. 161, *viz.*, if the Governor exercises the power himself without being advised by the Government; if the Governor transgresses the jurisdiction in exercise of the power under Art. 161; if the Governor has passed the order without application of mind; if the order is *mala fide*; if the Governor has passed the order on some extraneous consideration. Whatever applies to the President under Art. 72 equally applies to the power of the Governor under Art. 161. The power under Art. 72 or 161 is to be exercised by the government concerned and not by the President or the Governor on his own.[30] The advice of the appropriate government binds the President/Governor.

The Apex Court has also stated that "considerations for exercise of power under Arts. 72 or 161 may be myriad and their occasions protean, and are left to the appropriate government, but no consideration nor occasion can be wholly irrelevant, irrational, discriminatory or *mala fide*."

In the instant case, the Supreme Court observed further:

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27. For discussion on the concept of 'constitutionalism', see, *supra*, Ch. I.
28. *Swaran Singh v. State of U.P.*, AIR 1998 SC 2026, at 2028 : (1988) 4 SCC 75.
29. AIR 2000 SC 1702 : (2000) 5 SCC 170.
30. Reference was made to the *Kehar Singh* and *Maru Ram* cases discussed earlier, see, *supra*, Ch. III, Sec. D(i).

> "The entire file has been produced before us and we notice the uncanny haste with which the file has been processed and the unusual interest and zeal shown by the authorities in the matter of exercise of power to grant pardon."

In the instant case, the Court ruled that the Governor was not properly advised. He was not made aware of several crucial features of the case going against the accused.

It has now been settled that the Governor does not exercise the clemency power in his own discretion but on the advice of his Council of Ministers. The Governor of Madras rejected a mercy petition on his own without seeking the advice of Council of Ministers. The Madras High Court quashed the Governor's decision on the ground that the Governor had not followed the constitutional practice of seeking the advice of his Cabinet before passing orders on the mercy petition. The High Court directed the Governor to seek the advice of the Council of Ministers before taking a fresh decision on the mercy petition.[31]

These cases are telling examples of criminalisation of politics and show how powers vested in high functionaries by the Constitution can be manipulated to favour criminal politicians. The clemency power is exercised at times not on merits but on political and other extraneous considerations. So long as the clemency power is exercisable on the advice of the government of the day, political considerations are bound to creep in while exercising power under Art. 72 or 161. It is, therefore, necessary to develop a non-political mechanism for the exercise of this power so that it is exercised purely on the merits of each case without any political connotations.

These cases show that there exists a close *nexus* between crime and politics, and that the Supreme Court has through these sought to break this *nexus*. It also shows how necessary it is that the courts do exercise the power of judicial review over exercise of power under Art. 72 or 161 so as to ensure that this power is not misused or used arbitrarily in favour of influential politicians who commit crimes with impunity.

(ii) LEGISLATIVE POWER

(a) PARTICIPATION IN THE LEGISLATIVE PROCESS

Like the Central Executive, the State Executive also participates intimately in the legislative process.[32] Each Minister is necessarily a member of the State Legislature. The powers of prorogation and dissolution of the Legislature vest in the Executive. The Governor has to signify his assent to a Bill passed by the State Legislature before it can assume legal sanctity or reserve it for Presidential assent.

Most of the bills are drafted by government departments and are presented to, and piloted through, the Legislature by the Ministers. No bill can ever be passed by the Legislature without government sponsorship and support because the government has majority in the Legislative Assembly.

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31. *The Hindustan Times*, dated 26-11-1999; *The Hindustan Times*, dated 27-11-1999, p. 11.
32. *Supra*, Ch. VI, Sec. F(i).

(b) RULE MAKING

Several provisions of the Constitution confer rule-making powers on the Governor. He can make rules regarding:—

(1) authentication of orders and other instruments;[33]

(2) conditions of service of the members of the State Public Service Commission[34] as well as civil servants;[35]

(3) convenient transaction of Government business;[36]

(4) procedure in respect of communications between the Houses of State Legislature;[37]

(5) recruitment of officers, *etc.*, for a High Court,[38]

(6) recruitment of secretarial staff of the Legislature.[39]

(c) ORDINANCE-MAKING POWER

The State Executive has ordinance-making power similar to that enjoyed by the Central Executive.[40]

According to Art. 213(1), which is in *pari materia* to Art. 123, which has already been discussed earlier, the State Governor may promulgate such ordinances as the circumstances appear to him to require when—(1) the State Legislative Assembly is not in session; or if the State has two Houses, when one of the Houses is not in session; and (2) the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action.

According to the proviso to Art. 213(1), the Governor cannot, without instructions from the President, promulgate any ordinance if:—(*a*) a Bill to that effect would, under the Constitution, have required the previous sanction of the President for its introduction into the State Legislature;[41] or, (*b*) if the Governor would have deemed it necessary to reserve a Bill to that effect for the President's consideration;[42] or, (*c*), an Act of the State Legislature to that effect would have been invalid under the Constitution without receiving the President's assent.[43]

The purport of (c), mentioned above, is as follows: when a State makes a law containing a provision inconsistent with a Central Law with respect to a matter in the Concurrent List, the State Law has to receive the assent of the President to be valid. Thus, the assent of the President is secured *subsequent* to the passage of the Bill.[44] If, however, an ordinance is being made in the similar circumstances, then the instructions from the President are a condition *precedent* to the promulgation of the ordinance.

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33. Art. 166(2); *supra*, Sec. B.
34. Art. 318; *infra*, Ch. XXXVI, Sec. K.
35. Art. 309; Ch. XXXVI, Sec. B, *infra*.
36. Art. 166(3); *supra*, Sec. VIII, Sec. B.
37. Art. 208; *supra*, Ch. VI, Sec. G.
38. Art. 229, Proviso; *infra*, Ch. VIII, Sec. G.
39. Art. 187(3); *supra*, Ch. VI, Sec. D(c).
40. *Supra*, Ch. III, Sec. D(ii)(d).
41. For discussion of these points, see, *infra*, Ch. X, Sec. K.
42. *Supra*, Ch. VI, Sec. F(i).
43. *Infra*, Ch. X, Sec. K.
44. See, *infra*, Ch. X, Secs. F, H and K.

An ordinance is to be laid before the State Assembly, and before the Council as well if there is one in the state. [Art. 213(2)(a)]. An ordinance ceases to operate at the expiration of six weeks from the reassembly of the Legislature. If the State has a bicameral legislature, and the two Houses assemble on different dates, the period of six weeks is to be counted from the later of the two dates. If the Government so desires it can in the mean time bring forth a Bill incorporating the provisions contained in the ordinance and have it enacted. An ordinance ceases to operate earlier than six weeks if a resolution disapproving it is passed by the Assembly, and is agreed to by the Council, if any [Art. 213(2)(a)]. An ordinance may be withdrawn by the Governor at any time [Art. 213(2)(b)].

An ordinance has the same force and effect as an Act passed by the State Legislature. [Art. 213(2)]. The ordinance-making power is co-extensive with the legislative power of the State.[45] Just as the Legislature can make a law under Art. 209 to expedite financial business in the Houses, so can an ordinance.[46] An ordinance cannot make a provision which cannot be validity enacted by an Act of the State Legislature [Art. 213(3)]. In the Concurrent List, an Act of the State Legislature repugnant to an Act of Parliament with respect to a matter in that list may become effective if the President has assented to it. So an ordinance, in a similar situation, will be valid if enacted with the President's prior consent [Art. 213(1)(c)].[47]

The power to make ordinances though formally vested in the Governor is, in effect, exercised by the Council of Ministers on whose advice the Governor acts, except when the matter is one in which the Governor has to seek instructions from the President.[48] The position as regards justiciability of the Governor's satisfaction to issue an ordinance is similar to that of the President's satisfaction discussed earlier.[49]

EFFECT OF AN ORDINANCE

Article 123(2) or 213(2) says that an ordinance has the same force and effect as an Act of the Legislature. What happens when an ordinance lapses without being replaced by an Act of the Legislature? Is the ordinance to be regarded as void *ab initio*?

Under the Orissa Municipal Act, election took place to certain offices in the Cuttack Municipality. The High Court set aside the municipal election. To overcome the difficulty thus created, an ordinance was issued validating the election. This ordinance was also declared to be invalid by the High Court. The councilors filed an appeal in the Supreme Court. The argument was that the Ordinance lapsed as the Legislature failed to enact the necessary legislation and so the councilors lost their offices.

The Supreme Court observed on the effect of the ordinance:[50]

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45. See, Ch. XII, *infra*.
46. *State of Punjab v. Satpal Dang, supra,* Chs. II and VI.
47. *Infra,* Ch. X, Sec. K.
Also, *Bhupendra Bose v. State of Orissa,* AIR 1960 Ori 46.
48. *Infra,* Ch. X, Sec. K.
49. *Supra,* Ch. III, Sec. D(ii)(d).
50. *State of Orissa v. Bhupendra Kumar Bose,* AIR 1962 SC 945, 955 : 1962 Supp (2) SCR 380.

> "Having regard to the object of the ordinance and to the rights created by the validating provisions, it would be difficult to accept the contention that as soon as the ordinance expired, the validity of the elections came to an end and their invalidity was revived. The rights created by this ordinance, in our opinion,.. must be held to endure and last even after the expiry of the ordinance."

Here the Court in the factual context ruled that the effect of the ordinance did not cease when it lapsed. Similarly, in *Venkata Reddy*,[51] an ordinance issued by the State Government abolished the posts of part time village officers. After sometime, the ordinance lapsed without being replaced by an Act of the Legislature. The question was whether the offices revived after the lapse of the Ordinance. The Supreme Court answered in the negative. The Court refuted the argument that when an ordinance is not replaced by an Act, as required by Art. 123(2) or 213(2), the ordinance is to be deemed to be void *ab inilio* and it should be assumed that it never because effective.

The Court argued, after reading Arts. 123(2) and 213(2), that the wordings of both of these provisions being similar, neither of these provisions says that the ordinance shall be void from its commencement if it is not approved, or is disapproved by the Legislature. The constitutional provision merely says that the ordinance shall cease to operate. This means that the ordinance remains effective till it ceases to operate. Accordingly, a mere disapproval of an ordinance by the concerned legislature cannot revive closed or completed transaction. If the Legislature wants to revive the pre-ordinance position, it can do so by passing a law having retrospective effect. Therefore, abolition of the posts by the ordinance having become a completed event, no question arises of revival of those posts after the lapse of the ordinance. The effect of the ordinance was irreversible except by express legislation as stated above.

But, on the other hand, the Gauhati High Court in the following case[52] took a different view. The Central Government issued an ordinance declaring certain sections of people in Assam as Scheduled Tribes. By successive ordinances the benefit was continued till the last ordinance lapsed without Parliament passing the necessary Act continuing the provisions of the ordinance. The Court ruled that with the lapse of the ordinance, the people concerned also lost the benefit conferred on them by the lapsed ordinance. The ordinance in question was made only for a short period. When Parliament failed to pass the necessary law, the ordinance lapsed. "Until and unless the competent authority enacts such a law with a view to confer such benefits afresh on those sections of the people, it is not possible to hold that as a right has already accrued that right has to be saved".

It is thus clear that an ordinance is effective so long as it lasts. If it lapses because of non-action of the Legislature, its validity is not affected. Depending on the factual context and other factors, the Court may hold that the effect of the ordinance has not come to an end even if the ordinance may have ceased to exist.

JUSTICIABILITY OF ORDINANCE-MAKING POWER

The position as regards justiciability of the Governor's satisfaction to issue an ordinance is similar to that of the President's satisfaction discussed earlier.[53]

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51. *T. Venkata Reddy v. State of Andhra Pradesh*, AIR 1985 SC 724 : (1985) 3 SCC 198.
52. *Maitreyee Mahanta v. State of Assam*, AIR 1999 Gau 32.
53. See, Ch. III, Sec. D(ii)(d), *supra.*

The question has been raised from time to time whether the 'satisfaction' of the Governor (i.e. of the Government) to issue an ordinance is justiciable or not.

The Governor of Andhra Pradesh issued an ordinance reducing the age of retirement of civil servants from 58 to 55. The ordinance was challenged *inter alia* on the ground of non-application of mind. Rejecting the argument, the Supreme Court asserted in *Nagaraj*[54] that issuing an ordinance is a legislative act of the executive. The Court stated in this connection. "The power to issue an ordinance is not an executive power but is the power of the executive to legislate". [55] This power is plenary within its field like the power of the State Legislature to pass laws and "there are no limitations upon that power except those to which the legislative power of the State Legislature is subject". Therefore, an ordinance cannot be declared invalid for the reason of non-application of mind "any more than any other can be. An executive act is liable to be struck down on the ground of non-application of mind not the act of the Legislature."[56]

The Court also rejected the ground of *mala fides*[57] with the remark that the ordinance making power being a legislative power, the argument of *mala fides* was misconceived. The Court also observed, "The Legislature, as a body, cannot be accused of having a law for an extraneous purpose."[58] The Court cannot examine the motives of the Legislature in passing an Act.

In *T. Venkata Reddy v. State of Andhra Pradesh*,[59] the Supreme Court has again reiterated the proposition that an ordinance cannot be struck down on such grounds as non-application of mind, or *mala fides*, or that the prevailing circumstances did not warrant the issue of the ordinance. An ordinance passed under Art. 123, or under Art. 213, stands on the same footing as an Act. Therefore, "an ordinance should be clothed with all the attributes of an Act of legislature carrying with it its incidents, immunities and limitations under the Constitution. It cannot be treated as an executive action or an administrative decision".[60] The Courts can declare a statute unconstitutional when it transgresses constitutional limits, but they cannot inquire into the propriety of the exercise of the legislative power. It has to be assumed that the legislative discretion is properly exercised.[61]

The U.P. Government promulgated an ordinance acquiring 49% share of the Dalmia Industry in the U.P. State Cement Corporation, a government undertaking. The validity of the ordinance was challenged but the Supreme Court rejected all contentions and ruled that the ordinance was made in public interest. The acquisition of shares of Dalmia in the government company was in public interest. The ordinance was not only in public interest and for public purpose but also was just and fair.[62]

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54. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551 : (1985) 1 SCC 523.
55. *Ibid*., at 565.
56. For discussion on the concept of 'non-application of mind', see JAIN, *A TREATISE ON ADM. LAW, I*, 959-63; *CASES & MATERIALS*, III, 2306-16.
57. See, *A TREATISE op. cit*, 890-928; *CASES & MATERIALS, op. cit.*, 2068-2135.
58. AIR 1985 SC 551 at 566 : (1985) 1 SCC 523.
59. AIR 1985 SC 724 : (1985) 3 SCC 198.
60. *Ibid*, at 731.
61. See, *supra*, Ch. II.
Also see, *R.K. Garg, supra; A.K. Roy v. Union of India, supra*, Ch. III, Sec. D(ii)(d).
62. *Dalmia Industries Ltd. v. State of Uttar Pradesh*, AIR 1994 SC 2117 : (1994) 2 SCC 583.

Again, in the case noted below,[63] the Supreme Court has reiterated what it has said earlier in *Nagaraj* and *Venkata Reddy,* viz., the Court cannot take cognizance of "legislative malice" in passing a statute. Accordingly, motive for promulgation of an ordinance cannot be examined by the Court. The Court again reiterated the proposition that the ordinance cannot be invalidated on the ground of non-application of mind.

The judicial view expressed in the above cases that an ordinance cannot be questioned on the ground of *mala fides* is open to question as discussed earlier. It needs to be emphasized that the doctrine of Separation of Powers envisages not only separation of powers, as such, but also separation of the three organs who wield these powers.[64] When the Executive promulgates an ordinance, it exercises legislative power which in itself amounts to the negation of the doctrine of Separation of Powers, as it combines legislative power with executive power. Although an ordinance may have the same effect as an Act of the Legislature, and the function of making an ordinance may be regarded as legislative, yet there is a vital difference between the two: an ordinance is made by the Executive while an Act is made by a democratically elected Legislature after due deliberation and discussion. Therefore, the making of an ordinance can never be equated with the enactment of an Act through the Legislature. An ordinance and an Act may have the same effect after enactment, but this cannot mean that their origin is also on the same footing. One is the legislative act of the Executive, the other is the legislative act of the democritically elected Legislature. The executive can never be equated with the legislature.

The proposition, mentioned above, seems to have become untenable after the Supreme Court decision in *Bommai,* where the Supreme Court has ruled that a proclamation issued by the President under Art. 356 on the advice of the Council of Ministers is amenable to judicial review at least to the extent of examining whether the conditions precedent to the issuance of the Proclamation have been satisfied or not.[65] Thus, while an Act passed by a Legislature may not be challengeable on the ground of *mala fides,* the same ought not to be said of the Executive.

The Constitution itself differentiates between an Act and an ordinance as is very clear from the phraseology of Art. 123 or 213. An ordinance has a temporary life; it is not a permanent law like an Act. The very fact that an ordinance lapses automatically after a while, and has to be replaced by an Act of the Legislature shows that the Constitution does not confer the same status on an ordinance as that of an Act. The following discussion itself brings out clearly the fact that the Supreme Court does not treat an ordinance as being on *all fours with* an Act. In the eyes of the Court itself, an ordinance is a merely temporary expedient—an inferior kind of law. Accordingly to treat 'legislation' by the executive as *pari passu* with legislation by a legislature, as has been done in the above cases, does not appear to be sound.

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63. *Gurudevdatta VKSSS Maryadit v. State of Maharashtra,* AIR 2001 SC 1980 : (2001) 4 SCC 534.

64. See, *supra,* Ch. III, Sec. F.

65. For discussion on *Bommai,* see, *infra,* Ch. XIII, Sec. B.

MISUSE OF THE POWER TO MAKE ORDINANCES

The power to promulgate ordinances is meant to be used sparingly and only in an emergency and when the State Legislature is in recess. An ordinance has only a limited life. Art. 213 is so structured that no ordinance made by the State Government can remain in force for more than 7½ months without being approved by State Legislature and enacted into an Act. Under Art. 213, the Governor can promulgate an ordinance if the State Assembly is not in session. An ordinance lapses if not passed by the Legislature within six weeks from the re-assembly of the Legislature. The Assembly has to meet within six months of its last session; in effect, the maximum life of an ordinance can thus be seven and half months.

However, in Bihar, an objectionable practice arose of not placing the ordinances before the Legislature for approval. These ordinances were re-promulgated word to word after the prorogation of the Legislature. This practice was helped by the fact that the Assembly always met for less than six weeks. The re-promulgation of the ordinances was done on a massive scale in a routine manner without ever being replaced by Acts of Legislature as envisaged by the constitutional provision. The State Government proceeded on the basis that it was not necessary to introduce any legislation in the Legislature but that the law could be continued to be made by the Government by having ordinances repromulgated by the Governor from time to time. In this way, an ordinance raj in the real sense of the term was ushered in the State. This amounted to law-making by an executive fiat instead of by the Legislature. This practice of mass repromulgation of ordinances on the prorogation of the session of the State Legislature continued unabated for long and was resorted to methodologically and with a sense of deliberateness.

Just to take one example of how the whole thing operated: the Bihar Sugarcane (Regulation of Supply and Purchase) Ordinance was kept in force for more than 13 years through the process of re-promulgation instead of seven and a half months as envisaged by the constitutional provision. Many other ordinances were continued for years without ever being brought before the Legislature for approval.[66]

An idea of the extent of this objectionable practice can be had from the following figures: during the period 1967-81, the State Governor promulgated 256 ordinances; all these ordinances were kept alive for periods ranging between 1 to 14 years by repromulgation from time to time. This reprehensible practice posed a threat to the system of parliamentary democracy. It could also be characterised as a fraud on the constitution as Art. 213 was never designed to be used in such a manner.

A writ petition was filed in the Supreme Court as a matter of public interest litigation on January 16, 1984, challenging such a practice as unconstitutional. The Supreme Court delivered its opinion in the matter in December, 1986.[67] The Court emphasized that under the Constitution, the primary law-making authority is the legislature and not the executive and the ordinance making power is "in the nature of an emergency power". The Court took note of the practice prevailing in Bihar. The Court described the practice as follows:

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66. See, WADHWA, *Re-promulgation of Ordinances; A Fraud on the Constitution of India.*

67. *D.C. Wadhwa v. State of Bihar,* AIR 1987 SC 579 : (1989) 1 SCC 378. On "Public Interest Litigation', see, *infra,* Ch. VIII; *infra,* Ch. XXXIII, Sec. B.

> "It is clear that the power to promulgate ordinance was used by the Governor of Bihar on a large scale and that after the session of the Legislature was prorogued, the same ordinances which ceased to operate were re-promulgated, containing the same provisions almost in a routine manner".

The Court emphasized that every ordinance promulgated by the State Governor under Art. 213, must be placed before the State legislature, and "the executive cannot by taking resort to emergency provision of Art. 213 usurp the law-making function of the legislature."

The Court ruled unequivocally that the executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take- over the law-making function of the Legislature, as this would subvert the democratic process which lies at the core of our constitutional scheme. The Court emphasized: "The power to promulgate an ordinance is essentially a power to be used to meet an extraordinary situation and it cannot be allowed to be perverted to serve political ends". It is the function of the Legislature which is a representative body to make law; the Executive cannot continue the provisions of an ordinance in force without going to the Legislature. "If the Executive were permitted to continue the provisions of an ordinance in force by adopting the methodology of re-promulgation without submitting to the voice of the Legislature, it would be nothing short of usurpation by the Executive of the law-making function of the Legislature".[68]

Criticizing the practice in trenchant terms, the Court observed:

> "The executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law-making function of the legislature. That would be clearly subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by the laws made by the legislature as provided in the Constitution but by laws made by the executive".

The Court set its face against the Ordinance-Raj in the Country.

The Court did concede, however, that "there may be a situation where it may not be possible for the Government to introduce and push through in the Legislature a Bill containing the same provisions as in the ordinance, because the Legislature may have too much legislative business in a particular session, or the time at the disposal of the Legislature in a particular session may be short, and in that event, the Governor may legitimately find that it is necessary to repromulgate the ordinance. Where such is the case, repromultation of the ordinance may not be open to attack. But, otherwise, it would be a colourable exercise of power on the part of the Executive to continue an ordinance with substantially the same provisions beyond the period limited by the Constitution, by adopting the methodology of repromulgation". In this context, the Court further observed:

> "It is settled law that a constitutional authority cannot do indirectly what it is not permitted to do directly. If there is a constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. That would be clearly a fraud on the constitutional provision."[69]

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68. *Ibid.*, 589.

69. For comments on this case, see, DR. T.V. SUBBA RAO, Doctrine of Colourable Re-Promulgation of Ordinances : Wadhwa's case, AIR 1988 JL 49.

The Court held that the Executive in Bihar "has almost taken over the role of the Legislature in making laws, not for a limited period, but for years together in disregard of the constitutional limitations. This is clearly contrary to the Constitutional Scheme and it must be held to be improper and invalid." The Court ruled that the systematic practice of the Bihar Government in promulgating ordinances successively without enacting them through the Legislature was "clearly unconstitutional" and amounted to "a fraud on the Constitution".

The Court went on to say that "the Government (of Bihar), it seems, made it a settled practice to go on re-promulgating ordinances from time to time and this was done methodically and with a sense of deliberateness". The Court called this a "reprehensible practice of the highest constitutional importance".

The Court declared unconstitutional the Bihar Intermediate Education Council Ordinance, 1985, which was re-promulgated.

On 16-12-1989, the Bihar Government promulgated an ordinance to take over private recognised Sanskrit schools which were receiving government grants. The ordinance of 89 was successively replaced several times during 90 to 92. These ordinances were substantially in similar terms. Each ordinance contained a "repeal and savings' clause repealing the previous ordinance. As a result thereof, all actions taken under the previous ordinance were deemed to be taken under the fresh ordinance. It is thus clear that the facts of this case repeated what had been decried by the Supreme Court in *Wadhwa*. In *Krishna Kumar Singh v. State of Bihar,*[70] the Apex Court declared all these ordinances except the original one of 1989, as unconstitutional and invalid.

The Court ruled that in the absence of any explanation by the Government for promulgating these ordinances and in the absence of any compensation for taking over properties of the schools, all the ordinances which took colour from one another and formed a chain, were held to be fraud on Art. 213, arbitrary and invalid violating Art. 14 of the Constitution.[71]

There arose a very substantial question from the facts of the above case. An ordinance is a temporary or a stop-gap law. The first ordinance changed the status of the school employees from private to public or government servants. The ordinance lapsed without being replaced by a statute as is envisaged by the Constitution. The question was : Whether these employees lost the governmental status once the ordinance came to an end or was the status once conferred on them irreversible? The Bench deciding the case consisted of two judges who differed between themselves on this point. One judge took the view that the status conferred by the ordinance came to an end with the lapse of the ordinance as the status was not irreversible. The other judge took the view, that the status once conferred was irreversible. In view of this difference of opinion between the two judges, the matter has been referred to a larger bench.

The difficulty in accepting the doctrine of irreversibility of status is that if such a significant and permanent result can be achieved through the medium of an ordinance which is a stop gap law and which is enacted only to meet an unforeseen situation, then there remains no need to enact a law, as envisaged by the Constitution, to replace an ordinance and this will undermine the constitutional position

70. (1998) 5 SCC 643.
71. For discussion on Art. 14, see, *infra,* Ch. XXI.

of the Legislature. The executive can freely resort to an ordinance instead of undertaking the arduous process of legislation through the legislature and subjecting itself to legislative scrutiny.

In *Venkata Reddy*,[72] as stated above, an ordinance was given a high status by the Supreme Court, and was equated to an Act of the Legislature. But the later case (*Wadhwa*) shows that an ordinance cannot be placed on the same pedestal as an Act for all purposes, the reason being that an ordinance is made by the Executive and not by the Legislature, and that ordinance-making power is subject to some limitations to which legislative power is not subject.

Wadhwa exposes in a very telling manner the dangers of an unrestricted power to the Executive to issue ordinances, as this power, like any other power, is prone to be abused or misused.[73] Promulgation of an ordinance by the Executive is inherently undemocratic. But when the government by-passes the Legislature and resorts to the ordinance-making power in a routine manner, the situation becomes much worse.

(iii) EXECUTIVE POWER

As regards the content of the executive power in a State, whatever has been said under the Central Government is fully relevant.[74] The extent and the scope of the State executive power has been discussed under Federalism.[75]

The usual rule is that the executive power of the State Government is co-extensive with the legislative power of the State Legislature.[76] To avoid conflict of State executive power and the Central executive power in the concurrent area, the proviso to Art. 162 provides that the executive power of the State in this area is subject to any law made by Parliament, or restricted by the executive power of the Centre expressly conferred on it by the Constitution or any law made by Parliament.[77]

A State Government thus has the undoubted right to organise fair price shops for distribution of foodstuffs under its executive power derived from entry 33(b) of List III, and no statutory power need be vested in the Government for this purpose.[78] The State Government can make appointments under its executive power without there being any law or rule for the purpose.[79]

In the absence of a law, on a particular subject matter, the State Government can pass executive orders in that behalf.[80]

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72. *Supra.*

73. The Supreme Court has reiterated the *Wadhwa* ruling in *Gurudevdatta VKSSS Maryadit v. State of Maharashtra,* AIR 2001 SC 1980, at 1988.

74. *Supra,* Ch. III, Sec. D(iii).

75. *Infra.,* Ch. XII, Sec. A.

76. *Ambesh Kumar v. Principal, LL.R.M. Medical College,* AIR 1987 SC 400 : 1986 Supp SCC 543; *Bharat Coking Coal Co. Ltd. v. State of Bihar,* (1990) 4 SCC 557.

77. *Bharat Coking Coal Ltd. v. State of Bihar, op. cit.* For fuller discussion on this topic, see, *infra,* Ch. XII.

78. *Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh,* AIR 1981 SC 2030 : (1981) 4 SCC 471.
For entry 33(b), List III, see, *infra,* Ch. X, Sec. F.

79. *Sikkim v. Dorjee Tshering Bhutia,* AIR 1991 SC 1933 : (1991) 4 SCC 243.
Also see, Ch. XXXVI, Sec. B.

80. *State of Madhya Pradesh v. Nivedita Jain,* AIR 1981 SC 2045 : (1981) 4 SCC 296; *Dayaram A. Gursahani v. State of Maharashtra,* AIR 1984 SC 850 : (1984) 3 SCC 36.
See, *Ram Jawaya v. State of Punjab, supra,* Ch. III, Sec. D(iii).

The matter has been further elucidated by the Supreme Court in *Bishambar Dayal*.[81] The State in the exercise of its executive power is responsible for carrying on general administration of the State. So long as the Government does not go against a constitutional or a statutory provision, the width and amplitude of the executive power cannot be curtailed. If there is no law covering a particular aspect, the government can carry on the administration by issuing administrative directions or instructions until the Legislature makes a law in that behalf. The State Government can act within its competence and take executive action even if there is no legislation to support such executive action.

The Courts have propounded the doctrine of "occupied field" in relation to the exercise of the executive power under Art. 162. When a subject is covered by a statute passed by the State Legislature, then the Government cannot meddle with that subject through its executive power under Art. 162. The executive power under Art. 162 is not available in respect of the subject which is already covered by legislation.[82] In such a case, the executive has to exercise its statutory powers according to the provisions of the relevant statute.

The Government can issue general instructions in exercise of its executive power. These instructions may look very much like rules which the government makes in exercise of its statutory rule-making power which constitute delegated legislation. The instructions issued by the government under its executive power can supplement, but cannot supplant, the statutory rules made by the government. The executive instructions stand on a lower footing than statutory rules as they do not have the force of law.[83]

In the exercise of its executive power under Art. 162, the State Government has power and authority to prescribe conditions for admission to undergraduate and post-graduate medical courses, when there are no legal provisions for the purpose.[84] Government can create posts through administrative orders so long as they are not inconsistent with any statutory rules.[85]

The State Government issued a notification under its executive power prescribing an entrance examination for selection of candidates for admission to the medical colleges run by the State. The administrative notification was held valid as it did not come in conflict with any statutory provision. The notification only

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81. *Bishambar Dayal Chandra Mohan v. State of Uttar Pradesh,* AIR 1982 SC 33 : (1982) 1 SCC 39.

82. *S. Arunachalam v. State of Tamil Nadu,* ILR (1996) 3 Mad 1508; *V. Chandra v. State of Tamil Nadu,* ILR (1996) 1 Mad 1007; *Association of Management of Pvt. Colleges v. State of Tamil Nadu,* AIR 1998 Mad 34.

83. *Union of India v. Tulsiram Patel,* AIR 1985 SC 1416 : (1985) 3 SCC 398; *State of Maharashtra v. Jagannath,* AIR 1989 SC 1133; *Chairman, L.I.C. of India, Bombay v. Kalangi Samuel Prabhakar,* AIR 1997 AP 304*; Maharashtra State Electricity Board v. State of Maharashtra,* AIR 1997 Bom 267; *Ratan Kumar Tandon v. State of Uttar Pradesh,* AIR 1996 SC 2710 : (1997) 2 SCC 161; *National Mineral Development Corpn. Ltd. v. State of Kant.,* AIR 1997 Kant 331.

See, M.P. JAIN, *A TREATISE ON ADM. LAW,* I, Ch. VIII; *CASES & MATERIALS ON INDIAN ADM. LAW,* I, Ch. VII.

84. *Dr. Ambesh Kumar v. Principal, L.L.R.M. Medical College, Meerut,* AIR 1987 SC 400 : 1986 Supp SCC 543; *Aditya Shrikant Kelkar v. State of Maharashtra,* AIR 1998 Bom 260.

85. *C. Rangaswamaiah v. Karnataka Lokayukta,* AIR 1998 SC 2496 : (1988) 6 SCC 66.

supplemented, did not supplant, the qualifications for admission laid down by statutory rules.[86]

However, in the absence of any law, the State Government or its officers in exercise of its executive authority cannot infringe rights of citizens merely because the State Legislature has power to make laws with regard to that subject.[87] Similarly, a notification issued in exercise of executive power cannot override a rule statutorily made.[88] The executive cannot go, in exercising its executive power, against a constitutional or a statutory provision.

Defining 'executive power', the Supreme Court has stated that the executive power vested in the State Government under Art. 154(1) connotes the residual of government functions which remain after the legislative and judicial functions are taken away. The executive power includes acts necessary for the carrying on or supervision of the general administration of the State including both a decision as to action and the carrying out of the decision.[89]

In addition to the executive power conferred generally on the State Executive, a few specific executive functions have been conferred under the Constitution, *e.g.*, appointing the Advocate-General; appointing members of the State Public Service Commission,[90] etc.

E. ADVOCATE-GENERAL

Parallel to the Attorney-General at the Centre,[91] there is an Advocate-General in each State. He is formally appointed by the Governor. Needless to say that the Governor exercises this power with the aid and advice of the Council of Ministers.

The Advocate-general is a person who is qualified to be appointed as a Judge of the High Court [Art. 165(1)].

The Advocate-General holds his office during the Governor's pleasure and receives such remuneration as the Governor may determine [Art. 165(3)]. The fact that the Advocate-General holds office during the Governor's pleasure means that, unlike a High Court Judge who retires at the age of 62, the Advocate-General can hold office even after he attains the age of 62 years.[92]

He gives advice to the State Government upon such legal matters as may be referred to him. He performs such other duties of a legal character as may be assigned to him by the Governor from time to time, or are conferred on him by the Constitution or any other law [Art. 165(2).]

He also has the right to speak and otherwise participate in the proceedings of the Houses of the State Legislature, or of any committee of the Legislature of which he may be named as a member, but he does not have a right of vote under this provision [Art. 177]. He enjoys all legislative privileges which are available to a member of the Legislature.[93]

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86. *Andhra Pradesh v. Lavu Narendra Nath,* AIR 1971 SC 2560 : (1971) 1 SCC 607.
87. *Bharat Coking Coal Ltd. v. State of Bihar, op. cit.; Bishambar Dayal, op. cit.*
88. *Union of India v. Arun Kumar Roy,* AIR 1986 SC 737 : (1986) 1 SCC 675.
89. *Chandrika Jha v. State of Bihar,* AIR 1984 SC 322 : (1984) 2 SCC 41.
90. *Infra.* Ch. XXXVI, Sec. K.
91. *Supra*, Ch. III, Sec. G.
92. See, *Om Prakash Joshi v. State of Rajasthan,* AIR 2002 Raj. 33.
93. *Supra*, Ch. VI, Sec. H.