CHAPTER III

CENTRAL EXECUTIVE

SYNOPSIS

Articles 52 to 78 of the Constitution deal with the Central Executive.

The Central Executive consists of the President and the Council of Ministers headed by the Prime Minister. It is of the parliamentary type in so far as the Council of Ministers is responsible to the Lok Sabha.

The President is the head of the State and the Formal Executive. All Executive action at the Centre is expressed to be taken in his name. According to Art. 53(1) : "The executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution".[1]

The Constitution formally vests many functions in the President but he has no function to discharge in his discretion, or in his individual judgment. He acts on ministerial advice and, therefore, the Prime Minister and the Council of Ministers constitute the real and effective executive.

The structure of the Central Executive closely resembles the British model which functions on the basis of unwritten conventions. In India, however, some of these conventions have been written in the Constitution[2], *e.g.*, provisions regarding appointment, tenure and collective responsibility of the Ministers. But some matters are left to conventions, as for example, the Cabinet, and the concept of Minister's responsibility for the acts of his subordinates.

A. ADMISSION TO THE EXECUTIVE ORGANS

(i) PRESIDENT

(a) ELECTION

In the Preamble to the Constitution,[3] India is declared to be a "Sovereign Socialist Secular Democratic Republic". Being a republic, there can be no hereditary monarch as the head of State in India, hence the institution of the President.

The President is elected not directly by the people, but by the method of indirect election. The constitution-makers were faced with the question whether the President should be elected directly by the people or not. Ultimately, they chose the indirect elective procedure so as to emphasize the ministerial character of the executive that the effective power resides in the Ministry and not in the President as such.

It would have been anomalous to have the President elected by adult suffrage directly by the people and not to give him any real and substantive power. Also

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1. For comments on Art. 53, see, *infra*, Sec. B.

2. On conventions, see, Ch. I.
Reference to conventions has been made at several places in this Chapter.
Also see, Ch. XL, *infra.*

3. *Supra*, Ch. I.
Also see, Ch. XXXIV, *infra.*

the method of direct election would have been very costly and energy consuming. There was also the fear that a directly elected President may emerge, in course of time, as a centre of power in his own right. Therefore, the framers of the Constitution thought that it would be adequate to have the President elected indirectly. On the other hand, the framers of the Constitution did not want the President to be elected merely by Parliament alone as that would have been a very narrow basis, and Parliament being dominated by one political party would have invariably chosen a candidate from that party.[4] In that case, the President would not have commanded national consensus by an electoral college, consisting of the elected members of both Houses of Parliament and of the State Legislative Assemblies [Art. 54],[5] in accordance with the system of proportional representation by means of single transferable vote by secret ballot [Art. 55(3)].[6] The votes cast by all members of the electoral college are not of uniform value. Votes are apportioned amongst them according to the following two principles:

(1) As far as practicable, there is uniformity in the scale of representation of the different States at the presidential election [Art. 55(1)]. To achieve this result, a member of the electoral college from a State Legislative Assembly has as many votes as are obtained by the following formula [Art. 55(2)(*a*)]:

$$\frac{\text{State Population}}{\text{Total Number of elected members in the State Legislative Assembly}} \times \frac{1}{1{,}000}$$

This formula secures to a member of a State Legislative Assembly votes in the ratio of the population of the State and, thus, a smaller State having a relatively larger Legislature cannot swamp the votes of a larger State,[7] having comparatively a smaller legislature.

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4. IV *CAD*, 713, 733-736.
Also see, AUSTIN, *The Indian Constitution*, 121 (1966).

5. Originally, the elected members of the Legislative Assemblies of Union Territories were not included in the electoral college to elect the President. In *S.K. Singh v. V.V. Giri*, AIR 1970 SC 2097, the Supreme Court had ruled that the term 'State' in Art. 54 did not include Union Territories.
After the above pronouncement, the Constitution (Seventieth Amendment) Act, 1992, added an explanation to Art. 54 saying that the term "State" in Arts. 54 and 55 includes the National Capital Territory of Delhi and the Union Territory of Pondicherry. Thus, the elected members of the Legislative Assemblies of Delhi and Pondicherry now have become part of the electoral college.
For explanation of the term "Union Territories", see, *infra*, Chs. V and IX.
For the Constitution Amendment, see, Ch. XLII, *infra*.

6. The system of proportional representation ensures that the successful candidate is returned by an absolute majority of votes. If there are more candidates than two, it may be that by the simple majority rule, the person getting less than 51 per cent of votes cast, in the election may be declared elected; whereas, on the principle of proportional representation by the system of transferring votes, a candidate is finally declared elected by an absolute majority: IV *CAD* 880.
For a comment on the system of electing the President, see, BALKRISHNA, *Election of the President of India*, VII, *Jl* of *Constitutional and Parliamentary Studies*, (*JCPS*), 33 (1973).

7. Up to the year 2026, the figures of the State Population ascertained in the 1971 census will be taken for this purpose. Thus, increase in State population after 1971 is not going to increase its votes at the election of the President. See, S. 2 of the Constitution (Eighty-Fourth Amendment) Act, 2001.
If after taking the multiples of 1000, the remainder is not less than 500, then the vote of each member is increased by one [Art. 55(2)(*b*)].

(2) There is a parity of votes between the elected members of the Houses of Parliament, and of the State Legislative Assemblies, so that the former command the same number of votes in the electoral college as the latter. This result is achieved by the following formula which gives the number of votes available to a member of Parliament in the electoral college [Art. 552)(*c*)]:[8]

$$\frac{\text{Total number of votes assigned to the members of the State Legislative Assemblies in the Electoral College}}{\text{Total number of elected members of the two Houses of Parliament}}$$

In its advisory opinion in *In re, Presidential Poll*,[9] the Supreme Court has ruled that the election of the President can be held when a State Assembly has been dissolved under Art. 356 and its members are unable to participate in the election.[10]

Article 71(4) protects President's election from being challenged on the ground of the existence of any vacancy for whatever reason among the members of the electoral college electing him. The language of this provision is wide enough to cover vacancies arising in the electoral college because a State Assembly is dissolved.

(b) DISPUTES CONCERNING PRESIDENTIAL ELECTION

All doubts and disputes arising in connection with the election of the President are to be decided by the Supreme Court whose decision is final [Art. 71(1)].

The Supreme Court has held that it would not entertain any petition challenging the Presidential election before the completion of the election process and declaration of the result.[11] The reason for this stand is that if a doubt or dispute arising in connection with the election of a President is brought before the Court before the whole election process is concluded, then conceivably, "the entire election may be held up till after the expiry of five years' term which will involve a non-compliance with the mandatory provisions of Art. 62."[12]

Under Section 14 of the Presidential and Vice-Presidential Elections Act, an election can be called into question either by a candidate at such election or by 10 or more electors. The Supreme Court has therefore held that a person who is neither a candidate nor an elector could not file a petition to challenge the Presidential election.[13]

If the election of a person as President is declared void by the Supreme Court, acts done by him in exercise and performance of the powers and duties of that office before the Court's decision are not invalidated [Art. 71(2)].

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8. A fraction exceeding one-half is counted as one and a fraction less than one-half is to be disregarded [Art. 55(2)(*c*)].

9. AIR 1974 SC 1682 : (1974) 2 SCC 33. For advisory opinion of the Supreme Court, see, *infra*, Ch. IV, Sec. F.

10. For Art. 356, see, *infra*, Ch. XIII.

11. *N.B. Khare v. Election Commission*, AIR 1957 SC 694 : 1957 SCR 1081.

12. For Art. 62, see, *infra*, pp. 173, 174.

13. *N.B. Khare v. Election Commission*, AIR 1958 SC 139 : 1958 SCR 648.
For other challenges to the election of the President see, *Babu Rao Patel v. Zakir Hussain*, AIR 1968 SC 904 : (1968) 2 SCR 133; *S.K. Singh v. V.V. Giri*, AIR 1970 SC 2097 : (1970) 2 SCC 567.

(c) THE PRESIDENTIAL AND VICE PRESIDENTIAL ELECTIONS ACT, 1952

Subject to the provisions of the Constitution, Parliament is empowered to enact legislation to regulate any matter connected with the election of the President [Art. 71(3)]. Accordingly, Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952 to carry out the purposes of Art. 71(1).

The Act lays down that a candidate can be nominated when at least 10 voters propose him and ten voters second him and he deposits a sum of Rs. 2500. These provisions have been held to be not inconsistent with Art. 58 which deals only with qualifications for the eligibility of a candidate. Art. 58 has nothing to do with nomination of a candidate.[14] These provisions are completely covered by Art. 71(1).[15]

A petitioner must come within the four corners of the Act to have *locus standi* to challenge the Presidential election and to be able to maintain the petition.[16]

(d) QUALIFICATIONS FOR PRESIDENTIAL CANDIDATE

A candidate for the President's office should be a citizen of India, of at least thirty five years of age, and qualified to be elected as a member of the Lok Sabha [Art. 58(1)].

Further, he should not be holding any office of profit under the Central or State Government, or under any local or other authority subject to the control of any of these governments. The President or Vice-President of India, or the Governor of a State, or a Minister in the Central or State Government, is not disqualified to stand for the office of the President on the ground that he holds an office of profit [Art. 58(2)].

This restriction is broader than that under Art. 102,[17] as it even disqualifies the holder of an office of profit under a local or other authority which may be subject to governmental control from contesting for the President's office. In the case of Parliament, the disqualification extends only to the holding of an office of profit under the Central or State Government,[18] and not to the holding of office of profit under local or other authority.

A person who is or has been the President is eligible for re-election to that office if he fulfils the necessary conditions for this purpose as mentioned above [Art. 57].

(e) WHEN TO HOLD PRESIDENTIAL ELECTION

Election to the President's office must be held before the expiry of the tenure of the President in office [Art. 62(1)].

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14. For Art. 58, see below.
15. See above for Art. 71(1).
16. *Charan Lal Sahu v. N. Sanjeeva Reddy,* AIR 1978 SC 499 : (1978) 2 SCC 500.
Also see, *Charan Lal Sahu v. Fakruddin Ali Ahmed,* AIR 1975 SC 1288 : (1975) 4 SCC 832. *Charan Lal Sahu v. Giani Zail Singh:* (1984) 1 SCC 390: *Charan Lal Sahu v. K.R.Narayanan,* (1998) 1 SCC 56; AIR 1998 SC 1506*; Charan Lal Sahu v. A.P.J. Abdul Kalam,* (2003) 1 SCC 609 : AIR 2003 SC 548.
17. *Supra,* Ch. II.
18. *Abdul Shakur v. Rikhab Chand,* AIR 1958 SC 52 : 1958 SCR 387; *Gurushanthappa v. Abdul,* AIR 1969 SC 744; see *supra,* Ch. II., Sec. D(a).

If the office falls vacant by death, resignation or removal or otherwise, then election to fill the vacancy should be held within six months from the date of the occurring of the vacancy. The person so elected as the President is entitled to remain in office for the full term of five years from the date he assumes charge of his office [Art. 62(2)].

(f) OTHER CONDITIONS OF THE PRESIDENT'S OFFICE

Before entering upon his office, the President has to subscribe to an oath or affirmation in the prescribed form in the presence of the Chief Justice of India, or in his absence, of the senior-most Judge of the Supreme Court available at the time [Art. 60].

The President cannot hold any other office of profit [Art. 59(2)]. He cannot be a member of a House of Parliament or a State Legislature and if a member at the time of election, he automatically vacates his seat as soon as he assumes charge of the President's office [Art. 59(1)].

The President 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. 59(3)].[19]

The allowances and emoluments of the President cannot be diminished during his term of office [Art. 59(4)].

(g) TENURE

The normal tenure of the President is five years from the date on which he enters upon his office [Art. 56(1)], but he continues to hold office even thereafter till his successor enters upon his office [Art. 56(1)(*c*)].

The President may resign his office before the expiry of his normal tenure of five years by writing to the Vice-President [Art. 56(1)(*a*)]. The Vice-President has to communicate the President's resignation to the Speaker of the Lok Sabha [Art. 56(2)].

(h) IMPEACHMENT OF THE PRESIDENT

The President may be removed from his office, before the expiry of his term, for "violation of the Constitution" by the process of impeachment [Art. 56(1)(*b*); Art. 61(1)]. The procedure for impeachment is as follows.

For impeachment, the charge against him may be preferred by either House of Parliament [Art. 61(1)].

The proposal to prefer the charge is to be put in the form of a resolution of the House. Such a resolution can be moved only after giving at least fourteen days' written notice signed by not less than one-fourth of the total number of members of the House [Art. 61(2)(*a*)]. The resolution must be passed by a majority of not less than two-thirds of the total membership of the House [Art. 61(2)(*b*)].

When one House thus prefers a charge, it becomes incumbent on the other House to investigate the same. Investigation may be made either by the House

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19. Until so prescribed, he will get the emoluments etc. as laid down in the Second Schedule to the Constitution. Parliament has enacted the President's Emoluments and Pension Act, 1951.

itself or by some other agency as the House may direct. The President has the right to appear and be represented at such investigation [Art. 61(3)].

If after investigation, the House passes a resolution by a majority of not less than 2/3 of its total membership declaring that the charge preferred against the President has been sustained, it would have the effect of removing the President from his office from the date on which the resolution is so passed [Art. 61(4)].

There is however only a remote possibility of this provision being invoked because the President acts on the advice of his Ministers who are responsible to Parliament.[20] So long as he acts in this manner, the majority in Parliament need not invoke the provision regarding impeachment as it can easily remove the Council of Ministers. Nevertheless, the provision is salutary. Being otherwise immune from parliamentary and judicial control—he has a fixed term of office; his emoluments cannot be curtailed or diminished by Parliament during his term; he has immunity from judicial process[21] and the courts are barred from probing into the relationship between the President and the Council of Ministers [Art. 74(2)],[22] the fear that he may be impeached will keep the President within the framework of the Constitution and he will not dare to violate it.

The power to impeach might possibly be invoked in the event of the President acting independently of, or contrary to, ministerial advice, or for "treason, bribery or other high crimes or misdemeanours."[23] Impeachment is a political instrument; what constitutes 'violation of the Constitution' is a matter to be decided by the House which tries the charge and the House is essentially a political organ. There is no difficulty in the House interpreting the phrase 'violation of the Constitution' in a wider sense and regard a violation of the conventions, usages and spirit of the Constitution as violation of the Constitution. When forms are maintained and the spirit is sapped away the Constitution is violated.[24]

The idea of impeachment seems to have been borrowed from the U.S. Constitution.[25] According to Art. II, section 4 of the U.S. Constitution, the President can be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours. According to Art. I, section 3, all impeachments are tried solely by the Senate and when the President is being impeached, the Chief Justice of the Supreme Court is to preside. To convict the President, concurrence of two-thirds of the members present is needed.[26]

Though the idea of impeachment has been borrowed from the U.S.A., it has been given an entirely new orientation in India, as will be clear from the following features:

(1) The President in India can be impeached only for violation of the Constitution and not for any criminal offence.

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20. See, *infra*, Sec. B(a), on this point.
21. *See below under Presidential Privileges :* Art. 361.
22. See, *infra*, Sec. B(a).
23. See, *infra*, under "*President—A Titular Head*", Sec. B(a).
24. Also see *infra*, Ch. XIII; B.C. DAS, *Impeachment of India's President: A Study of the Procedure*, V *JCPS* 245 (1971).
25. See, *infra*, Sec. F.
26. In the U.S.A., the process of impeachment of the President (Andrew Johnson) was invoked in 1868 but it failed by one vote in the Senate. The procedure has been put into motion again recently to impeach President Clinton, but, ultimately, it failed because of lack of 2/3 votes in the Senate to convict the President.

(2) In India, impeachment can be tried by either of the two Houses of Parliament, and not necessarily by the Upper House [Rajya Sabha].

(3) There is no provision for the Chief Justice of India to preside at such sittings of the House when the charge against the President is being investigated.

(4) For conviction, in the U.S.A., votes of 2/3 of the members of the Senate present are needed, whereas, in India, votes of at least 2/3 of the total membership of the House is required. Therefore, in India, conviction on impeachment is more difficult.

(i) PRESIDENTIAL PRIVILEGES

The office of the President is very august and the Constitution attaches to it many privileges and immunities. He is not answerable to any court for the exercise and performance of the powers and duties of his office, or for "any act done or purporting to be done by him" in the exercise and performance of those powers and duties [Art. 361(1)].

The ambit of this immunity is very extensive. No court can compel the President to exercise or not to exercise any power, or to perform or not to perform any duty, nor can a court issue any writ in respect of the President's official acts or omissions. He is not amenable to any mandate, writ or direction from any court. No court can compel him to show cause or defend his action. In the case of official acts, an absolute immunity from the process of the court is given to the President.

The immunity extends to acts or omissions which may be incidental to, as well as to any act 'purporting to be done' by the President in, the exercise and performance of the powers and duties of his office. The words "purporting to be done" are of very wide scope. Even though the act is outside, or in contravention of, the Constitution, the President is protected so long as the act is professed to be done in pursuance of the Constitution.[27]

The immunity is, however, personal to the President. It does not place the action as such beyond court scrutiny in suitable actions or proceedings. Appropriate proceedings can be brought against Government of India [Proviso to Art. 361(1)]; only the President personally is not amenable to a court-process with reference to the act in question. It is axiomatic that lack of *bona fides* unravels every transaction yet when a question arises whether in a given situation the President has acted rightly or wrongly it may be decided only against the Government of India without questioning the President's conduct.[28]

When any official act of the President is challenged on the ground of *mala fides*, the immunity under Art. 361 extends to him and he cannot be called upon personally to defend himself against such an allegation. Nevertheless, the validity of the act can be questioned and the Government has to defend it.

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27. *Biman C. Bose v. H.C. Mookerjee,* 56 CWN 651.
Also see, *Satwant v. State of Punjab,* AIR 1960 SC 266; *Dhananjoy v. Mohan,* AIR 1960 SC 745; *Prabhakar v. Shankar,* AIR 1969 SC 686 (688) : (1969) 2 SCR 1013.

28. *Rao Birinder Singh v. Union of India,* AIR 1968 Punj, 441; *Madhav Rao Scindia v. Union of India,* AIR 1971 SC 530 : (1971) 1 SCC 530: *Bijayanand v. President of Union of India,* AIR 1974 Ori. 52; *K.A. Mathialagam v. The Governor,* AIR 1973 Mad. 198.
Also see *infra,* Ch. XIII.

Government orders are issued in the name of the President as Art. 77(1) requires[29] all executive actions of the Central Government to be expressed in the name of the President. But such an order does not become an order passed by the President *personally*. It remains basically and essentially an order of the Minister on whose advice the "President" acted and passed the order. That being so, the order carries with it no immunity granted to the President under Art. 361. The Supreme Court has observed on this point.[30]

> "Being essentially an order of the Government of India, passed in exercise of its executive functions, it would be amenable to judicial scrutiny and, therefore, can constitute a valid basis for exercise of power of judicial review by this court. The authenticity, validity and correctness of such an order can be examined by this court in spite of the order having been expressed in the name of the President. The immunity available to the President under Art. 361 of the Constitution cannot be extended to the orders passed in the name of the President under Art. 77(1) or 77(2) of the Constitution."

Further, it is now a very well settled proposition that if the President appoints a disqualified person to a constitutional office, the discretion of the President to do so cannot be questioned because of Art. 361. But that would confer *no* immunity on the appointee himself. His qualification to hold the office can be challenged in *quo warranto* proceedings.[31] If the appointment is contrary to constitutional provisions, it can be quashed.[32]

A House of Parliament is not debarred from calling into question any act of the President in impeachment proceedings and for this purpose the House may appoint any court, tribunal or other body to investigate into a charge against the President [Proviso to Art. 361(1)].

No criminal proceeding whatsoever can be instituted against the President in [Art. 361(2))], and no process for the arrest or imprisonment of the President can issue from, any court during his term of office [Art. 361(3)]. Thus, no criminal proceedings can be taken against the President even for acts done in his personal capacity.

No civil proceedings claiming relief against the President in respect of any act done or purporting to be done by him in his personal capacity can be instituted during his term of office until a two months' notice in writing has been served on him stating the nature of the proceedings, the cause of action, the name, description and residence of the party taking legal proceedings and the relief claimed [Art. 361(4)].

In civil cases, a distinction is drawn between the President's official or personal acts. In respect of his official acts, an absolute bar has been created against a court action; in respect of his personal acts, there is only a partial bar in so far as a two months' notice needs to be given to him prior to the institution of civil proceedings.

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29. See, *infra*, Sec. B(a), for this Article.

30. *Common Cause, A Registered Society v. Union of India*, AIR 1999 SC 2979 at 2991 : (1999) 6 SCC 667.

31. For a writ of *quo warranto*, see, Ch. VIII, *infra*.

32. See, *Kumar Padma Prasad v. Union of India*, *infra*, Chs. IV and VIII, under "Appointment of Judges".

Also, *B.R. Kapur v. State of Tamil Nadu*, JT 2001 (8) SC 40 : (2001) 7 SCC 231 : AIR 2001 SC 3435; *infra*, Ch. VII.

(ii) VICE-PRESIDENT

There is a Vice-President of India [Art. 63]. He is the *ex-officio* chairman of the *Rajya Sabha* [Art. 64]. In case the office of the President falls vacant due to death, resignation, removal or otherwise, the Vice-President acts as the President till the new President-elect enters upon his office [Art. 65(1)]. The Vice-President also discharges the functions of the President when he is unable to act owing to illness, absence or any other cause until the President is able to resume his duties [Art. 65(2)].

When the Vice-President acts as, or discharges the functions of, the President, he enjoys all powers and immunities enjoyed by the President. He is entitled to such emoluments, allowances and privileges as may be determined by Parliament by law. Until such a law is made, he receives such emoluments, allowances and privileges as are specified in the Second Schedule to the Constitution. [Art. 65(3)].

While acting as the President, the Vie-President ceases to act as the Chairman of the *Rajya Sabha* and he is not entitled to any salary or allowance payable to him in that capacity [Proviso to Art. 64].

Parliament is empowered to make such provisions as it thinks fit for the discharge of the President's functions in any other contingency not mentioned above [Art. 70]. In pursuance of this provision, Parliament has enacted the President (Discharge of Functions) Act, 1969. It provides that when vacancies occur in the offices of both the President and the Vice-President, the Chief Justice of India or, in his absence, the senior-most Judge of the Supreme Court available, is to discharge the President's functions until a new President or Vice-President enters upon his office.

(a) HOW ELECTED?

The Vice-President of India is elected by the members of an electoral college consisting of the members of both Houses of Parliament assembled in a joint meeting in accordance with the system of proportional representation by means of single transferable vote by secret ballot [Art. 66(1)].

The functions of the President extend both to the Central and the State spheres and, therefore, State representatives participate in his election along with the members of Parliament. The normal function of the Vice-President, on the other hand, is to preside over the Rajya Sabha. Only rarely, and that, too, only temporarily he may officiate as the President. That being so, it was not thought necessary by the framers of the Constitution to invite members of the State Legislative Assemblies to participate in the Vice-Presidential election.[33]

Subject to the provisions of the Constitution, Parliament is empowered to enact legislation to regulate any matter relating to the election of the Vice-President [Art. 71(3)].

All doubts and disputes arising out of, or in connection with, the election of the Vice-President are to be decided by the Supreme Court whose decision is fi-

33. VII *Constitutional Assembly Debates*, 1001.

nal [Art. 71(1)]. The position in this connection is the same as discussed earlier in relation to the election of the President [Art. 71(1)].[34]

The election of the Vice-President also cannot be called in question on the ground that any vacancy exists in the electoral college electing him [Art. 71(4)]. If the Court declares the election of a person as Vice-President void, the acts done by him while in office before the Court's declaration are not invalidated [Art. 71(2)].

A candidate for the Vice-President's office should be a citizen of India, of at least thirty-five years of age, and qualified to be elected as a member of the Rajya Sabha [Art. 66(3)]. He should not be holding any office of profit under the Central or State Government or under any local or other authority subject to the control of any such government [Art. 66(4)]. However, the President or the Vice-President or a State Governor, or a Minister in the Central or a State Government, is not disqualified to contest election to this office [Expl. to Art. 66(4)].

Election to fill the Vice-President's office is to be completed before it falls vacant by efflux of the incumbent's term [Art. 68(1)]. In case vacancy arises for any other reason, election to fill the same is to be held as soon as possible after the vacancy occurs [Art. 68(2)]. The person thus elected is entitled to serve as Vice-President for the full term of five years from the date on which he enters upon his office [Art. 68(2)].

(b) OTHER CONDITIONS OF THE VICE-PRESIDENT'S OFFICE

Before entering upon his office, the Vice-President has to subscribe to, before the President or someone appointed by him for this purpose, an oath or affirmation in the prescribed form [Art. 69]. He cannot hold any other office of profit [Art. 64]. He cannot be a member of any House of Parliament or of a State Legislature and, if a member at the time of election, he automatically vacates his seat on the date he enters upon his office [Art. 66(2)].

As Chairman of the Rajya Sabha, the Vice-President is entitled to get such salary and allowances as may be fixed by Parliament by law, and until so fixed, as specified in the Second Schedule to the Constitution. [Art. 97]. He does not get any salary as Vice-President.

(c) TENURE

The normal tenure of the Vice-President's office is five years from the date on which he enters upon his office [Art. 67]. He would however continue to hold office even thereafter until his successor enters upon his office [Proviso (*c*) to Art. 67].

He may resign his office by writing to the President [Proviso (*a*) to Art. 67]. He may also be removed from office by a resolution passed by a majority of all the then members of the Rajya Sabha, and agreed to by the Lok Sabha. Such a resolution can be moved only when at least fourteen days' notice has been given of the intention to move it [Proviso (*b*) to Art. 67].

The above provision means that while in the Rajya Sabha there should be an absolute majority of the total membership (excluding those whose seats are va-

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34. *Supra*, Sec. A(i)(b).

cant) of the House supporting the resolution to remove the Vice-President, a simple majority is sufficient in the Lok Sabha. Also, the resolution to remove the Vice-President is to be passed in the Rajya Sabha first, and then it is to be agreed to by the Lok Sabha. The preponderant voice in this matter has thus been given to the Rajya Sabha, the reason obviously being that he is its Chairman and is thus one of its officers.[35]

The procedure for removing the Vice-President is much simpler than that prescribed for removing the President. The President is removable by impeachment, but no such formal procedure is necessary to remove the Vice-President and only a resolution of both Houses is sufficient. The President can be removed only for violation for the Constitution, by a 2/3 vote in both Houses and after an enquiry into the charges against him. The Vice-President, on the other hand, can be removed on any ground, without a 2/3 vote in the two Houses, and without enquiry into the charges against him.

(iii) COUNCIL OF MINISTERS

Articles 74 and 75 which deal with the composition and status of the Council of Ministers are sketchy and very generally worded. The framers of the Indian Constitution left these matters undefined so that these may be regulated by practices and conventions.

The conventions operating in Britain, where a similar pattern of government prevails, are very relevant to India and can be adapted suitably to meet the conditions prevailing here. The Supreme Court has emphasized upon the importance of conventions to interpret these constitutional provisions in the following words:[36]

> "It was said that we must interpret Article 75(3) according to its own terms regardless of conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a constitution which establishes a Parliamentary system of Government with a cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the constitution was framed."

According to Art. 74(1), there shall be a Council of Ministers with the Prime Minister at its head to aid and advise the President who shall, in the exercise of his functions, *act in accordance with such advice*.

The provision that "there shall be a Council of Ministers" is mandatory and at no point of time can the President dispense with this body. The Council of Ministers remains in office even when the Lok Sabha is dissolved.[37] The Supreme Court has refused to accept the contention in *U.N.R. Rao* that during the dissolution of the Lok Sabha, there need be no Council of Ministers and that the President can rule with the help of advisers.

This argument was based on the hypothesis that when there is no *Lok Sabha*, the responsibility of the Council of Ministers to this House cannot be enforced

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35. *Supra,* (ii).
36. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002, 1005 : (1971) 2 SCC 63.
On conventions, see, Ch. I, and also, *supra,* Ch. XL, *infra.*
37. *Ibid.*

and so there need be no Council of Ministers when there is no House[38]. The Supreme Court rejected the argument that, in the context, the word "shall' in Art. 74(1) should be read as "may". Just as Art. 52 ("there shall be a President of India") is mandatory so is Art. 74(1).

The Constitutent Assembly did not choose the Presidential System of Government.[39] Accepting the argument that Art. 74(1) is not mandatory would change the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise him in the exercise of his functions. In the absence of the Council of Ministers, nobody would be responsible to the *Lok Sabha*. The President would be able to rule with the aid of advisors till he is impeached. Therefore, the Court ruled that the word "shall" in Art. 74(1) sought to be read as meaning "shall" and not "may". Accordingly, "the President cannot exercise the executive power without the aid and advice of the Council of Ministers." It is thus clear that the President cannot function without a Council of Ministers at any time.

It may be noted that the Supreme Court has emphasized upon the theme of responsible government in India in a number of cases.[40] Thus, the Supreme Court has made a sterling contribution towards the promotion and strengthening of parliamentary system of government in the country.

Functions are conferred on the President by constitutional and statutory provisions. According to Art. 74(1) all these functions are to be discharged by the President on the advice of the Council of Ministers.

Under Art. 53(1), executive powers vested in the President are to be exercised by him either directly or through officers subordinate to him.[41] When the President acts directly, he acts on the advice of the Council of Ministers. Instead of the whole Council of Ministers, advice may be tendered to the President by one Minister. Advice tendered by one Minister is regarded as advice tendered by the Council of Ministers in view of the principle of collective responsibility[42] of the Council of Ministers. When a decision is taken by an official himself, he acts under the Rules of Business framed by the President under Art. 77(3).

What is the legal sanction behind the provision making ministerial advice binding on the President? *Prima facie*, the provision is cast in mandatory terms as the use of the word "shall" act in accordance with the advice of Council of Ministers would seem to indicate. But, legalistically speaking, the provision is at best merely of a directory nature because it *is* not legally enforceable through a court action.

No action can be brought against the President personally because of the ban placed on such legal actions by Art. 361.[43] Further, according to Art. 74(2), the

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38. On dissolution of Lok Sabha see, *supra,* Ch. II, Sec. I(c).
On the question of accountability of the Council of Ministers to the Lok Sabha, see, *infra,* under "Collective Responsibility," Sec. B(d).

39. For discussion on the Presidential System, see, *infra,* Sec. F.

40. Reference may be made to the following cases in this connection : *Ram Jawaya v. State of Punjab,* AIR 1955 SC 549 : (1955) 2 SCR 225; *A. Sanjeevi Naidu v. State of Madras,* AIR 1970 SC 1102 : (1970) 1 SCC 443; *Samsher v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *S.R. Bommai v. Union of India,* (1994) 3 SCC 1 : AIR 1994 SC 1918.

41. *Infra,* Sec. B.

42. The principle of collective responsibility is discussed later in this book. See, *infra,* Sec. B.

43. *Supra,* under "Presidential Privileges," Sec. A(i)(*i*)

courts are barred from enquiring into what advice, if any, has been given by the Ministers to the President.[44] Whatever advice the Cabinet or a Minister has given to the President is confidential, and the courts can neither take any cognisance thereof nor enquire as to what advice has been given by the Ministers to the President. The courts are, therefore, helpless in the matter in view of this constitutional provision. Thus, the matter lies outside the purview of the courts and any relief through the courts in such a situation does not seem to be possible.

The only sanction behind the provision would thus seem to be political, and, ultimately, there is the fear of impeachment of the President if he violates Art. 74(1) on a crucial matter by not acting on ministerial advice.[45] This may be regarded as "violation of the Constitution" in terms of Art. 56(b). But, as has already been discussed above, impeachment is a very complicated and cumbersome procedure, and it can be resorted to only by a very strong government having majority in one House and *support* of 2/3rd of *total* membership in another House. The Constitution stipulates that to remove the President from office it is necessary to pass the motion by not less than 2/3rd of the total membership of the House.

For all these reasons, the only conclusion is that that part of Art. 74(1) which makes the ministerial advice binding on the President is merely directory in nature. In Britain, it is a convention that the monarch acts on the advice of the Ministers. In India, an attempt has been made to codify this convention, but, in effect, it still remains a convention, and does not become a legally enforceable injunction.

(a) NON-JUSTICIBAILITY OF CABINET ADVICE

The next question is : what is the scope of the provision in Art. 74(2) which bars the courts from embarking upon an inquiry as to whether any, and if so what, advice was tendered by the Council of Ministers to the President.

The reasons which may have weighed with the Council of Ministers in giving the advice also form part of the advice and so are protected from judicial scrutiny. The notings of the officials which lead to the cabinet note leading to the cabinet decision also form part of the advice tendered to the President.[46] All this material is protected from disclosure under Art. 74(2).[47] Thus, the courts would be barred, because of Art. 74(2), from inquiring, for example, into the grounds which might have weighed with the Council of Ministers in advising the President to issue a proclamation under Art. 356.[48] However this rule has been whittled away in subsequent decisions.[49]

But the courts can compel production of the materials on which the decision of the Council of Ministers is based as such material does not form part of the ad-

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44. See, below.
45. On Impeachment of the President, see, *supra.*
46. *Harsharan Verma v. Union of India,* AIR 1987 SC 1969 : 1987 Supp SCC 310.
47. *Rao Birinder Singh v. Union of India,* AIR 1968 P.H. 441, 450; *State of Punjab v. Sodhi,* AIR 1961 SC 493 : (1961) 2 SCR 371.
48. See, *State of Rajasthan v. Union of India,* AIR 1977 SC 1361 : 1977 (2) SCC 592, per BEG, C.J., at 1392; CHANDRACHUD, J., at 1420, and FAZL ALI, J., at 1440-41.
For discussion on Art. 356, see, *infra,* Ch. XIII.
49. See *infra* and *Rameshwar Prasad (VI) v. Union of India,* (2006) 2 SCC 1 : AIR 2006 SC 980.

vice.[50] Therefore, the correspondence between the Chief Justice of India, the Chief Justice of the concerned High Court and the Central Government—which constitutes the material forming the basis of the Central Government's decision to continue or discontinue a High Court Judge—falls outside the exclusionary rule contained in Art. 74(2).[51]

The Supreme Court has clarified the implications of Art. 74 (2) in *S.R. Bommai v. Union of India*[52]. No court is concerned with what advice was tendered by the Minister to the President. The court is only concerned with the validity of the order and not with what happened in the inner councils of the President and the Minister. An order cannot be challenged on the ground that it is not in accordance with the advice tendered by the Minister or that it is based on no advice. If, in a given case, the President acts without, or contrary to, the advice tendered to him, it may be a case warranting his impeachment, but so far as the court is concerned, it is the act of the President.

Article 74(2) protects and preserves the secrecy of the deliberations between the President and his Council of Ministers. Its scope is limited. It does not immunize orders and acts done by the President in exercise of his functions. Art. 74(2) cannot override the basic provisions of the Constitution relating to judicial review. When any action taken by the President in exercise of his functions is challenged, it is for the Council of Ministers to justify the same, since the President acts under Art. 74(1).

Article 74(2) does not mean that the Government need not justify the act of the President taken in exercise of his functions. When act or order of the President is questioned in a court, it is for the Council of Ministers to justify the same by disclosing the material which formed the basis of the act/order.

The Court will not inquire whether such material formed part of the advice tendered to the President, or whether the material was placed before him, or what advice was tendered to the President, what discussions took place between the President and the Ministers and how was the ultimate decision arrived at. "The court will only see what was the material on the basis of which the requisite satisfaction is formed and whether it is relevant to the action taken".

The Court will not go into the correctness or adequacy of the material. The material placed before the President by a Minister does not become part of the advice. Advice is what is based upon the said material. Material is not advice. The material only because it was placed before the President in support of the advice does not become advice itself. It is difficult to appreciate how does the supporting material become part of the advice.[53] The Court disagreed in this respect with the reasoning of its own earlier decision in *State of Rajasthan v. Union*

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50. *Kartar Singh v. State of Punjab,* JT (1994) 2 SC 423 : (1994) 3 SCC 569; *R.K. Jain v. Union of India,* (1993) 4 SCC 119 : AIR 1993 SC 1769.

51. *S.P. Gupta v. Union of India,* AIR 1982 SC 149 : 1981 Supp SCC 87, per BHAGWATI, J., at 230. This view overrules the view of GAJENDRAGADKAR, C.J., in *State of Punjab v. Sodhi Sukhdev Singh,* AIR 1961 SC 493, giving a broad meaning to the parallel provision in Art. 163(3), *infra,* Ch. VII.
Also see, *R.K. Jain v. Union of India,* (1993) 4 SCC 119 : AIR 1993 SC 1769.
For discussion on *S.P. Gupta,* see, *infra,* Ch. VIII.

52. AIR 1994 SC 1918 : (1994) 3 SCC 1. For further discussion on this case, see, Ch. XIII, *infra.*

53. *Ibid.,* at 2073. All other Judges participating in this decision substantially agreed with this view.

of India.[54] The view expressed in *Bommai's* case was affirmed and extended in *Rameshwar Prasad(VI) v. Union of India*[55] and the views to the contrary in *State of Rajasthan v. Union of India,*[54] were held to be no longer the law. The majority held that Article 74(2) does not bar scrutiny by courts of the factual existence and relevance of the material on the basis of which advice is given by the Ministers to the President. The onus of proving the preconditions for the exercise of the President's power was on the Union of India. The mere ipse dixit of the Governor's report would not do. The courts can also scrutinise the reasons for such advice.[56]

The Court, in *Bommai's case*, also mentioned that while privilege in respect of presenting documents in the court may not be claimed under the constitutional provision in Art. 74(2), it may, nevertheless, be possible to claim privilege under S. 123, Evidence Act.[57] The field and purpose of S. 123 is entirely different and distinct from Art. 74(2). Art. 74(2) and S. 123 cover different and distinct areas. While justifying the government action in court, the Minister or the concerned official may claim a privilege under S. 123 and the court will decide the claim on its merits.[58]

This clause is designed to safeguard the confidentiality and secrecy of cabinet deliberations as well as of the advice tendered to the President by the Cabinet. The Supreme Court has ruled in *Doypack*[59] that "it is duty of this court to prevent disclosure where Art. 74(2) is involved." The Court has also ruled that "the notings of the officials which lead to the Cabinet note leading to the Cabinet decision formed part of the advice tendered to the President." Cabinet papers also include papers brought into existence for the purpose of preparing submission to the Cabinet.

This clause excluding the courts from the area of the President-Cabinet relationship also means that if the President refuses to act on the advice of the Cabinet in any particular instance, the courts are barred from compelling the President to act according to the cabinet advice, because the courts are barred from compelling production of the advice tendered by the Council of Ministers.

(b) APPOINTMENT OF PRIME MINISTER

The Prime Minister is appointed by the President [Art. 75(1)]. This is one act which the President performs in his discretion without the advice of the Council of Ministers or the Prime Minister. The question of appointment of a new Prime Minister usually arises either after holding a fresh election to Lok Sabha, or when the incumbent Prime Minister dies or resigns. In such a contingency, the President cannot act on the advice of any Prime Minister in the matter of selection and appointment of the Prime Minister.

While the Constitution *prima facie* appears to confer an unfettered discretion on the President to appoint whomsoever he likes as the Prime Minister, in practice, it is not so. A few conventions, and a few constitutional provisions indirectly, restrict his choice of a Prime Minister.

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54. AIR 1977 SC 1361 : 1977 (2) SCC 592.
55. (2006) 2 SCC 1 : AIR 2006 SC 980.
56. *Ibid* at pp. 119 and 124.
57. For discussion on S. 123, Evidence Act, see Jain & Jain, *Principles of Adm. Law*, Ch. XIX. Also see, *R.K. Jain v. Union of India,* AIR 1993 SC 1769 : (1993) 4 SCC 119.
58. Also see, *A.K. Kaul v. Union of India,* AIR 1995 SC 1403, 1414-1415 : (1995) 4 SCC 73.
59. *Doypack Systems v. Union of India,* AIR 1988 SC 782 : (1988) 2 SCC 299.

To keep the fabric of parliamentary government in proper working order, it is necessary that the Council of Ministers, of which the Prime Minister is the head, enjoys the confidence of the Lok Sabha. It is thus laid down that the Council of Ministers shall be collectively responsible to the Lok Sabha [Art. 75(3)].[60]

It is, therefore, essential that the President appoints a person as the Prime Minister who has the support and confidence of a majority of the members of the Lok Sabha, otherwise he will not be in a position to form a stable Ministry and carry the House with him in his policies and programmes and the government cannot function. This means that the leader of the majority party in the Lok Sabha should invariably be invited to become the Prime Minister. This is the principal limitation in practice on the President's choice. As IVOR JENNINGS has asserted in the context of Britain: "If a party secures a majority and that party has a leader, that leader must become Prime Minister".

A well established convention in Britain has been that the Prime Minister should belong to the House of Commons.[61] The justification for the convention is not far to seek. The House of Commons is elected on the popular basis, reflects the public opinion more truly and faithfully than does the House of Lords, and plays a decisive role in the governmental process. The Cabinet is responsible to it; it controls the strings of the purse and thus it is here that the maintenance of party organization matters vitally. To carry on the government effectively, the Prime Minister cannot afford to be out of touch with the House of Commons. In the very nature of things, therefore, it is necessary that the Prime Minister should belong to the House of Commons so that he may carry the House along with him.

There is neither any specific provision in the Indian Constitution nor a mandatory convention debarring a member of the Rajya Sabha from becoming the Prime Minister. For example, Mrs. Indira Gandhi, a member of the Rajya Sabha, became the Prime Minister in 1966. But the fact that she was elected to the Lok Sabha soon thereafter also shows that it is considered desirable that the Prime Minister should belong to the Lok Sabha. Rajya Sabha is not a hereditary chamber like the House of Lords, and has contact with the contemporary public opinion as one-third of its members are indirectly elected every two years.

Also, a Minister who is a member of the Rajya Sabha has a right to participate in the proceedings of the Lok Sabha and *vice versa* [Art. 88].[62] Such is not the case in Britain where a Lord, even though a Minister, cannot participate in the proceedings of the House of Commons. In view of these circumstances, there may not be as much objection to a member of the Rajya Sabha becoming the Prime Minister as there is in the case of a peer becoming the Prime Minister in Britain. In fact, the present Prime Minister, Dr. Manmohan Singh, was appointed as such in 2004 when he was a member of the Rajya Sabha and in a departure with earlier convention he did not seek re-election to the Lok Sabha after resigning from the Rajya Sabha. But, keeping the best democratic traditions in view, and also to ensure smooth working of the governmental machinery, it is preferable that a member of the Lok Sabha rather than that of the Rajya Sabha should

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60. *See, infra,* Sec. B(d).

61. WADE AND PHILLIPS, *op. cit,* 244 (IX Ed.).
LORD HOME renounced his peerage in Oct., 63, to become the Prime Minister.

62. *Supra,* Ch. II, Sec. G(h).

be the Prime Minister. In any case, a member of the Rajya Sabha on becoming the Prime Minister should seek election to the Lok Sabha at the earliest opportunity.

In the matter of appointment of the Prime Minister, the President thus enjoys some marginal discretion his discretion being limited to choosing a person who is qualified to be a member of Parliament under Article 84 and not disqualified under Article 102, who is either a member of Parliament or has the potentiality to be so elected within six months of his appointment and who can command the support of the majority of the members of the Lok Sabha.[63] In a recent decision, the Supreme Court held that there was no requirement under the Constitution which required a person elected to the Rajya Sabha to either be a voter or a resident in the State which the person is chosen to represent.[64] At critical moments, the choice of the Prime Minister by the President may prove to be extremely crucial. When a party has a clear majority in the Lok Sabha, the President has to induct the acknowledged leader of the party into the Prime Minister's office, and the President's power in such a case is merely formal. If, however, the political situation is not clear and no party has a clear majority, then the President will have some scope to exercise his own judgment as to who amongst the several aspirants to the office has the best chance of forming a stable Ministry and secure confidence of the Lok Sabha.

But even here it may be desirable to have some agreed conventions for the guidance of the President, *e.g*., that he may invite the leader of the largest party in the Lok Sabha to form the government. In the ultimate analysis, however, the President's choice of a Prime Minister is controlled, in practice, by the will of the majority in the Lok Sabha.

Even a minority government may remain in office for sometime with the parliamentary support of some other parties for its policies. For example, towards the end of 1969, Indira Gandhi's Government, though numerically in a minority in the Lok Sabha remained in power for quite some time. There were several occasions when the Gandhi Government was challenged on the floor of the House, but the opposition motions were defeated with wide margins.

If two or more parties enter into a coalition and thus secure a majority in the Lok Sabha, then again the President would have no option but to induct the acknowledged leader of the coalition into the Prime Minister's office. In 1977, the Janata Party, a combination of several parties, secured a majority. The leader of the Janata Party was appointed as the Prime Minister. After the break of this party, in 1979, Chaudhury Charan Singh, leader of a faction of the Janata Party, was appointed as the Prime Minister as he was being supported by the Congress Party from outside, i.e. without participating in the Council of Ministers.

Although he did not command an absolute majority in the Lok Sabha, he, nevertheless, enjoyed support of more members than Morarji Desai who had just resigned as the Prime Minister.[65] The President at the time expressed the wish that "in accordance with the highest democratic traditions and in the interest of establishing healthy conventions", the Prime Minister should seek a vote of con-

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63. *Ashoke Sen Gupta v. Union of India*, 1996 (II) CHN 292, 297.
64. *Kuldip Nayar v. Union of India*, (2006) 7 SCC 1 : AIR 2006 SC 3127.
65. To assess the support enjoyed by each leader in the House, the President asked them both to submit lists of their supporters.

fidence in the Lok Sabha at the earliest. Within a few days, the Congress Party withdrew its support and Charan Singh was reduced to a minority in the Lok Sabha. The House was then prorogued by the President on the advice of the new Prime Minister. Charan Singh could not seek a vote of confidence from the House. Incidentally, he was the only Prime Minister who remained in office for a while without obtaining a vote of confidence from, and without ever facing, the Lok Sabha.

A petition was moved in the Delhi High Court for the issuance of a writ of *quo warranto* challenging the appointment of Charan Singh as the Prime Minister. The Court however rejected the petition.[66] The Court rejected the argument that it is only after a member of the Lok Sabha secures the vote of confidence of the Lok Sabha that he should be appointed as the Prime Minister. The Court argued that to accept this contention would virtually amount to saying that it is not the President but the Lok Sabha who should select the Prime Minister. Under the Constitution, such a function is to be performed by the President.[67] He has, of course, to respect the constitutional conventions in choosing the Prime Minister.

The Court argued further that the existence of the Council of Ministers precedes, in order of time, the vote of confidence or no confidence in the Council of Ministers by the Lok Sahba. It is not possible to expect the Council of Ministers to seek the approval of the House immediately on appointment.[68] The Court also held it proper and constitutional in the circumstances to prorogue the House.[69] The President exercised his discretion after considering the advice of the Council of Ministers and in a difficult and extraordinary situation. The legal status of the new government under Charan Singh as the Prime Minister being according to the conventions and the Constitution, the President could accept its advice to prorogue the House.

After some time, Charan Singh Ministry resigned and advised the President to dissolve the House and hold fresh election to the Lok Sabha.[70] The President, accordingly, dissolved the House and asked the Ministry to remain in office till other arrangements could be made. At this stage, another petition for *quo warranto*[71] was moved in the Calcutta High Court to show cause under what authority the Prime Minister and his colleagues resolved to advise the President to dissolve the Lok Sabha and also to show cause as to why Charan Singh should not be removed from the office of the Prime Minister.

After a review of the relevant cases[72] and the conventions prevailing in Britain,[73] the Court in *Madan Murari v. Chaudhury Charan Singh*,[74] rejected the petition. The Court observed that despite the 42nd Amendment,[75] the President acts in his own discretion in choosing the Prime Minister. In making his assessment

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66. *Dinesh Chandra v. Chaudhuri Charan Singh,* AIR 1980 Del. 114.
67. *Supra*, under "Council of Ministers", Sec. A(iii).
68. *Infra.*
69. *Supra*, Ch. II, Sec. I(a).
70. *Supra*, Ch. II, Sec. I(c).
71. *Infra*, Ch. VIII, Sec. E.
72. *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *infra*, Sec. B; *U.N.R. Rao v. Indira Gandhi*, AIR 1971 SC 1002 : (1971) 2 SCC 63; *supra*.
73. *Supra*, under "Council of Ministers"; *infra*, under "Collective Responsibility."
74. AIR 1980 Cal 95.
75. *Infra*, Ch. XLII.

as to who as the Prime Minister will enjoy the confidence of the Lok Sabha he is not fettered in his choice except by his own assessment, and the court could not sit in judgment on the political assessment of the President. Whether he was politically justified or not in appointing the Prime Minister is not a matter for the court to determine.

Thus, in the facts and circumstances of the case, the President was legally and constitutionally justified in calling upon Charan Singh to form the Ministry. Once the Ministry was formed it was competent constitutionally and legally to function and aid and advise the President in terms of Art. 74(1) until the Cabinet resigned on the 20th August, 1979.

It was constitutionally within the discretion of the President to accept the Cabinet's advice to dissolve the Lok Sabha. The President was not bound to accept that advice; he was free to accept or not to accept that advice. The President did not act unconstitutionally in accepting that advice. After the Prime Minister and the Council of Ministers tendered their resignation, their continuance in office until alternative arrangements could be made as directed by the President was mandatory and an imperative obligation for them as they held their office during President's pleasure.

The Court however expressed the view that the government should now function only as a caretaker government and carry out only day to day administration and defer all policy questions which could await disposal by a Council of Ministers responsible to the Lok Sabha. This was so because the government had never proved its responsibility to Parliament; it resigned before facing a vote of confidence and it was an unprecedented situation that such a government should give advice to the President which would be binding on him.

Accordingly, the President could refuse to accept any advice which went beyond the day to day administration. This no doubt would give powers to the President not expressly conferred on him by the Constitution, but having regard to the basic principle behind the Constitution, in the peculiar facts and circumstances of the case, that "is the only legitimate, legal and workable conclusion that can be made."

Needless to say, Chaudhury Charan Singh episode constituted an unprecedented situation. Here was a Council of Ministers which never faced the *Lok Sabha* for a single day, never proved its responsibility to the House, which resigned before facing a vote of confidence, and which was aiding and advising the President in the discharge of his functions. The whole episode cannot be regarded as being in the best traditions of constitutionalism and the Parliamentary system.

In 1985, when Prime Minister Indira Gandhi was assassinated, the Congress Party, which had a majority in the Lok Sabha, had no acknowledged leader. The calling of a meeting of the Congress Legislature Party would have taken a few days, but it was necessary to appoint the Prime Minister immediately. At this critical moment, President Zail Singh immediately appointed her son Rajiv Gandhi as the Prime Minister without waiting for his being formally elected as the leader of the Congress Party. It was only after his appointment as the Prime Minister that he was elected as the leader of the majority party.

In 1989, V.P. Singh was appointed as the Prime Minister even though his party had no clear majority as the party had only 176 members in a House of 520.

The BJP promised to support V.P. Singh from outside without itself participating in the government. V.P. Singh succeeded in getting a vote of confidence from the House.[76] After some time, BJP withdrew support. Though V.P. Singh was reduced to minority in the House, yet the President did not ask him to vacate his office immediately but gave him time to prove his majority in the House. V.P. Singh resigned when he failed to secure the vote of confidence from the House.

In November, 1990, Chandra Sekhar was appointed as the Prime Minister. Though he led a minority group, he was promised support from outside by the Congress Party and was thus able to muster a majority support in the Lok Sabha.[77] After some time, the Congress Party withdrew support, and, consequently, Chandra Sekhar resigned and recommended dissolution of the House and holding of fresh elections.

In 1991, fresh elections were held for the House. Again, no party emerged with a clear-cut majority in Lok Sabha. Narasimha Rao, leader of the Congress Party, was appointed as the Prime Minister. Though he had no majority support, he was the leader of the largest party. The party position in Lok Sabha at the time was that the Congress Party had 251 members in a House of 528 members and, thus, it was short by 14 members for a simple majority. No other party at the time staked its claim to form the government. The President asked Rao to establish his majority in the Lok Sabha in four weeks.[78] Not only was Rao able to do so but, in course of time, he succeeded in mustering a majority in the House and was thus able to stay as the Prime Minister for a full five year term.

In 1996, Lok Sabha was dissolved at the end of its term of five years and general elections held which resulted in a Parliament with no party having a majority in the Lok Sabha. The Congress Party which was the ruling party before the elections (1991-1996) could secure only 135 seats in a House having 520 members. The Bhartya Janata Party (BJP) secured 162 seats. The United Front (Leftist Parties along with Janta Dal and a few other regional parties) secured 178 seats and the rest of the seats went to Independents and small groups. The President invited the leader of the BJP which was the single largest party to form the government with the stipulation that it should secure a vote of confidence in the Lok Sabha within 15 days. Prime Minister Atal Beharee Vajpayee having failed to secure such a vote resigned just after 13 days.

The President then invited the leader of the United Front which had been promised support from outside (without participation in the government) by the Congress Party. The President appointed Deve Gowda, who was not a member of either the Rajya or the Lok Sabha and did not belong to any political party but had the support of the majority of the members. This Government lasted for nearly two years (with a change of leadership in between). It resigned in December, 1997 when the Congress Party withdrew support.

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76. The President had imposed a condition on him to get a vote of confidence from the Lok Sabha. See, R. VENKATARAMAN, *MY PRESIDENTIAL YEARS*, 324 (1994).

77. When Chandra Shekhar was appointed as the Prime Minister, the President was satisfied *prima facie* that he had the strength to form a viable government. Nevertheless, the President stipulated that the Prime Minister should prove his majority in the Lok Sabha. See, VENKATARAMAN, *op. cit.* 443.

78. Venkataraman, *op. cit.*, 553.

The House was dissolved and fresh elections were held in March, 1998. Again, no majority party emerged in the Lok Sabha. Atal Behari Vajpayee, the leader of the BJP (being the largest single party having 162 members as against 141 members belonging to the Congress Party), was able to form a coalition with several small regional parties and having thus got a majority was invited to form the government. Atal Behari Vajpayee became the Prime Minister again and was able to win a vote of confidence in the Lok Sabha. In the general elections held in 2004 and 2009, the government in the centre was formed by the Congress, which emerged as the largest single party, with the support of other political parties.

It is clear from the above events that the President seeks to put in office a Prime Minister who is able to muster majority support in the House. This accords with the view expressed by S.A. de Smith as regards Britain that when "no party has an overall majority in the House", the Queen will have to decide who has "a reasonable prospect" of maintaining himself in office. "That person will normally, *but not invariably*, be the leader of the largest party in the House of Commons".

At times, a Deputy Prime Minister is appointed though no such office is created by the Constitution. A question has been raised whether the taking of oaths as the DPM is constitutionally valid as there is no separate oath prescribed for the DPM. The Supreme Court has ruled that the DPM is just a Minister and he takes the same oath as a Minister does. Though described as the DPM, such description does not confer on him any of the powers of the Prime Minister.[79]

(c) APPOINTMENT OF MINISTERS

A Minister should, normally speaking, be a member of a House of Parliament. It is a well established convention in all countries having the Parliamentary system[80] but not, an absolute rule; even a non-member may be appointed as a Minister, but he must sooner than later become a member of a House.

In India, the same practice prevails. If, however, a non-member is appointed as a Minister, he cannot hold the office for longer than six months without becoming a member of a House of Parliament in the meantime. A Minister who for a period of six consecutive months is not a member of a House of Parliament ceases to be a Minister at the expiry of that period [Art. 75(5)].

This provision ought to be read along with Art. 88[81] which permits a Minister to participate in the proceedings of a House of which he is not a member. This means that a Minister who is not a member of any House can speak in, and participate in the proceedings of, any House, but he does not have a right to vote in any House. Thus, the Minister can function effectively even though not a member of any House.

The rule that Ministers should be members of Parliament is, indeed, essential to the smooth and proper working of parliamentary form of government. Their presence in Parliament makes a reality of their responsibility and accountability

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79. *K.M. Sharma v. Devi Lal*, AIR 1990 SC 528 : (1990) 1 SCC 438.

80. SIR IVOR JENNINGS, *CABINET GOVERNMENT*, 60 (IIIrd ed.); WADE & BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 268; PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA*, 243 (4th ed.); *State of South Wales v. Commonwealth of Australia*, 108 ALR 577.

81. *Supra*, Ch. II, Sec. G(h).

to Parliament, and facilitates co-operation and interaction between them and Parliament, both these features being vital to parliamentary government.

To appoint a non-member of the Parliament as a Minister does not militate against the constitutional mechanism or democratic principles embodied in the constitution. A non-member can remain a Minister only for a short period of six months and as a minister he is collectively responsible to Lok Sabha. There are several reasons for permitting a non-member to be appointed as a Minister for a short duration. A person who may be competent to hold the post of a Minister may be defeated in the election. There is no reason why he cannot be appointed as a Minister pending his election to the House.

There is no condition that only a member of a House of Parliament can be appointed as the Prime Minister. A non-member, even a member of a State Legislative Assembly, may be appointed as the Prime Minister. However, his appointment as the P.M. would remain valid if within six months, he becomes a member of a House of Parliament and resigns his seat in the Legislative Assembly.

Under Art. 75(5)[82], a person who is not a member of any House of Parliament can be appointed as a Minister. He has to become a member of either House within six months otherwise he ceases to be the Minister. The term 'Minister' in Art. 75(5) includes the Prime Minister. The Supreme Court has repudiated the suggestion that appointment of a non-member as the Prime Minister is anti-democratic. Only a person who, the President thinks, commands the confidence of the Lok Sabha is appointed as the Prime Minister. The Council of Ministers of which he is the head is collectively responsible to the *Lok Sabha.* Therefore, even though the Prime Minister is not a member of Parliament, he is the one who commands the support of a majority of members of the *Lok Sabha* and he becomes answerable and accountable to the House and this ensures the smooth functioning of the democratic process.

Shri Sitaram Kesari was appointed as a Minister of State in the Central Cabinet. His appointment was challenged in a writ petition on the ground that he was not a member of either House of Parliament at the time of his appointment and so he could not be appointed as a Minister. The writ petition was dismissed as under Art. 75(5), a person not being a member of a House could be appointed as a Minister upto a period of six months.

Reading Arts. 75(5) and 88 together,[83] the Supreme Court has reiterated in *Harsharan Verma v. Union of India*:[84]

> "The combined effect of these two Articles is that a person not being a member of either House of Parliament can be a Minister up to a period of six months. Though he would not have any right to vote, he woud be entitled to participate in the proceedings thereof."

Shri H.D. Deve Gowda, who was not a member of either House of Parliament was appointed as the Prime Minister of India. His appointment was put in issue.[85]

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82. *Supra.*

83. For Art. 88; see, *supra,* Ch. II, Sec. G(h). According to Art. 88, a Minister, even though a non-member, can participate in the proceedings of a House without vote.

84. AIR 1987 SC 1969 : 1987 Supp SCC 310.

85. *S.P. Anand v. H.D. Deve Gowda,* AIR 1997 SC 272 : (1996) 6 SCC 734.
Also see, *Janak Raj Jai (Dr.) v. H.D. Deve Gowda,* (1997) 10 SCC 462.

The Supreme Court upheld the appointment. The Court also repelled the argument that if a non-member is appointed as the Prime Minister, it would be against national interest. Once appointed as the Prime Minister, he becomes responsible and answerable to the House. The Court observed:

> "Even if a person is not a member of the House, if he has support and confidence of the House, he can be chosen to head the Council of Ministers *without violating the norms of democracy and the requirement of being accountable to the House* would ensure the smooth functioning of the democratic process."

The Supreme Court has made a pronouncement of great constitutional significance in *S.R. Chaudhuri v. State of Punjab.*[86] The question which arose in the instant case was as follows : a person who is not a member of a House of Parliament is appointed as a minister. He resigns after six months, as required by Art. 75(5), as he fails to become a member of a House of Parliament in the meantime. Can he be re-appointed as a minister for another term of six months? Can a person be appointed repeatedly as a minister for a period of six months at a time even though he is not a member of a House of Parliament?

Although Art. 75(5) does not specifically bar such a practice, if a literal view is adopted thereof, the Supreme Court has banned it in *Chaudhuri* characterising it as "undemocratic"; it would be "subverting the Constitution" to allow such a practice. The Court has observed further : "The practice would be clearly derogatory to the constitutional scheme, improper, undemocratic and invalid." Art. 75(5) is in the nature of an exception to the normal rule that only members of Parliament can be appointed as ministers. "This exception is essentially required to be used to meet very extraordinary situation and must be strictly construed and sparingly used."[87] This means that within the life time of Parliament for five years, a person who is not a member of a House of Parliament, can be appointed as a minister only once and that too for a short period of six months.

The *Chaudhuri* case arose the State of Punjab under Art. 164(4) which applies to the appointment of ministers in a State and is in *pari materia* with Art. 75(5). Therefore, whatever is said in relation to Art. 164(4) applies to Art. 75(5) as well and *vice versa.*[88]

In a very significant pronouncement, viz. *B.R. Kapur v. State of Tamil Nadu,*[89] the Supreme Court has read a significant restriction in Art. 75(5). The Supreme Court has ruled that under Art. 75(5), a person who is not a member of a House of Parliament can be appointed as the Prime Minister or a Minister only if he has the qualifications for membership of Parliament as prescribed by Art. 84[90] and is not disqualified from the membership thereof by reason of the disqualifications set out in Art. 102.[91]

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86. AIR 2001 SC 2707 : (2001) 7 SCC 126.
87. *Ibid,* at 2720.
88. For Art. 164(4) and a detailed discussion on the *Chaudhuri* case, see, Ch. VII, *infra.*
89. JT 2001 (8) SC 40 : (2001) 7 SCC 231 : AIR 2001 SC 3527. The case arose under Art. 164(4) but the principle is equally applicable to Art. 75(5) as both the provision are similar in phraseology.
For further discussion of this issue, see, *infra,* Ch. VII.
90. *Supra,* Ch. II, Sec. A(iii)(c).
91. *Ibid.*

The Ministers are appointed by the President on the advice of the Prime Minister [Art. 75(1)]. In effect, therefore, Ministers are the nominees of the Prime Minister. The President depends entirely on the Prime Minister's advice in this matter; he does not have much of a choice in the matter and his function in this respect is purely formal.

The Constitution does not contain any restriction on the Prime Minister's choice of his colleagues. In practice, his choice is governed by many considerations, such as party standing, capacity, educational skill, willingness to carry out a common policy, regional representation and representation of backward or scheduled classes and minorities. However, since 2004, the total number of Ministers including the Prime Minister cannot exceed 15% of the total number of members in the Lok Sabha [Article 75(1B)][1]

The President administers to a Minister, before he enters upon his office, the prescribed oaths of secrecy and office [Art 75(4)].

It is for Parliament to prescribe salaries and allowances of Ministers from time to time by law [Art. 75(6)]. The Salaries and Allowances of Ministers Act, 1952, has been passed for this purpose.

(d) MINISTERIAL TENURE

On this question, two constitutional provisions, *viz.*, Art. 75(2) and 75(3) come into play. *Ex facie* these provisions seem to be inconsistent with each other but, in practice, it is not so and these provisions can be reconciled.

The Council of Ministers remains in office so long as it enjoys the confidence of the Lok Sabha and a majority of members in that House back and support it. It should resign when it is unable to command this confidence. This is the inevitable result of Art. 75(3) which requires the Council of Ministers to be collectively responsible to the Lok Sabha. The provision brings into existence responsible government. It means that the tenure of the Ministry is determined by the House. However, Art. 75(3) operates only when the Lok Sabha is not dissolved. When the Lok Sabha is dissolved, the Council of Ministers naturally cannot enjoy the confidence of the House.[2]

Another constitutional provision having a bearing on the question of ministerial tenure is Art. 75(2), according to which, Ministers hold office during the pleasure of the President. *Prima facie* it would mean that the ministerial tenure is within the President's discretion and that a Minister may legally be dismissed by him as and when he likes. *Ex facie*, there appears to be an inconsistency between Arts. 75(2) and 75(3), but, in practice, this is not so. Reading Arts. 75(2) and 75(3) together, the position seems to be that the President's power to dismiss the Ministry is subject to democratic controls.

The President's power of dismissal is conditioned by the need to keep in office a Ministry able to command the confidence of the Lok Sabha and, therefore, he is not expected to dismiss a Ministry so long as it enjoys this confidence.[3] The reasons for the proposition are not difficult to discern. It is mandatory for the Presi-

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1. Inserted by the Constitution (Ninety-first Amendment) Act, 2003 with effect from 2-1-2004.
2. *U.N.R. Rao v. Indira Gandhi, supra*, under "Council of Ministers".
3. M. RAMASWAMY, "The Constitutional Position of the President of the Indian Republic," 28 *Can. B.R.* 648 (1950); *infra*, Sec. B(d).

dent to have a Council of Ministers. If, therefore, the President acts in a high handed manner and dismisses from office a ministry enjoying the confidence of the House, the alternative Ministry which he installs will be a minority Ministry. Such a Ministry will find it practically impossible to carry on government because the majority in the House will not support it. The Ministry cannot carry out its policy; legislation desired by it will not be passed and the House may even refuse funds to it. The President's position itself becomes vulnerable as the majority party whose Ministry has been dismissed by the President may even move for his impeachment.[4]

In view of these dangers, it may be safely assumed that the power of the President to dismiss a Ministry is more formal than substantial. It is to be used by him to throw a Ministry out of office, not when it enjoys, but when it forfeits, the confidence of the Lok Sabha. Ordinarily, a Ministry losing the confidence of the House will itself resign, or seek a dissolution of the House[5]. But in case it sits tight and takes no action one way or the other, the President will use his power, dismiss the Ministry and install into office another Ministry able to command the confidence of the House.

The President's power, therefore, is a reserve power to be used by him in case of a clear manifestation of lack of Parliament's confidence in the Ministry. This power is to be used to support, and not to thwart, the Constitution and the institution of representative government in the country. 'During pleasure' does not mean that the 'pleasure' shall continue notwithstanding the fact that the Ministry has lost the confidence of the majority.

A President who dismisses Ministers would be regarded as the ally of the opposition, and as such be made the subject of attack. His function is to see that the Constitution functions in the normal democratic manner. It is for the electors and not the President to decide between competing parties. The power of dismissal of the Ministry is the ultimate weapon, a recourse of last resort "which is liable to destroy its user."[6]

This position is in accord with the conventions prevailing in Britain. A similar power vested in the Crown in Britain has become practically obsolete. Since 1783, no Ministry enjoying the confidence of the Commons has been dismissed in Britain.[7] The scholarly opinion however is that the Monarch can dismiss the Ministers if they are purporting to subvert the democratic basis of the Constitution, such as, prolonging the life of Parliament in order to avoid defeat at a General Election; obtaining majority by duress, or fraudulent manipulation of the poll etc.

It may be worthwhile to take note of the dismissal of the Labour Government in Australia in 1975 by the Governor-General. The Government had a majority in the Lower House but not in the Senate. The Lower House passed the annual appropriation bill but the Senate refused to approve the same making the running of government difficult. In Australia, assent of the Senate to financial legislation is required. There was a danger that the whole governmental machinery may come

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4. *Supra*.
5. For discussion on Lok Sabha, see, *supra*, Ch. II.
6. DE SMITH, *CONSTITUTIONAL & ADM. LAW*, 102 (1977).
7. KEITH, *BRITISH CABINET SYSTEM*, 8 (1952); JENNINGS, *THE CABINET GOVT*., 403-412 (1969).

to a halt if the appropriation bill was not passed, because no money could then be withdrawn from the government treasury.

To resolve the crisis, the Governor-General dismissed the Government and invited the leader of the opposition to form the new government. The new Prime Minister who formed a minority government got the appropriation bill passed by the Senate and then recommended to the Governor-General to dissolve the Parliament and hold fresh elections. This recommendation was accepted by the Governor-General and both the Houses were dissolved and fresh elections to the Houses were held. In the subsequent elections, this Government won a majority in the Lower House. However, the action of the Governor-General gave rise to a bitter public controversy in the country.

The President's power of dismissal under Art. 75(2) may however be invoked by the Prime Minister to get rid of a Minister who has lost his confidence. Since a Minister is appointed on the advice of the Prime Minister, so he can get rid of any Minister. Although, technically, the ministers hold office during the "pleasure" of the President, the acknowledged democratic convention is that on the advice of the Prime Minister, the President has to dismiss the Ministers. If the Prime Minister has the power to make his Ministers, it is also his constitutional right to unmake them. The identity of the Ministers is not known without the Prime Minister.

Ordinarily, a Minister whom the Prime Minister no longer wants in the Council of Ministers will himself resign when asked by the Prime Minister to do so. But in an extreme situation, when such a Minister ignores the wishes of the Prime Minister, the latter may request the President to dismiss the undesirable Minister from office. The President thus acts on the advice of the Prime Minister and uses his power to maintain the integrity and solidarity of the government without which the Council of Ministers cannot function effectively.[8]

Accordingly, President's power to dismiss a Minister is only meant to be used to keep the parliamentary form of government functioning smoothly, to promote collective responsibility among Ministers,[9] and to protect the Ministry from disruption. In a healthy democratic polity, where democratic traditions have taken roots, the President's power may never be called into action. It is only the ultimate resort, to be invoked in an exceptional situation, and that, too, to uphold, support and maintain democratic and parliamentary traditions.

B. WORKING OF THE EXECUTIVE

(a) PRESIDENT—A TITULAR HEAD

The supreme command of the defence forces of the Union is vested in the President but the exercise of the supreme command is to be regulated by law [Art. 53(2)]. This provision seeks to bring the defence forces subject to the civilian authority.

The executive power of the Union is vested in the President [Art. 53(1)]. This power is to be exercised in accordance with the Constitution [Art. 53(1)]. Though formally vested in the President, the idea could never be that he should person-

8. *Infra*, Sec. B(d), under "Collective Responsibility."
9. *Ibid.*

ally exercise this power, or take every decision himself. That would be a task physically impossible for him to discharge. It will also be constitutionally undesirable for in a parliamentary system effective powers vest in the Ministers. The Constitution therefore seeks to create a mechanism by which the responsibility for decision making may be passed from the President to others.

First, the Constitution provides that the President can exercise his functions either directly or through officers subordinate to him [Art. 53(1)]. This provision permits exercise of executive power vested in the President by the Ministers and other officials. For this purpose, a Minister is regarded as an officer subordinate to the President and, therefore, the President can exercise his executive authority through the Ministers.[10]

Secondly, the President is to make Rules for the more convenient transaction of the business of the Government of India and for the allocation of work among the various Ministers [Art. 77(3)]. The Rules of Business confer power on the Ministers to carry on the administration and take decisions in their departments. When an order is made in accordance with the Rules of Business made under Art. 77(3), it cannot be challenged on the ground that the President had not personally applied his mind to the matter.[11]

The idea underlying Art. 77(3) is that while the actual administration is run by the Ministers, and not by the President who is a constitutional head, a Minister cannot, in the very nature of things, take every decision by himself. A Minister is not expected to burden himself with the day to day administration in his department. Minister's primary function is to lay down policies and programmes of his Ministry. Therefore, under the Rules of Business, officials in the department can take decisions and when a civil servant takes a decision, he does so on behalf of the government. The officers designated by the Rules of Business or the standing Orders[12] can take decisions on behalf of the Government[13].

Thirdly, Parliament may by law confer any function on authorities other than the President [Art. 53(3)(*b*)]. When Parliament does so, the officer concerned can act in his own name.

Fourthly, although, executive power of the Union is vested in the President, actually, in practice, it is carried on by the Ministers and other officials and the President's personal satisfaction is not necessary in every case.[14]

There is however the over-all condition, *viz.*, the executive power is to be exercised "in accordance with this Constitution". This clause opens the way to judi-

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10. *King-Emperor v. Sibnath Banerji,* AIR 1945 PC 163; *S.N. Ghosh v. B.L. Cotton Mills,* AIR 1959 Cal. 552.
For further discussion, see, *infra*, under "State Executive,", Ch. VII.

11. For a detailed discussion on the scope and effect of the Rules of Business, see, M.P. JAIN, *A Treatise on Administrative Law*, Vol. II, Ch. XXI.
For further discussion on Rules of Business, see, *infra,* Sec. E.

12. Standing Orders are made by the Minister for his department.

13. See, *A. Sanjeevi Naidu v. State of Madras,* AIR 1970 SC 1102 : (1970) 1 SCC 443; *Laxim Udyog Rock Cement Pvt. Ltd. v. State of Orissa,* AIR 2001 Ori. 51.
Also see, Ch. VII, *infra.*

14. *Bijoya Cotton Mills v. State of West Bengal,* AIR 1967 SC 1145 : (1967) 2 SCR 406; *A. Sanjeevi v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443; *Samsher Singh v. State of Punjab, infra,* note 20.
For further discussion on this point, see, *infra.*

cial review of executive action *vis-à-vis* the Constitution. The court can strike down an unconstitutional act, *i.e.*, an act infringing a constitutional provision. "Any exercise of the executive power not in accordance with the Constitution will be liable to be set aside"[15]

The formal vesting of executive power in the President does not also envisage that he should personally sign all the executive and administrative orders passed by the Central Government. The wheels of government would stop if it were to be mandatory for the President to sign all such orders. In actual practice, the President signs only a few crucial orders, and all other orders are promulgated by subordinate officers without reference to him. This result is achieved by Article 77.

According to Art. 77(1), all executive action of the Central Government is to be expressed to be taken in the name of the President.

Article 77(1) prescribes the mode in which executive action of the Central Government is to be expressed. This provision is however merely directory and not mandatory and its non-compliance does not render the order a nullity as it does not preclude proof by other means that the order or instrument in question was made by the President. This provision does not lay down how an executive action of the Government of India is to be performed; it only prescribes the mode in which such act is to be expressed.[16] However, even if an executive action of the Central Government is not formally expressed to have been taken in the name of the President, it would not render the action invalid under Article 77. [17]

Further, Art. 77(2) lays down the manner in which the order of the Central Government is authenticated. Art. 77(2) says that orders and other instruments executed in the President's name are to be authenticated in such manner as may be specified in the rules made by the President,[18] and the validity of any document so authenticated cannot be called into question on the ground that it is not an order or instrument made or executed by the President.

This provision immunizes an order from being challenged on one ground only, *viz*., that it has not been made by the President. It does not oust the jurisdiction of the courts to examine the validity of the order on any other ground. Thus, the correctness of the recitals in the order as to the facts which are essential for its validity can be questioned.[19] Nor can any policy decision be taken under Articles 77 or 162 which would contravene constitutional or statutory provisions. [20]

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15. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002, 1004 : (1971) 2 SCC 63; *supra,* Sec. A(iii).
Also, *Maneka Gandhi v. Union of India,* AIR 1978 SC 597 : (1978) 1 SCC 248.

16. The terms of Art. 77(1) are equivalent to Art. 166(1) which operates in the State sphere.
For a detailed discussion on Art. 77(1), see, *infra*, Chapter VII.

17. *Air India Cabin Crew Assn. v. Yeshaswinee Merchant,* (2003) 6 SCC 277/ 312: AIR 2004 SC 187. The observation in *Draupadi Devi v. Union of India,* (2004) 11 SCC 425, 451: AIR 2004 SC 4684, to the effect that a decision not taken in the manner contemplated by Article 77,"would only mean that there was no decision" was made without reference to the decision in Air India Cabin Crew Assn.

18. The President has promulgated the Authentication (Order and Other Instruments) Rules, 1958. Rule 2 thereof provides that orders and other instruments made and executed in the name of the President shall be authenticated by the signatures of the Secretary, Joint Secretary, Deputy Secretary, Under Secretary or Assistant Secretary to the Government of India.
For a detailed discussion on Art. 77, see, *supra*, JAIN, footnote 11.

19. *Supra*, footnote 10.

20. *Post Master General v. Tutu Das* , (2007) 5 SCC 317, 322 : 2007 (6) JT 340.

Article 77 gives effect to the provisions of Article 53 which permit the President to exercise his authority through others. When an order issued in the President's name is duly authenticated by the authorised officer, it cannot be impeached on the ground that the matter has not been personally considered by the President or that he has not applied his mind to it.

The implications of Arts. 77(1) and (2) are as follows : Arts. 77(1) and 77(2) are only directory.[21] If an order is issued in the name of the President, and is duly authenticated in the manner prescribed by Art. 77(2), there is an irrebuttable presumption that the order is made or executed by the President. Even if an order is not issued in strict compliance with the provisions of Art. 77(1), it can be established by evidence aliunde that the order has been made by the appropriate authority.

An order not in strict compliance with the provisions of Arts. 77(1) and (2), is not invalid *per se,* but the irrebuttable presumption in its favour cannot be drawn. The party concerned can prove by other evidence that, as a matter of fact, the order has been made by the appropriate authority. For example, in *Barsay*,[22] an order issued by the Deputy Secretary to the Government on behalf of the Central Government was held valid. Under the Prevention of corruption Act, a public servant can be prosecuted for certain criminal offences only after the Central Government gives its sanction for the purpose. In the instant case, the sanction was given in the name of the Central Government by its Deputy Secretary. It was not an authenticated order but one issued by the Deputy Secretary in his own right. Although the order did not comply with Arts. 77(1) and 77(2), nevertheless, it was held valid because the Deputy Secretary was competent to accord sanction in his own right. The order was made by the Deputy Secretary on behalf of the Central Government in exercise of the power conferred on him under the Rules of Business.[23]

The expressions "executive power" and "executive action" in the context mean the power and action of the executive. Therefore, all orders made by the executive, whether administrative or legislative in nature, can be authenticated under Art. 77(2).[24] It is not true to say that under Art. 77(2) only executive orders, and not legislative orders, can be authenticated.

Before 1976, Art. 74(1) merely said that the Council of Ministers is to 'aid and advise' the President in the exercise of his functions. Art. 74(2) declares that no court can inquire into the question whether any, and if so what, advice was tendered by the Ministers to the President.[25] Art. 74(2) thus expressly makes advice tendered by the Ministers to the President non-justiciable. Originally there was no provision in the Constitution to make ministerial advice binding on the President, but , for all practical purposes, this was so. The position by and large had crystallised before 1976 that the President was more or less a titular head of the executive and was bound by the advice of the Ministers. The real head of the ex-

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21. See, *Dattatraya Moreshwar v. State of Bombay,* AIR 1952 SC 181 : 1952 SCR 612. For a further discussion on the point, see, Ch. VII, *infra.*
22. *Major E.G. Barsay v. State of Bombay,* AIR 1961 SC 1762 : (1962) 2 SCR 195.
23. See, *infra,* Sec. E.
24. *D.S. Sharma v. Union of India,* AIR 1970 Del. 250.
25. *Supra,* Sec. A(iii).

ecutive was the Prime Minister. This author had summed up the position as follows:[26]

> "Whatever the formal constitutional provisions may be, in effect, however, the totality of the executive power at the Centre vests not in the President alone, but in the President and the Council of Ministers. The President is the head of the State and only a formal executive. In all functions vested in him, he acts on the advice of the Ministers. The President is more of a symbol used to formalize the decisions arrived at by the Ministers and the Cabinet. The effective executive power lies with the Prime Minister and the Ministers who constitute the real executive carrying on the entire burden of conducting the administration of the Union."

The Supreme Court had, in a number of decisions, expressly accepted this constitutional position of the President. In *Ram Jawaya v. State of Punjab*,[27] MUKHERJEA, C.J., speaking on behalf of the Supreme Court stated that our Constitution has adopted the British system of a parliamentary executive, that the President is only "a formal or constitutional head of the executive" and that "the real executive power are vested in the Ministers or the Cabinet." MUKHERJEA, C.J., further observed:

> "Our Constitution…. is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative Branch of the State... In the Indian Constitution, therefore, we have the same system of Parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is like the British Cabinet, 'a hyphen which joins, a buckle which fastens', the legislative part of the State to the executive part. The cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions…."

In *U.N.R. Rao v. Indira Gandhi*,[28] the Supreme Court emphasized that the conventions operating in Britain governing the relationship between the Crown and the Ministers are very pertinent to the Indian Constitution as well, and the formal provisions of the Indian Constitution should be read in the light of those conventions. The Court observed:

> "The Constituent Assembly did not choose the Presidential system of Government."[29]

In *R.C. Cooper v. Union of India*,[30] the Supreme Court said: "Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an ordinance on the advice of his Council of Ministers."[31]

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26. See the last edition of this book at 94.
27. AIR 1955 SC 549 : (1955) 2 SCR 225.
28. AIR 1971 SC 1002 : (1971) 2 SCC 63.
29. *Ibid,* at 1005.
For discussion on the Presidential System, see, *infra,* Sec. F.
30. AIR 1970 SC 564 : (1970) 1 SCC 248.
31. On the power to issue ordinances, see, *infra,* Sec. D(ii)(d).
Also see, Ch. VII, *infra.*

In *Samsher Singh v. State of Punjab*,[32] the Supreme Court stated that it was not correct to say that the President is to be satisfied personally in exercising the executive power. The President is only a formal or constitutional head who exercises the power and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers. Whenever the Constitution requires the 'satisfaction' of the President for the exercise by him of any power or function, it is not his 'personal satisfaction', but, in the constitutional sense, the 'satisfaction of the Council of Ministers'.

The President's "opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion, satisfaction or decision." "The decision of any Minister or officer under the Rules of Business [made under Art. 77(3)][33] is the decision of the President".[34] Any argument that an order could not be made by a Minister without reference to the President is thus untenable. Describing the nature of the government, the Court observed:[35]

> "It is a fundamental principle of English constitutional law that Ministers must accept responsibility for every executive act. In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English constitutional law is incorporated in our Constitution. The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government."

The Court then said that whatever the function vested in the President/Governor, whether executive, legislative or quasi judicial in nature and whether vested by the Constitution, or by a statute, may be discharged according to the Rules of Business, unless the contrary is clearly provided for by such constitutional or statutory provisions. The Court stated in this regard as follows:

> "The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Whenever the Constitution requires the satisfaction of the President or the Governor for any exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or the Governor in the constitutional sense in the cabinet system of government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. The decision of any Minister or Officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These Articles did not provide for any delegation. Therefore, the decision of Minister

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32. AIR 1974 SC 2192 : (1974) 2 SCC 831. *Pu Myllai Hlychhlo v. State of Mizoram* , (2005) 2 SCC 92 : AIR 2005 SC 1537. Also see, *infra*, under State Executive, Ch. VII.

33. See, *supra*; *infra*, Sec. D(iii).

34. See, *G.D. Zalani v. Union of India*, AIR 1995 SC 1178 : (1995) Supp (2) SCC 512; *B.L. Wadehra v. Union of India*, AIR 1998 Del. 436.

35. AIR 1974 SC at 2199 : (1974) 2 SCC 831.

or officer under the rules of business is the decision of the President or the Governor."

Under Art. 352, the President of India can proclaim an emergency in the country in certain situations.[36] Thereafter, under Art. 359 (1), the President may by order suspend the operation of any Fundamental Right.[37] The proclamation of emergency is issued in the name of the President under his own signature.[38]

In the instant case, orders suspending Arts. 14, 21 and 22[39] were issued under Art. 359(1) in the name of the President but were signed by an Additional Secretary to the Government of India. Rejecting the argument that it could not be said whether the President was personally satisfied about the orders or not, the Supreme Court ruled in *Nambiar*[40] that in view of Art. 77, President's personal satisfaction is not essential for issuing such an order. A properly authenticated order signed by the Additional Secretary to the Government of India issued under Art. 359(1) could not be questioned on the ground that it was not an order made and executed by the President.

The National Mineral Development Corporation (NMDC) an autonomous public sector undertaking transferred the mining lease of an iron mine to a joint venture company. The transfer was approved by the Ministry of Steel. Under the Memorandum and Articles of Association, the Corporation could transfer property only with the sanction of the President.

The Delhi High Court ruled that the sanction given to the transfer by the Minister was valid. It was not necessary for the President to personally give the sanction. In the cabinet system, the 'satisfaction' of the President does not mean his 'personal satisfaction' but the satisfaction of the President in the constitutional sense, i.e. the satisfaction of the Council of Ministers on whose aid and advice the President exercises all his powers and functions. The decision of a Minister or an officer under the Transaction of Business Rules is regarded as the decision of the President.[41]

Thus, the President/Governor does not exercise the executive functions personally. He acts on the aid and advice of the Council of Ministers in all matters which vest in the executive whether those functions are executive or legislative in character.

In *Union of India v. Sripati Ranjan*,[42] the respondent was dismissed from service by the Collector of Customs. He preferred an appeal to the President as was provided for in the Service Rules. The Minister of Finance rejected the appeal without any reference to the President. The question was whether the Minister could have himself decided the appeal or should the President have decided the matter personally because the rule in question said that the appeal lay to the President.

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36. *Infra,* Ch. XIII, Sec. A.
37. *Ibid.*
38. *Ibid.*
39. See, *infra,* Chs. XXI, XXVI and XXVII.
40. *K. Anada Nambiar v. Government of Madras,* AIR 1966 SC 657 : (1966) 2 SCR 406.
41. *B.L. Wadehra v. Union of India*, AIR 1998 Del 436.
42. AIR 1975 SC 1755 : (1975) 4 SCC 699.
Also see, *A. Sanjeevi v. State of Madras,* AIR 1970 SC 1102 : (1970) 1 SCC 443; *supra,* footnote 12.

The Supreme Court ruled that the appeal had been validly disposed of by the Minister. The Court asserted that the Constitution 'conclusively contemplates' a constitutional President and any reference to the President under any rule made under the Constitution must need be to the President as the constitutional head acting with the aid and advice of the Council of Ministers. Thus, in the instant case, the principle laid down in *Samsher Singh* has been extended to a *quasi-judicial* function as well vested in the President by a statutory provision.

It may be pointed out that Arts. 74[43] and 77[44] are in a way complimentary to each other, though they may operate in different fields. Art. 74(1) deals with the acts of the President done "in exercise of his functions". Art. 77 speaks of the executive action of the Government of India which is taken in the name of the President of India. As regards the executive action of the Government of India, it has to be taken by the Minister/Officer to whom the said business is allocated by the Rules of Business under Art. 77(3). The allocation of business has been construed as merely directory by the Bombay High Court.[45] However, recently the Supreme Court has taken a contrary view in *NDMC v. Tanvi Trading and Credit (P) Ltd.*,[46] Guidelines relating to the Lutyens' Bungalow Zone in Delhi had been issued by the Ministry of Urban Development at the instance and initiative of the Prime Minister's Office. The Court held that these guidelines cannot be ignored by the Court and any relaxation in the guidelines under the Government of India (Transaction of Business) Rules, 1961 would require the approval of the Prime Minister's Office. Therefore, although the subject-matter of the guidelines fell within the scope of the Minister of Urban Development, a relaxation, without the approval of the Prime Minister could not be granted by any other authority, other than the Prime Minister's Office.

An order issued in relation to the executive action of the government has to be authenticated by the officer empowered under the Rules of Authentication under Art. 77(2). Many such orders do not reach the President and so there is no occasion in such cases for any aid and advice being tendered to the President by the Council of Ministers. These acts though executed in the name of the President are really the acts of the government. They are distinct from the acts of the President "in the exercise of his functions" which he discharges on the aid and advice of his Ministers.

The Constituent Assembly had consciously adopted the British pattern of government.[47] Therefore, the relevant conventions operating in Britain governing the relationship between the Crown and the Ministers are very pertinent to the Indian Constitution as well. In Britain, following a centuries-old tradition, the formal position is that the King, who had gradually lost legislative, judicial, and finally executive powers, is still the supreme formal agency in whose name action is taken. According to the British convention, the Sovereign has "the right to be consulted, the right to encourage, the right to warn" the Ministers.[48] The term

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43. *Supra*, Sec. B.
44. *Supra*, Sec. B.
45. *Crawford Bayley & Co v. Union of India*, 2003 AIHC 3372 (Bom). The view was affirmed by the Supreme Court in (2006) 6 SCC 25, 34 : AIR 2006 SC 2544.
46. (2008) 8 SCC 765 : (2008) 10 JT 109.
47. AUSTIN, *THE INDIAN CONSTITUTION : CORNERSTONE OF A NATION*, 116-143 (1966).
48. BAGHEOT, *THE ENGLISH CONSTITUTION*, 111 (Fontana Ed.)

'Crown' represents the sum-total of governmental powers and is synonymous with the executive.[49]

Accordingly, the term 'President' has been used in most of the constitutional provisions in India as denoting the Central Executive, *i.e.*, the President acting on the advice of the Ministers, and not the President acting personally. The Constitution-framers never envisaged that the powers and functions vested in the President should be exercised by him on his own responsibility without the consent of the Ministers. The framers of the Indian Constitution had no doubt in their minds that what they were seeking to create was a President to act merely as a constitutional head without having any discretionary or prerogative powers. Pandit Nehru while moving the report of the Committee on Principles of the Union Constitution stated:[50]

> "Power really resided in the Ministry and in the Legislature and not in the President as such. At the same time, we did not want to make the President just a mere figure-head like the French President. We did not give him any real power, but we have made his position one of authority and dignity."

The point was very clearly elucidated by several stalwarts in the Constituent Assembly that what was being introduced in India was the British model of the parliamentary government, and that the President, like the British Crown, would be a mere constitutional head. Thus, ALLADI K. AYYAR observed that "the word 'President' used in the Constitution merely stands for the fabric responsible to the Legislature."[51] AMBEDKAR said in the same vein that "the President is merely a nominal figure-head", that he "represents the nation but does not rule the nation. He is the symbol of the Nation" and that "he has no discretion and no powers of administration at all," and that he "occupies the same position as the King under the English Constitution."[52] "His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known" and "the President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice nor can he do anything without their advice."[53]

The President's role as a constitutional-head is reflected in his indirect election. If he were to be elected directly by adult franchise, then it might have been anomalous not to give him any real powers and it was feared that he might emerge as a centre of power in his own right. Since the power was really to reside in the Ministry and in the Legislature, and not in the President, it was thought adequate to have him elected indirectly.[54] It is also pertinent to note that in the Government of India Act, 1935, phrases like 'discretion' and 'individual judgment' were used to denote the areas where the Governor-General could act without, or independent of, the advice of the Ministers. No such phrases were adopted in the Constitution in relation to the President.

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49. WADE & PHILLIPS, *op. cit.*, 216.
Also, *Town Investment Ltd. v. Dept. of Environment*, (1978) A.C. 359.

50. IV *CAD*, 734.

51. VII *CAD*, 337; IV *CAD*, 12, 909.

52. IV *CAD*, 1036; VIII *CAD*, 724.

53. VII *CAD*, 32.

54. NEHRU, IV *CAD*, 6, 713, 734; AUSTIN, *op. cit*., 121; GHOSH, *THE CONSTITUTION OF INDIA*: *HOW WAS IT FRAMED*. 140 (1966). Also see, *supra*, 133.

A question may be asked that if the framers of the Constitution were so definite in their minds regarding the constitutional status of the President, then why did they not categorically incorporate any provision in the Constitution that the President would be bound by ministerial advice? The Drafting Committee did examine this question but dropped the idea of putting any such provision as it thought it better to leave the matter to conventions. Such a provision could not have been enforced legally and the remedy could only have been political and that remedy exists even now. The relationship of the President with the Cabinet is based on the system of responsible government functioning in Britain. There the system of parliamentary government based on conventions has been working for long and it could be expected that a similar system would also work reasonably well in India.

Further, President's part in assent of Bills has already been defined in the Constitution.[55] In matters of dissolution of the Lok Sabha,[56] appointment of the Prime Minister[57] and dismissal of the Ministry,[58] there may be a marginal use of discretion by the President in certain grave and exceptional situations, and so in such matters some flexibility appeared to be necessary to meet any unforeseen contingencies. As conventions in Britain around the powers of the King in his relationship with the Cabinet 'are sufficiently strong', there could be no danger of misuse of these powers by the President.

No exact rules could be laid down for the exercise of these reserve powers as threats to the Constitution may be infinite in variety and, therefore, it was not possible to put in the Constitution precisely what the President must do in these extremely exceptional situations or what the Prime Minister can ask him to do and where the President can use his judgment.[59]

The power of the Prime Minister in Britain has been progressively increasing and his advice is now regarded as paramount.[60]

Nor does the matter rest entirely on conventions. There are a few safeguards woven into the fabric of the Constitution itself because of which critical situations may arise if the President ever ignores ministerial advice. The Council of Ministers is responsible to the Lok Sabha and this principle necessarily leads to the gravitation of effective power into the hands of the Prime Minister and the Ministers.[61]

If the President ever takes it into his head to override the Ministry on any matter, it may resign *en bloc* and thus create a constitutional crisis. It is obligatory on the President to always have a Council of Ministers[62] and so it follows that when a Ministry resigns, the President must at once seek to have an alternative Ministry which may be capable of commanding the confidence of the House and justifying to Parliament, and securing its approval of, the presidential action in refusing the advice of the previous Ministry. The President may find this very

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55. *Supra*, Ch. II, Sec. J(i)(c).
56. *Supra*, Ch. II, Sec. (I)(c).
57. *Supra*, Sec. A(iii).
58. *Ibid.*
59. XI *CAD*, 956. See, AUSTIN, *op. cit*, 132-6.
60. See, *infra*, under "Prime Minister".
61. *Infra*, see under "Collective Responsibility".
62. *Supra*, Sec. A(iii).

difficult in a situation where the previous Ministry enjoying the confidence of the House had to resign due to his own conduct, as the majority of members, who supported the previous Ministry, would refuse to support any other Ministry.

Parliament has supreme power of legislation, taxation and appropriation of funds. No appropriations from the Consolidated Fund can be made, and no tax can be levied by the Executive, without parliamentary sanction.[63] President's ordinance-making power is meant for use only for a short duration and is ultimately subject to parliamentary control.[64] The President cannot carry on the administration of the country without the co-operation of Parliament as no more than six months could elapse between two parliamentary sessions.[65] The President's power to declare an emergency is also subject to the approval of the two Houses of Parliament.[66]

All the above-mentioned constitutional provisions lead inevitably to one result : that there should be in office a Ministry which is in a position to secure parliamentary approval, sanction and finance for its policies and programme. A Ministry lacking the confidence of the Lok Sabha will find it impossible to carry on the administration with a non co-operative, or even hostile, House facing it. It is therefore absolutely essential for the President to maintain in office a Council of Ministers enjoying the confidence of the Lok Sabha and to act on its advice.

Further, if a Ministry having the solid support of the Lok Sabha is dislodged by the President, the majority party may even move for his impeachment for violation of the Constitution.[67] The President may be impeached if he seeks to disregard the rule of parliamentary government by ignoring the underlying basic conventions, as the phrase 'violation of Constitution' in the constitutional provision relating to Presidential impeachment is flexible enough to include not only the formal provisions of the Constitution but also the conventions operating thereunder.[68] This, therefore, should serve as a sanction to make the President observe the convention of acting on the advice of the Council of Ministers.

On the other hand, the 'activist' theory of the President has many snags for the President himself as well as for the Constitution. The President is not elected for his political views or programme. It is the programme of the political party, emerging as the majority party at the polls, which may be regarded as having been endorsed by the electorate and the Council of Ministers is there to implement the same.

The 'activist' theory will result in the negation of the parliamentary system. If the President vetoes a Bill passed by the two Houses, he will be setting himself against the majority in Parliament. He will thus become controversial and partisan and be drawn into the vortex of political controversy and public criticism which will do irreparable damage to the dignity, prestige and neutrality of the President's office.

An activist President is going to face sooner or later a confrontation with the Cabinet. There is no way to hold the President responsible except the extreme

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63. *Supra,* Ch. II.
64. *Infra,* Sec. D(ii)(d).
65. *Supra,* Ch. II, Sec. G.
66. *Infra,* Ch. XIII.
67. *Supra,* Sec. A(i)(h).
68. X *CAD,* 7, 269, 270; AUSTIN, *op cit.,* 138 .

step of impeachment. Two co-ordinate decision-making authorities acting independently of each other would be the negation of good government as well as that of responsible and parliamentary form of government. What would happen to the theory of collective responsibility of the Ministers, specifically stated in the Constitution, with an activist President? Will the Ministers defend the actions of the President in Parliament or criticise the same as having been taken against their advice? Such a situtation is bound to injure the parliamentary system irreparably.

The working of the Constitution since 1950 has conclusively established that the President is a figure head while the Council of Ministers wields the real executive power. There has not been a single case when the President might have vetoed a Bill passed by the two Houses or refused to accept ministerial advice on any point. Nehru, the First Prime Minister of India, made the position clear repeatedly by asserting that the responsibility for any policy was entirely that of the government which was responsible to Parliament, which in turn was responsible to the people and that the President was a constitutional head who did not oppose or come in the way of anything.[69]

It is however true that controversies regarding the President's constitutional position did arise from time to time in the past but each time it ended in confirming the position that the President was a constitutional, and not an effective, head of the State.

Within a few months of the Constitution coming into operation, President Rajendra Prasad, in a note to Prime Minister Nehru, expressed the desire to act solely on his own judgment, independently of the Council of Ministers, in the matter of giving assent to the Bills and sending messages to Parliament. This view was based on a literal reading of Articles 111 and 86 ignoring the underlying conventions.[70] Nehru consulted Attorney-General Setalvad and Ayyar, a member of the Drafting Committee of the Constituent Assembly, and they both expressed the view that the President had no discretion in this matter and that it would be constitutionally improper for him not to seek, or not to be guided, by the advice of his Ministers as Art. 74 was all pervasive in character and the Council of Ministers was to aid and advise the President in all his functions. The matter was not however precipitated as President Prasad relented and did not force his views.[71]

The controversy erupted again in 1960. On November 28, 1960, while laying the foundation-stone of the Indian Law Institute building, President Prasad said that it was generally believed that like the Sovereign of Great Britain, the President of India was also a constitutional head and had to act according to the advice of his Council of Ministers. But there were in the Constitution many provisions which laid down specific duties and functions of the President and, therefore, the question which needed to be studied and investigated was the extent to which, and the matters in respect of which, the powers and functions of the President differed from those of the British Sovereign. Further, it might also be considered

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69. Press Conf., July 7, 1959; *The Hindustan Times*, July 8, 59, p.1.

70. Art. 86 enables the President to send messages to the Houses of Parliament. Art. 111 refers to Presidential assent to Bills. See, *supra*, Ch. II.

71. AUSTIN, *op. cit.*, 140-143. Also SETALVAD, *My Life, Law and Other Things*, 170-2 (1970). See, MUNSHI, *PILGRIMAGE TO FREEDOM*, I, 568-75, (1967), for President's note and Setalvad's opinion.

if the procedure by which the President was elected and was liable to be removed or impeached introduced any difference, constitutionally speaking, between the President and the British Monarch. The President also posed the wider question as to how far the conventions of the unwritten British Constitution could be invoked and incorporated into the written Indian Constitution by interpretation.[72]

This speech naturally brought into forefront the question of President's relationship with his Council of Ministers, but the matter was set at rest by Nehru declaring at the Press Conference on December 15, 1960, that the President's remarks were only "casual," and that politically and constitutionally, the President's position conformed to that of the British Crown and that the President was a constitutional head and had always acted as such.[73]

For the third time, a similar controversy was raised in 1967. As a result of the Fourth General Elections held in March, 1967, the Congress monopoly of power in the States was broken as in some States non-Congress governments took office. When the question of electing a new President arose in May, 1967, the parties opposed to the Congress set up their candidate as against the Congress candidate, and one of the arguments that was put forth by these parties in soliciting support for their candidate was that the President was not a figure-head and that he had a constructive and meaningful role to play in the affairs of the country, especially, that he should act as a sort of mediator between the Centre and the States.

This last idea became rather important in the newly emerging political pattern of some States being under non-Congress governments while the Centre was under the Congress control, and, thus, seeds of Centre-State conflict, tensions and stresses were inherent in this situation. But the controversy was laid at rest with the election of the Congress candidate as the President, for the Congress Party had fought the election specifically on the basis that the President was merely a constitutional head and this was vindicated by the election of its candidate.[74]

Again, in 1969, the presidential election brought forth the same issue, but again the issue was settled in favour of the view that the President is a constitutional head and performs no activist role.

Thus, in 1976 the position was quite clear. Even without any words in the Constitution making ministerial advice binding on the President, the President, in effect, acted only as the titular head of the executive while the Prime Minister was the real head. The phrase 'aid and advice' used in Art. 74(1) was a masterly understatement of the real position enjoyed by the Council of Ministers for, in

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72. *THE HINDUSTAN TIMES*, November 29, 1960, p. 1.

73. *Ibid.*, Dec. 16, 1960, p. 6.

74. MUNSHI in *THE PRESIDENT UNDER THE INDIAN CONSTITUTION* (1963), argued that the Indian President's position was not the same as that of the British Crown. He based himself partly on a literalistic reading of the Constitution and argued that conventions could not override written constitutional provisions—obviously, an untenable argument, see, *infra*, Ch. XL, under "Constitutional Interpretation". Partly, his argument was political, as what he would like the position to be.

It is, however, interesting to note that in the Constituent Assembly, as a member of the Drafting Committee, he had assured the members that the President would be a constitutional head.

VII *CAD*. 984. Also, MUNSHI, *PILGRIMAGE*, *op. cit.*, 276-290.

practice, most of the decisions were made and implemented by the Ministers themselves without reference to the President.

It was recognised that the Ministers and not the President bore the responsibility of the governmental action and in whatever matter the President acted, he invariably did so on ministerial advice. There was no aspect of his functioning which was free of ministerial advice, and that the President exercised no discretion himself except the marginal discretion in such matters as appointing the Prime Minister *etc*. It was widely recognised that the Constitution embodied generally the parliamentary or the cabinet system on the British model where the monarch never acts on his own responsibility; he has ministers to bear the responsibility for his actions and that the constitutional relationship existing between the President and the Council of Ministers was substantially analogous to that subsisting between the British Crown and the Cabinet.

In spite of this, in 1976, by the Constitution (Forty-second Amendment) Act, 1978,[75] Art. 74(1) was amended so as to state explicitly that the President shall act in accordance with the advice of the Ministers in the exercise of his functions.

This amendment did not effect any real or significant change in the pre-existing position of the President *vis-a-vis* the Council of Ministers but it did make explicit what had been implicit at that time. The constitutional amendment only reiterates the position as it had come to be by then. The purpose of the amendment however was to remove any doubt on this point and clarify the position once and for all.

The Forty-Fourth Constitution Amendment[76] introduced a new proviso to Art. 74(1) authorising the President to require the Council of Ministers to reconsider the advice given by it, and the President shall act in accordance with the advice tendered after such reconsideration. And, further, that "the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court" [Art. 74(2)].[77]

The present position therefore is that the President has to act on ministerial advice. The only right the President has is to ask the Council of Ministers to reconsider the matter. But the President is bound by the advice given thereafter [Proviso to Art. 74(2)]; He must act in accordance with this advice. In 2006 a potential confrontation was avoided in connection with the "office of profit" amendment.[78]

At times, the "reconsideration clause" may prove to be of crucial significance and may result in avoidance of hasty action on the part of the Council of Ministers. In October, 1997, the Gujral Government recommended imposition of the President rule in Uttar Pradesh under Art. 356 of the Constitution,[79] but the President sent it back to the Cabinet for reconsideration. The reason was that the U.P. Government had just won a vote of confidence in the Assembly. The Cabinet then relented and decided not to pursue the matter further.[80]

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75. For the Amendment, see, *infra*, Ch. XLII.
76. *Ibid.*
77. *Ibid.*
78. See *supra* p.76
79. For discussion on Art. 356, see, *infra*, Ch. XIII.
80. *THE TIMES OF INDIA*, dated 23/10/1997, p. 1.

History repeated itself in 1998 when the B.J.P. Government recommended imposition of the President's rule in Bihar under Art. 356, but the President again sent back the recommendation to the Cabinet for reconsideration, but the Cabinet decided to keep the matter pending and not pursue it. This happended on September 25, 1998. But, on February 12, 1999, the Cabinet reconsidered the matter and reiterated its earlier recommendation to impose President's rule in Bihar and this time the President accepted the Cabinet recommendation according to the proviso to Art. 74(2).

More recently, while affirming that the satisfaction of the President under Article 356 to direct dissolution of the Legislative Assembly is the satisfaction of the Council of Ministers, the Supreme Court set aside the order dissolving the Assembly because the Council of Ministers had wrongly advised the President.[81]

In this connection, reference may also be made to Art. 78 which empowers the President to be informed about the country's affairs. Thus, the Prime Minister is obligated to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and the proposals for legislation [Art. 78(*a*)]. The Prime Minister is also under a duty to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for [Art. 78(*b*)].

As the constitutional head of the Union Executive, he has at least the right to be informed and to call for any information that he may desire. Further, the President may require the Prime Minister to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister alone without consulting the Council of Ministers [Art. 78(c)]. This provision is designed in effect to enforce the principle of collective responsibility among the Ministers.[82] In all these matters, obviously, the President acts on his own responsibility without any ministerial advice because no Ministry is going to advise the President to seek information from it or ask it to reconsider its earlier decision.

From the phraseology of Art. 78(b), it becomes obvious that the right of the President to seek information is not governed by Art. 74. Arts. 74 and 78 are not mutually restrictive or contradictory. To call for information, the President does not have to act on the advice of the Council of Ministers. Denial of information to the President will amount to violation of the Constitution.

It is the duty of the Prime Minister to communicate the decision of the government to the President to enable him to know and to bring his influence to bear on the working of the government. It is also the duty of the Prime Minister to furnish such information relating to the administration of the affairs of the Union as the President calls for. If the President feels that a decision taken by a Minister requires reconsideration by the Council of Ministers, he can require the Prime Minister to place it before the Council of Ministers. It will therefore be wrong to assume that the President is merely a non-effective symbol.

In addition to what has been said above, the President can exercise a persuasive influence on the Ministers and help them with his advice and experience.

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81. *Rameshwar Prasad v. Union of India (UOI)*, (2006) 2 SCC 1 : AIR 2006 SC 980. For further discussion see *infra*, Chapter VII.

82. On "Collective Responsibility", see, *infra*.

Like the British Sovereign, the role of the President is "to advise, encourage and warn Ministers in respect of the recommendations which they make."[83]

The influence of the President, however, depends on his personality. A man of character and ability can really exert a potent influence on the affairs of the government with his advice, help and persuasion, by using his knowledge, experience and disinterestedness to arrive at sound decisions on matters affecting the well-being of the people and not by his dictating any particular course of action to his Ministers.

In the ultimate analysis, it is the Council of Ministers which will prevail and not the President. His role is at best advisory; he may act as the guide, philosopher and friend to the Ministers, but cannot assume to himself the role of their master—a role which is assigned to the Prime Minister. The Constitution intends that the President should be a centre from which a beneficent influence should radiate over the whole administration, and not that he should be the focus or centre of any power.

While the new provision makes explicit what had generally been regarded as already being the position, there may possibly arise some difficulties in practice in some situations as a result of this explicit statement. Before 1976, in exceptional and abnormal situations, the President enjoyed some marginal discretion in certain matters, as for example, appointment of the Prime Minister (when the Lok Sabha is split with no majority party), or dissolution of the Lok Sabha, or the removal of the Council of Ministers from office. What is the position in these matters now after 1976? What is the impact of the new constitutional provision on these matters? What happens when the Prime Minister's party loses the election and a new Prime Minister is to be appointed? Is the President to seek, and is he bound by, the advice of the defeated Prime Minister regarding whom to appoint as the new Prime Minister or can he take his own decision in the matter?

Suppose the Council of Ministers is defeated on the floor of the House and the Prime Minister seeks dissolution of the House even though it may be possible to install an alternative ministry in office. Should the President automatically follow the Cabinet advice and dissolve the House, or should he seek to find a new Prime Minister and avoid fresh election? Or, again, the Prime Minister loses the confidence of the Lok Sabha and the Prime Minister neither resigns nor seeks dissolution of the House to hold fresh elections? Is the President to watch the situation helplessly because he cannot act without Prime Minister's advice, or can he act on his own and take suitable action? The crucial question is whether in such crucial questions the President is left with any discretion?

The true position seems to be that in the crucial areas mentioned here, the President has to depend on his own judgment. In the matter of appointment of the Prime Minister, as the court cases concerning appointment of Chaudhary Charan Singh as the Prime Minister clarify,[84] the President is to depend on his own assessment. He is not required to seek the advice of anyone in this matter.

Similarly, in matters of taking action when the Council of Ministers is defeated in the House, the President cannot be immobilisd merely because the Prime Minister does not advise him to take any action. Perhaps the constitutional

83. WADE AND PHILLIPS, *op, cit*., 222.
84. *Supra.*

provision binding the President to ministerial advice may be read as meaning that the advice of the Ministers is binding on the President only so long as the Council of Ministers enjoy the confidence of the House.[85]

It may be argued that Arts. 74(1) and 75(3) ought to be read together. Art. 74(1) comes into play so long as Art. 75(1) is being fulfilled, *i.e.*, the Council of Ministers retains the confidence of the *Lok Sabha.* Similarly, in the matter of dissolving the Lok Sabha, he may have to exercise his own judgment in some situations.[86] In critical constitutional situations, any one of these matters may assume great importance and the President's decision may have a profound impact on the country's destiny and in spite of the amended Art. 74(1), it cannot be interpreted so as to take away all discretion from the President to act suitably in difficult situations. The President continues to have marginal discretion in these matters although, in normal times, he acts on the advice of the Prime Minister even in some of these matters.

In *Rameshwar Prasad (VI) v. Union of India*,[87] the Supreme Court relied on the recommendations of the Sarkaria Commission relating to the discretionary powers of the Governor when faced with a fractured electoral mandate. Given the element of subjectivity involved in the Governor's taking decisions in controversial circumstances, including the appointment of the Chief Minister, or in ascertaining the majority, or in dismissal of the Chief Minister or in dissolving the legislative assembly, the Supreme Court emphasised that it was necessary to ensure that the decisions were objective and politically unbiased.

A question has been raised about the relation between the President and the Council of Ministers which has resigned on losing majority support in the Lok Sabha, but which remains in office pending alternative arrangements being made. If the House is dissolved, then such a Ministry may remain in office for a few months pending fresh elections to the Lok Sabha.[88] This happened when Charan Singh resigned in 1979, or when Chandra Sekhar resigned in 1991, or Gujral resigned in 1997. In each of these cases, the Ministry lost majority support in the Lok Sabha, so it resigned. As no alternative Ministry could be formed, the Lok Sabha was dissolved[89] and fresh elections held. The question is: Is the President bound to act on the advice of such a Ministry?

Article 74(1) draws no distinction between a Ministry enjoying confidence of the House and the one which remains in office after losing confidence of the Lok Sabha. Theoretically, therefore, it can be argued that the President remains bound by the advice of such a Ministry. But, on the other hand, it may also be argued that Art. 74(1) is pre-conditioned by Art. 75(2). However, a view has been expressed that such a Ministry should only act as a care-taker government and take routine decisions and not policy decisions or make heavy financial commitments binding the future government.[90] This means that the President has to monitor Cabinet decisions and refuse to accept any policy decision by a care-taker gov-

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85. Reference may be made to what happended in Australia in 1975 : see, *supra*.
86. On dissolution of Lok Sabha, see, Ch. II, *supra.*
87. (2006) 2 SCC 1 : AIR 2006 SC 980.
88. This arrangement has been validated by the Supreme Court in *U.N.R. Rao v. Indira Gandhi*, *supra*, Sec. A(iii).
89. On dissolution of Lok Sabha, see, *supra*, Ch. II, Sec. I(c)(d).
90. R. VENKATARAMAN (former President), Relations with the Cabinet, *The Hindustan Times*, dated Feb. 24, 98, p. 13; VENKATARAMAN, *MY PRESIDENTIAL YEARS*, 504.

ernment. To do so would amount to an exception to the rule contained in Art. 74(1) that the President acts in accordance with the aid and advice of the Council of Ministers.

It can also be argued that so far as the Constitution is concerned, it draws no distinction between a care-taker and a normal government. The term care-taker government has not been used anywhere in the Constitution. The term came in vogue to denote a government in office after dissolution of the Lok Sabha pending fresh elections and installation of a new government. The question lies basically in the realm of practices and conventions. Perhaps, in course of time, some conventions will emerge to regulate the relationship between the President and the Ministry holding office while the *Lok Sabha* is dissolved.

This question came to the forefront rather acutely during the period April to October, 1999. The Vajpayee Government, a coalition of several parties headed by the BJP was in office at the time. A constituent party (AIADMK) withdrew support and doubt arose whether the Government enjoyed a majority support in the Lok Sabha. The President advised the Government to seek a vote of confidence. On April 17, 1999, the Government lost by one vote (in favour, 269; against, 270). As the opposition failed to come together to form an alternative government, the President dissolved the Lok Sabha on April 26, '99, on the advice of the Cabinet, and asked the Vajpayee Government to remain in office till a new government assumed office after fresh elections which were scheduled to be held in September, 99. Thus, the new government could assume office only in October.[91]

The question arose how should the Vajpayee Government behave during the period from April to October, a period of about 6 months. The opposition parties insisted that the Government should act as a care-taker government and take only routine administrative decisions and no policy decision. On the other hand, the Government's view was that it was not a care-taker, but a full-fledged, government. In practice, the Government did take several policy decisions. The most important task performed by the Government was to throw out Pakistani intruders from Kargil, and this involved taking a number of policy decisions. The Government could not have taken the stand that being a caretaker government, it would not take such decisions. Such a stand would have been against national interest.

In such a situation, therefore, a relevant question does arise : can a government remain in limbo for six months? At the end of the day, the question seems to be one of propriety rather than of legality. Perhaps, in normal circumstances, it may be proper to avoid taking policy decisions, and bind the discretion of the future

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91. This episode raises some serious questions having a bearing on the working of parliamentary form of government in India. One, should a government in office be required to seek a vote of confidence whenever a doubt arises about its majority support in Lok Sabha? The opposition parties always have at their disposal the technique of bringing a vote of no-confidence against the government, especially when the Parliament is in session. Besides, many occasions arise when the government majority can be tested on the floor of the House. Two, should the opposition parties vote out a government in office when they themselves are not in a position to form an alternative government? In the view of the author, the opposition parties owe to the people that they should behave with a sense of responsibility.

In Britain, a minority government has remained in office when the opposition parties, though in majority, are not in a position to form government. Why cannot this happen in India as well?

government, except when it becomes absolutely necessary to take such a decision. The matter falls more in the domain of conventions rather than of law.

The fact, however, remains that the working and viability of the parliamentary system depends upon a disciplined party system. If there are multiple loosely knit parties then the marginal discretion of the President in matters of appointing the Prime Minister and dissolution of Lok Sabha may be of crucial and decisive significance.[1] But the President may not have much scope to exercise his judgment if there is a strong and cohesive party system.

In normal times, the Prime Minister and his colleagues hold their offices not as a gift from, or as a matter of grace of the President, but because they have a majority support behind them. So long as this position holds, the President has no activist role to play. There can be no conflict between his will and that of Parliament. But when fissures appear in the party system, and it becomes fluid, then the President will have opportunity to exercise his marginal discretion. In any case, the Constitution envisages not a dictatorial but a democratic President who uses his judgment to keep the democratic and representative government functioning and not to thwart or to subvert the same.

The relationship between the President and the Council of Ministers is based on political sanctions and any error of judgment on the part of the President may well prove to be his graveyard.[2] Nevertheless, the President can exert a lot of constructive and beneficial influence on the functioning and processes of the government of the day through his sagacious, objective, non-partisan and non-political advice. He may not rule but he certainly may reign and seek to keep parliamentary system on an even keel.[3] This is in line with the tradition in Britain where the Queen "has the right to offer, on her own initiative, suggestions and advice to her Ministers even where she is obliged in the last resort to accept the formal advice tendered to her".[4]

(b) PRIME MINISTER

In the mechanism of the parliamentary form of government, the Prime Minister occupies a crucial position.[5] JENNINGS describes him as the 'keystone of the

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1. See, *Dinesh Chandra v. Chaudhuri Charan Singh*, AIR 1980 Del. 114, *supra*, Sec. A(iii), where the court has said that the President enjoys discretion in the matter of appointment of the Prime Minister.

2. The question of the constitutional position of the President has been discussed too often in India. See, for example, HENRY W. HOLMES JR., Powers of President : Myth or Reality, 12 *J.I.L.I.* 367 (1970); V.S. DESHPANDE, The President, His Powers and their Exercise, 13 *J.I.L.I* 326 (1971); HARISH KHARE, The Indian Prime Minister—A Plea for Institutionalization of Powers, V *JCPS* 22 (1971).

3. Some time back, some letters exchanged between President Sanjeeva Reddy and Prime Minister Indira Gandhi (period 1981) were released. It seems from these letters that the President did communicate his views on urgent public matters to the Prime Minister and urged her to take remedial action. Other Presidents have also adopted a similar course. Apart from personal discussion, Presidents do use the vehicle of letters to communicate their views to the Prime Ministers. See, CHALAPATI RAO & AUDINARAYANAN REDDY, *FROM FARM HOUSE TO RASHTRAPATI BHAWAN*: *BIOGRAPHY OF PRESIDENT SANJEEVA REDDY*, (1989).

One will gather the same impression after reading the memories of the former President of India, (1987-1992), R. VENKATARAMAN under the title *MY PRESIDENTIAL YEARS*, (1994).

4. S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 99 (III Ed. 1977).

5. On the question of appointment of the Prime Minister, see, *supra*, Sec. A(iii).

Constitution'.[6] He further observes : "All roads in the Constitution lead to the Prime Minister". Earlier, Joh Morley had described him as the "keystone of the cabinet arch".

The Prime Minister is the leader of the majority party in the Lok Sabha. He is the head of the Council of Ministers. He co-ordinates government policy. He is the channel of communication, the only link, between the President and the Council of Ministers. In this connection, reference may be made to the provisions of Art. 78.[7]

He is responsible for the appointment of the Ministers and allocation of work among them.[8] He can compel the resignation of a Minister and invoke the presidential power to dismiss an unwanted Minister, and, therefore, all Ministers hold office at his discretion.[9] A Minister who is not prepared to accept his leadership must tender his resignation.

The Prime Minister is the principal spokesman of the Cabinet and its defender in Parliament. He can obtain dissolution of the Lok Sabha.[10] He is the Chairman of the Cabinet, summons its meetings and presides over them. His resignation would automatically amount to a resignation of all Ministers who compose the government.

Therefore, the Prime Minister's position is one of great power, influence and prestige. He keeps the fabric of the parliamentary form of government in working order. The entire constitutional machinery would appear to revolve around his personality. He has therefore, been described as 'the keystone of the Cabinet arch,' who is 'central to its formation, central to its life, and central to its death.'[11]

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6. JENNINGS, *CABINET GOVT*., 173 (1969). Also see, BYRAM CARTER, *THE OFFICE OF PRIME MINISTER*; JENNINGS, *PARLIAMENT*, 73-79 (1970); MACKINOSH, *THE BRITISH CABINET*, 428-58 (1977).

7. *Supra*, p. 209.

8. *Supra*, Sec. A(iii).

9. *Ibid.*

10. *Supra*, Ch. II, Sec. (I)(c).

11. S.A. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW*, 146 *et seq;* LASKI, *PARLIAMENTARY GOVERNMENT IN ENGLAND*, 228; A.H. BROWN, Prime Ministerial Power, 1968 *Public Law*, 228; O. HOOD PHILLIPS, *CONSTITUTIONAL & ADM. LAW*, 3-325 (1993).

In Britain, the position of the Prime Minister has been described in various ways. "The Prime Minister", said JOHN MORLEY, "is the keystone of the cabinet arch". JENNINGS describes him as "the keystone of the Constitution". IVOR JENNINGS in the *CABINET GOVERNMENT* states that the Prime Minister is not merely the first among equals, he is not merely a moon among lesser stars, he is rather "a sun around which planets revolve".

NEHRU also underlined the primacy of the Prime Minister's office: *THE HINDUSTAN TIMES*, June 17, 1954, p. 5. Again, in a Press Conference on Nov. 7, 1958, he emphasized that the whole basis of parliamentary system of government is based on a homogeneous Cabinet of which the keystone is the Prime Minister and that if a Minister could not co-operate with him, it was difficult for him to carry on—either the Prime Minister goes or he goes,' and that it would be rather absurd if Ministers functioned in a way opposed to the Prime Minister; *The Hindustan Times*, Nov. 8, 1958, p. 1.

Similarly, the President of the ruling party, the Congress, stated that if after discussions and consultation, the Ministers do not agree with the Prime Minister, he after assessing the situation in the light of discussions may finally make it clear to his Ministers, his own view and those who do not agree with him will have to decide whether they will vote with him or against him. If they vote against him, then the Prime Minister would be justified in calling for their resignations; *THE HINDUSTAN TIMES*, Jan. 19, 1959. p. 12.

However, no Prime Minister can govern without the aid of colleagues. He thus functions under one important limitation—that of keeping a government in office which constantly enjoys the confidence of the majority in the Lok Sabha. The selection of the Prime Minister is itself the result of compromises of various forces within the political party concerned and, therefore, the Prime Minister has also to seek constantly the support of the political party to which he belongs. If the Prime Minister is heading a coalition government, his freedom of action becomes much more limited because he has to carry with him not only his own party but also the several parties in the coalition.

The Prime Minister cannot, therefore, act as an autocrat or despot; he cannot afford to disregard the views of his colleagues and party organs always. He depends on his colleagues for support and too many resignations from the Cabinet may ultimately lead to his downfall.

Due to this reason, it has sometimes been suggested that the Prime Minister is *primus inter pares* among his colleagues.[12] But this does not depict the position of the Prime Minister aptly. Subject to the limitation of his commanding the confidence of the Lok Sabha, and the support of the political party, the Prime Minister's position is very much superior to that of other Ministers. Much, however, depends on the individual personality of the Prime Minister and a person like Nehru or Indira Gandhi could completely overshadow the whole Cabinet, and even the party machinery. In the words of KEITH, "the polite description of the Prime Minister as *primus inter pares*" is "inadequate to describe the real position of the Prime Minister if by temperament he is willing to assert to the full position which he can assert if he so desires."[13]

In this connection, DE SMITH observes:[14]

> "But the most significant fact is that nearly all commentators regard the cabinet as being in some degree subordinate to the Prime Minister. Hardly any one today will make out a case for the proposition that the Prime Minister is merely *primus inter pares*, the first among the equals.."

The Constitution makes no mention of the office of the Deputy Prime Minister, but, on occasions such appointments have been made. In 1990, when V.P. Singh was appointed as the Prime Minister, Devi Lal took oath mentioning himself as the Deputy Prime Minister. A question was raised through a writ petition before the Supreme Court whether the oath taken by Devi Lal was valid.

In *K.M. Sharma v. Devi Lal*,[15] the Court rejected the writ petition saying that an oath has two parts—(i) descriptive; (ii) substantial. So long as the substantial part of the oath is properly followed, a mere mistake or error in the descriptive part would not vitiate the oath.[16] On this basis, the Court ruled that though Devi Lal described himself as the Deputy Prime Minister, he was "just a Minister like other members of the Council of Ministers" and though he described himself as the Deputy Prime Minister, such description of him "does not confer on him any powers of the Prime Minister."

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12. WADE AND PHILLIPS *op. cit*., 244.
13. *THE BRITISH CABINET SYSTEM*, 61 (1952); also, JENNINGS, *CABINET GOVT*., 227.
14. S.A. DE SMITH, *CONST. AND ADMN. LAW*, 147.
15. AIR 1990 SC 528 : (1990) 1 SCC 438.
16. *Virjiram Sutaria v. Nathalal Premji Bhavadia*, AIR 1970 SC 657 : (1969) 1 SCC 77.

(c) CABINET

Cabinet is the nucleus of the Council of Ministers. The Council of Ministers is usually a large body consisting of a number of Ministers of various ranks, *e.g.*, Cabinet Minister, Ministers of State and Deputy Ministers. Within this large body, there exists a smaller inner body known as the Cabinet which is really the effective policy-making organ within the Council of Ministers.

Cabinet really is the driving and steering body responsible for the governance of the country.[17] It consists of the principal Ministers with whom rests the real direction of policy. The Council of Ministers as a whole never meets formally.

In Britain, Cabinet is based on no legal sanction and has no legal status; it is an organ of government which rests on understandings and conventions. Similar is the case in India. The Constitution makes reference to the Council of Ministers but makes no reference to the Cabinet. Cabinet is a conventional, an extra-constitutional, body but it is the ultimate policy-making and decision-making organ within the executive.

All members of the Council of Ministers are not members of the Cabinet. Its composition is flexible. It is for the Prime Minister to determine from time to time the composition of the Cabinet, though due to the relative importance of certain departments, their Ministers are invariably its members. The Cabinet Ministers are members of the Cabinet, while a Minister of State may attend a Cabinet meeting when matters pertaining to his department are to be discussed.

Cabinet decides major questions of policy. Its decisions are binding on all Ministers. The various government departments carry out the Cabinet's policy decisions by administering the law and devising measures for enactment as law by Parliament. A Minister may himself dispose of routine matters without reference to the Cabinet, but in all matters of major policy or of real political importance, a Minister seeks guidance from the Cabinet.

Cabinet is the central directing instrument of government in legislation as well as in administration. It coordinates administrative action and sanctions legislative proposals. It is the Cabinet which controls Parliament and governs the country. The primary function of the Cabinet is to formulate the policies of the government for the governance of the country, have it accepted by the Legislature and carry on the executive function of the state as per the Constitution and the laws.

In no other authority there is such a concentration of power and such a capacity for decisive action as that possessed by the Cabinet, provided always that it enjoys the support of majority in the House.[18] The Cabinet can be said to be the centre of gravity of the parliamentary system for the whole weight of government is, in a very real sense, concentrated at that point. However, views have been expressed recently that the Cabinet government has become transformed into Prime Ministerial government. This indicates the ascendancy of the Prime Minister at the expense of the Cabinet.[19]

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17. *R.K. Jain v. Union of India*, (1993) 4 SCC 119, 147 : AIR 1993 SC 1769; *S.R. Bommai v. Union of India*, (1994) 3 SCC 1 : AIR 1994 SC 1918.

18. L.S. AMERY, The Nature of British Parliamentary Government, in *PARLIAMENT—A SURVEY*, (ed. Lord CAMPION), 59; DAWSON, *op, cit*., 167-192.

19. WADE AND PHILLIPS, *Op. Cit.*, 242, 246

(d) COLLECTIVE RESPONSIBILITY

A notable principle underlying the working of parliamentary government is the principle of collective responsibility which represents ministerial accountability to the legislature. It means that the Government must maintain a majority in the *Lok Sabha* as a condition of its survival.

In Britain, the principle is not legal but conventional; in India, on the other hand, there is a specific provision in the Constitution to ensure the same. Art. 75(3) lays down that the Council of Ministers shall be collectively responsible to the Lok Sabha.

Reference may also be made in this connection to Art. 78(*c*) which says that the President may submit a decision taken by a Minister for consideration by the Council of Ministers which really means the Cabinet. This provision further strengthens the principle of collective responsibility. When a Minister tenders any advice to the President, the matter not having been considered by the Cabinet, the President may submit it for consideration by the Cabinet.[20]

The principle of collective responsibility may be regarded as fundamental to the working of the parliamentary government, as it is in the solidarity of the Cabinet that its main strength lies. The principle of collective responsibility means that the Council of Ministers is responsible as a body for the general conduct of the affairs of the government. All Ministers stand or fall together in Parliament, and the government is carried on as a unity. The rule ensures that the Council of Ministers works as a team, as a unit, and as a body commands the confidence of the House, and that Cabinet's decisions are the joint decisions of all Ministers.[21] There has been for sometime and is at present a multitude of political parties in India. At present, 57 political parties are represented in Parliament and in the States. Without any particular party capable of forming a government on its own, there have been coalition governments at the Centre and in many States for about the last 30 years. The country has and is being run by a number of parties which not only do not represent the majority in the country but may not even represent the majority in their own state. With different political agendas there is often no consensus on major issues of policy. Threats of withdrawal of support unless a coalition partner's particular political agenda is met, has resulted either in a stalemate or in an individual minister in charge of the ministry taking decisions without consulting the Council or the Cabinet.[22]

The principle of collective responsibility secures the unity of the Cabinet and the Council of Ministers. Prime Minister Nehru took occasion to expound the principle as follows in the context of the State Governments. "A government af-

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20. *Supra* (a).

21. *State of Jammu & Kashmir v. Bakshi Gulam Mohd*., AIR 1967 SC 122 : 1966 Supp SCR 401.

See, KEETON, *THE BRITISH COMMONWEALTH*, I, 55.

For a discussion on the Indian Cabinet at work, see, MICHAEL BRECHER, *INDIA AND WORLD POLITICS*, 234-253 (1968).

On collective responsibility, also see, Beg, C. J., in *State of Karnataka v. Union of India*, AIR 1978 SC 68 at 96-7 : (1977) 4 SCC 608; Common Cause, *A Registered Society v. Union of India*, AIR 1999 SC 2979, 2992 : (1999) 6 SCC 667; *PU Myllai Hlychho v. State of Mizoram*, (2005) 2 SCC 92 : AIR 2005 SC 1537.

22. See for exhaustive discussion : Bimal Jalan: India's Politics: A view from the Backbench (2007).

ter the parliamentary model, is one united whole. It has joint responsibility. Each member of the government has to support the others so long as he remains in the government. The Minister has to support his other Ministers and the other Ministers have to support each other and the Chief Minister. It is quite absurd for any Minister to oppose or give even the impression of opposing a colleague of his. Opinions may be freely expressed within the Cabinet. Outside, the government should have only one opinion. There is no question of a member of government being neutral in a controversial issue in which the government is concerned, except in the rare cases which we may consider as matters of conscience, where freedom is given."[23]

Collective responsibility envisages that each Minister assumes responsibility for cabinet decisions and action taken to implement the same. The policies and programmes of the Cabinet have to be supported by each Minister. Even if there may be differences of opinion within the Cabinet, once a decision has been taken by it, it is the duty of every Minister to stand by it and support it both within and outside the Legislature.

The decisions of the Cabinet are regarded as the decisions of the whole Council of Ministers and binding on all Ministers. A Minister cannot disown responsibility for any Cabinet decision so long as he remains a Minister. He cannot both remain a Minister and criticise or oppose a Cabinet decision or even adopt an attitude of neutrality, or oppose a colleague in public. A Minister who disagrees with a Cabinet decision on a policy matter, and is not prepared to support and defend it, should no longer remain in the Council of Ministers and should better resign.

There have been a number of resignations in the past because of differences with the Cabinet. Dr. Mathai resigned as a Finance Minister because he disagreed with the Cabinet on the question of scope and powers of the Planning Commission which was proposed to be set up then. C.D. Deshmukh resigned because he differed from the Cabinet on the issue of re-organisation of States, especially on the question of Bombay. On September 5, 1967, Foreign Minister Chagla resigned because of his differences with the Government's language policy, especially the place of English. Several other Ministers have resigned from the Central Council of Ministers owing to their differences with the Cabinet.[24] There is, however, a convention that a resigning Minister may, if he so wishes, may state the nature of his disagreement with the Cabinet in his letter of resignation and make a resignation speech in Parliament.

The principle of collective responsibility does not mean that every Minister must take an active part in the formulation of policy, or that he should be present in the committee room whenever a policy decision is taken. This is not possible because of the large size of the present-day Council of Ministers. The effective decision-making body is the Cabinet and not the entire Council of Ministers and, therefore, the obligations of a Minister may be passive rather than active when the decision does not relate to matters falling within his own sphere of responsibility.

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23. NEHRU'S Letter, *THE HINDUSTAN TIMES*, June 17, 1954.
24. For details, see, VENKATESWARAN, *CABINET GOVERNMENT IN INDIA*, 73-93 (1967).

Collective responsibility ensures that the Council of Ministers presents a united front to Parliament. In the words of LASKI, "Cabinet is by nature a unity : and collective responsibility is the method by which this unity is secured." In the words of the Supreme Court of India, the principle of collective responsibility is that "for every decision taken by the Cabinet, each one of the ministers is responsible to the Legislature concerned."[25]

The principle of collective responsibility is both salutary and necessary. In *S.P. Anand, Indore v. H.D. Deve Gowda*,[26] it was held that even though a Prime Minister is not a member of either House of Parliament, once he is appointed he as also his Ministers become answerable to the House and the principle of collective responsibility governs the democratic process. On no other condition can a Council of Ministers work as a team and carry on the government of the country. It is the Prime Minister who enforces collective responsibility amongst the Ministers through his ultimate power to dismiss a Minister. The Supreme Court has ruled that the principle of collective responsibility is in full operation so long as the *Lok Sabha* is not dissolved. "But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of People."[27]

The Gujarat High Court has described the principle of collective responsibility as follows:[28]

> "Collective responsibility means all Ministers share collective responsibility even for decisions in which they have taken no part whatsoever or in which they might have dissented at the meeting of the Council of Ministers. Collective responsibility means the members of Council of Ministers express a common opinion. It means unanimity and confidentiality."

According to the Supreme Court, collective responsibility means that "all members of a government are unanimous in support of its policies and would exhibit that unanimity on public occasions although while formulating the policies, they might have expressed a different view in the meeting of the Cabinet."[29]

It is to give effect to the principle of collective responsibility that the deliberations of the Cabinet are kept secret and confidential because preservation of a united front will become impossible if disclosures are permitted of the differences of opinion which emerged at a Cabinet meeting amongst its members.[30]

The consequences of this secrecy are far reaching. "Relying on this protection, Cabinet members are free to voice their opinions without reserve on all subjects which come up for discussion; the motives which have influenced the Cabinet in coming to its decision will not be disclosed: the dissentients can support the corporate policy without being themselves singled out for special attack or having the motives impugned."[31]

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25. *Karnataka v. Union of India,* AIR 1978 SC 131. For further discussion on this case, see, *infra,* Ch. XIII, Sec. B.
26. 1996 (6) SCC 734 : AIR 1997 SC 272.
27. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002 : (1971) 2 SCC 63; *supra,* Sec. A(iii).
28. *Dattaji Chirandas v. State of Gujarat,* AIR 1999 Guj. 48, 59.
29. *Common Cause—A Regd. Society v. Union of India,* AIR 1999 SC 2979 at 2992 : (1999) 6 SCC 667.
30. WADE AND PHILLIPS, *op. cit*., 100.
31. DAWSON, *op. cit*., 185.

A Cabinet Minister may lose his office if he reveals the details of a Cabinet discussion to the press. The secrecy may at times be released partially when a Minister resigns his office. He is entitled to make a statement in Parliament so that he may reveal the reasons for his resignation.

How far can an ex-Cabinet Minister be legally obligated not to reveal Cabinet discussion? This question has been answered in Britain in *Attorney-General v. Jonathan Cape Ltd*.[32] Crossman was a Cabinet Minister for nearly six years (1964-1970). He maintained a detailed diary about the Cabinet proceedings. After he ceased to be a Minister, he began to collate his diaries with a view to their eventual publication. Crossman died in 1974. After his death, his diaries were due for publication. The Attorney General brought an action for injunction against Crossman's executors for restraining them to publish the diaries. His contention was that the Cabinet proceedings and Cabinet papers being secret, these could not be publicly disclosed. The confidentiality of Cabinet papers and proceedings emanate from "the convention of joint Cabinet responsibility" "whereby any policy decision reached by the Cabinet has to be supported thereafter by all members of the Cabinet whether they approve of it or not, unless they feel obliged to resign".

The Court laid down the proposition that "when a Cabinet Minister receives information in confidence the improper publication of such information can be restrained by the Court". The Court pointed out that the "Cabinet is at the very centre of national affairs and must be in possession at all times of information which is secret or confidential". To identify the Ministers who voted one way or another in a Cabinet meeting would undermine the doctrine of joint responsibility".

The Court, therefore, ruled that "the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest". The Court also agreed that "the maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers". But in the instant case, the Court refused to grant injunction because what was sought to be revealed was ten years old, as the Cabinet discussions held during the period 1964-1966 were sought to be published in 1975, and there would be no damage to public interest by the said publication.

As earlier noted, coalition governments have now become the order of the day in India, especially at the Centre. A number of disparate political parties come together to form the government as no single party has majority in the House. Experience has shown that inherently such governments are unstable as any constitutional party forming such a coalition government can withdraw its support anytime, thus, reducing the government to a minority. Another casualty of such an arrangement is the principle of collective responsibility, the reason being that the various parties lack a common programme and a common approach to national issues and so they speak in different voices. Further, the various parties constituting the government are more interested in pursuing their own party programme rather than a common national agenda. The coalition governments adversely affect the homogeneity and solidarity of the Cabinet.

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32. [1976] QB 752.

To begin with, in Britain, the concept of collective responsibility was based on conventions. But, now, after *Jonathan Cape*, it cannot be regarded as a purely conventional concept because the court of Appeal has specifically recognised it. In India, the concept of collective responsibility has been specifically incorporated in a constitutional provision [Art. 75(3)], and it has been judicially recognised in several cases mentioned above.

(e) MINISTER'S INDIVIDUAL RESPONSIBILITY

All decisions are not taken by the Cabinet; many decisions are taken by the Ministers themselves without reference to the Cabinet, or by officials in the department without reference to the Minister.

Article 77(3), noted above, [33] envisages distribution of business among several Ministers. Even a Minister does not take all decisions himself, most of the decisions are taken by officials in the department under the Minister according to the Rules of Business. This is the effect of Art. 77(3). Therefore, along with the principle of collective responsibility, there also works the principle of the individual responsibility of each Minister to Parliament, which is more positive in character. Each Minister is personally accountable for his actions.

The Supreme Court has explained this principle in the following words: [34]

> "The Cabinet is responsible to the legislature for every action in any of the ministeries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the Cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly, an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his Ministry. This again is a political responsibility and not personal responsibility."

No Minister can retain office against the will of Parliament. Each Minister in his own sphere of responsibility bears the burden of speaking and acting for the government. He has to answer questions relating to the activities of his department and defend his policies and administration when the House discusses the same. He must answer for every act or neglect of his department, and he cannot throw this responsibility on any one else whether an official in his department or another Minister. Each Minister is personally liable and collectively responsible for his actions, acts and policies.

This positive liability of each Minister is essential if the Parliament is to effectively perform its role of criticising the Executive. But when a particular Minister is under fire in Parliament, the principle of collective responsibility ensures that other Ministers should come to his rescue and defend his actions.[35]

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33. See, *supra*, Sec. B(a).
For a detailed discussion on this point, see, M.P. JAIN, *A TREATISE ON ADMINISTRATIVE LAW*, II, Ch. XX.

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

35. The best example of this is provided by the discussion in Parliament on Kuo Oil Deal. When the then Petroleum Minister P.C. Sethi was being criticised for his error of judgment, his action was defended by the Shiv Shankar who was the Petroleum Minister at the time of the discussion. Sethi said nothing in his defence: See, *THE HINDUSTAN TIMES* (Int'l, ed.), Aug, 12, 82, p. 4.

By and large, a vote of no-confidence against one Minister may be treated as a vote of no-confidence against the entire Council of Ministers. This principle of responsibility of the entire Council of Ministers for the actions of one Minister is not, however, an absolute rule. Many a time, a Minister acts without reference to the Cabinet though on important issues of policy he would ordinarily seek the Cabinet's decision. If the Minister has taken the policy-decision in question with the Cabinet's approval, then, naturally, the principle of collective responsibility applies and each Minister is liable for it. But, some flexibility is noticeable in case a Minister takes an action without the Cabinet's approval.

Ordinarily, the Council as a whole would support him, but there have been instances when the erring Minister has been asked or allowed to go instead of the whole Council. The truth probably is that constitutional practice in this respect is not rigidly settled, but depends on the exigencies of the situation. On occasions, Cabinet may feel bound to back a Minister, but there are instances, when the Cabinet has decided to throw the offending Minister off. "Faced with the problem of what to do when an individual Minister's actions are likely to be criticised in Parliament, the Cabinet must decide which course will do the greater damage to the Government—to accept full responsibility and let the odium fall on the Government as a whole or suffer the shock of the amputation of the offending member. What the Cabinet cannot, however, do is to retain the Minister but contend that the responsibility is all his."[36]

The most outstanding example of a Minister going out instead of the whole Council of Ministers is that of Krishna Menon who resigned as the Defence Minister because of the debacle of the Indian arms in the face of the Chinese aggression in 1962. Many policies of the Cabinet going way back were responsible for India's unpreparedness, and not only what one Minister alone did or did not do, but still the brunt of public hue and cry fell on Menon. The truth appears to be that it is ultimately for the Prime Minister to decide whether he will drop a particular Minister or not because of criticism against him in Parliament. It appears to be most unlikely today that the House could force a Prime Minister to remove an individual Minister from his office.

When a Minister is guilty of some indiscretion, corruption, *mala fides* or a mistake of a personal nature, invariably he alone would go out instead of the whole Council of Ministers. For example, in 1963, K.D. Malaviya resigned after an inquiry by a Supreme Court Judge into some allegations against him, although the Judge's findings were kept confidential. In 1965, T.T. Krishnamachari, the Finance Minister, resigned because certain allegations were made against him which the Prime Minister wanted to be enquired into by a Supreme Court Judge. Krishnamachari, insisted that the Prime Minister should himself hold the inquiry and since the Prime Minister did not agree to this, he resigned as he felt that the Prime Minister had ceased to have confidence in him.[37]

When a commission of inquiry is appointed to probe into charges of corruption or misuse of power against an individual minister, there is no violation of the principle of collective responsibility discussed above. As the Supreme Court has

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36. KEETON, *op.cit*., 56.

37. VENKATESWARAN, *op. cit*., 160.

Also see, WADE AND PHILLIPS, *op. cit*., 106-8; KEETON, *op. cit*., 56; S.A. DE SMITH, *CONSTITUTIONAL & ADMINISTRATIVE LAW*, 161-167**.** Also see, *infra*, Ch VII.

observed in this connection in *State of Karnataka v. Union of India,*[38] it is difficult to accept that for "acts of corruption, nepotism or favouritism which are alleged or proved against an individual Minister, the entire Council of Ministers can be held collectively responsible to the legislature. If an individual Minister uses his office as an occasion or pretence for committing acts of corruption, he would be personally answerable for his unlawful acts and no question of collective responsibility of the Council of Ministers can arise in such a case." The principle of collective responsibility of the Cabinet does not exclude the individual responsibility of a Minister for his actions or decisions.

The Supreme Court has very explicitly spelt out the concept of the individual responsibility of a Minister in *Secretary, Jaipur Development Authority v. Daulat Mal Jain.*[39] The holder of a public office is empowered by virtue of his appointment to the office. The holder of the office, therefore, gets opportunity to abuse or misuse the office. Each Minister is personally and collectively responsible for the actions, acts and policies. He is accountable and answerable to the people. The legal and moral responsibility or liability for the acts done or omissions, duties performed and policy laid down rest solely on the Minister of the Department. Accordingly, he is indictable for his conduct or omission, or misconduct or misappropriation. The Council of Ministers is jointly and severally responsible to the legislature. The Minister/Council of Ministers is/are also publicly accountable for the acts or conducts in the performance of duties.

The Court has further asserted that the most elementary qualification which a Minister ought to possess is honesty and incorruptibility.[40]

The principle of individual responsibility is underlined by Art. 75(2) according to which "The Ministers shall hold office during the pleasure of the President". As stated above, the power to dismiss a Minister is to be exercised on the advice of the Prime Minister on whose recommendation a Minister is appointed. The Prime Minister can get rid of an undesirable minister by invoking the President's power under Art. 75(2). But, in practice, this power is invoked rarely for a Minister would ordinarily resign when asked to do so by the Prime Minister.[41]

Ministers or government employees also remain accountable to the courts for the legality of their actions. They may be held civilly or criminally liable, in their individual capacities, for tortious or criminal acts.[42] An unlawful order passed by a Minister or a civil servant can be quashed or declared unlawful on judicial review. In the case noted below,[43] the Supreme Court quashed the allotment of petrol pumps by the Central Minister for Petroleum in his discretion describing it as illegal, arbitrary and "atrocious". In another case,[44] allotment of shops/stalls by the Minister of Housing and Urban Development to her own relatives/employees/

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38. AIR 1978 SC 131.
Also, *Bakshi Ghulam Mohd. v. State of Jammu & Kashmir,* AIR 1967 SC 122 : 1966 Supp SCR 401.

39. (1997) 1 SCC 35.

40. Also see, *Common Cause, A Registered Society v. Union of India,* AIR 1999 SC 2979 : (1999) 6 SCC 667.

41. *Supra,* Sec. A(iii)(d).

42. See, *State of Jammu & Kashmir v. Bakshi Gulam Mohd.,* AIR 1967 SC 122 : 1966 Supp SCR 401.

43. *Common Cause A Registered Society v. Union of India,* (I), AIR 1996 SC 3538 : (1996) 6 SCC 520; *Common Cause v. Union of India,* (II), AIR 1999 SC 2979 : (1999) 6 SCC 667.

44. *Shiv Sagar Tiwari v. Union of India,* (1996) 6 SCC 599; (1996) 6 SCC 558.

domestic servants out of the discretionary quote without following any policy or criteria was held by the Supreme Court to be "wholly arbitrary, *mala fide* and unconstitutional."

MISFEASANCE IN OFFICE

In course of time, a tort of misfeasance in public office has also come into existence.

The tort has been defined as "malicious abuse of power, deliberate maladministration and unlawful acts causing injury" to a person. The tort arises when there is deliberate abuse of power. The tort imposes, liability on a public officer who does an act which to his knowledge amounts to an abuse of his office and which causes damages. The element of "bad faith or malice" is the decisive factor in such a tort.[45] In *Common Cause* I (1996), the Supreme Court held that the Minister for Petroleum had committed the tort of "malfesance in public office" and imposed on him exemplary damages of Rs. 50 lacs payable to the Central Exchange. But, then, in *Common Cause* II (1999), the Court revised its earlier judgment and held that the Minister had not committed any such tort. The Minister's order was held to be simply "unlawful" and so it was quashed.[46]

(f) MINISTER'S RESPONSIBILITY FOR HIS SUBORDINATES

A Minister's responsibility extends not only to his own actions but also covers the actions of his subordinates who work under him.

A Minister cannot attend to every business in his department. Most of the decisions in the department are taken by civil servants at various levels. The function of the Minister is to lay down broad policies and programmes of his Ministry while the Council of Ministers settle the major policies and programmes of the government. A Minister is not expected to burden himself with day to day administration.[47]

An important convention followed in Britain is that a Minister is responsible for the acts of his subordinate civil servants in his Ministry. By tradition, individual civil servants are not the target for parliamentary criticism: for their shortcomings and mistakes the Minister must accept responsibility. For what an unnamed official does, or does not do, his Minister alone must answer in Parliament. A Minister is responsible for his department and is accountable for departmental errors even though the individual fault is to be found in his subordinates.

Again, the Supreme Court has pointed out that the functions of the government are carried out in the name of the President by the Prime Minister, Ministers and Civil Service. "Since the functions of the government are carried on by the Executive in the name of the President on the advice of the Ministers, they alone are answerable to the Parliament. The Civil Service as such has no constitutional personality or responsibility separate from the duly constituted government."[48]

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45. *Dunlop v. Woolahara Municipal Council*, [1981] 2 WLR 693; *Northern Territory v. Mengel*, (1995) 69 *Aus LJ* 527; *Lucknow Development Authority v. M.K. Gupta,* AIR 1994 SC 787 : (1994) 1 SCC 243.

46. For further discussion on this tort, see, JAIN, *A TREATISE ON ADM. LAW*, II.

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

48. *Common Cause, A Regd. Society v. Union of India,* AIR 1999 SC 2979 at 2989 : (1999) 6 SCC 667.

This principle has two advantages. First, the official who cannot defend himself publicly, is thus protected from attack. Secondly, it prevents the Minister from trying to evade criticism of his own actions by shifting the responsibility on to the subordinates. It would be a dangerous constitutional doctrine if a Minister were to shield himself by blaming the officials for the failure of his policies. No Minister can absolve himself by passing on the blame to someone else or saying that what was done had not been authorised by him. This positive liability of a Minister is essential if Parliament is to perform effectively its role of critic of the executive. In Britain, the classic case defining ministerial responsibility is the *Crichel Down* case in which the Minister of Agriculture resigned because of certain controversial transactions by his department without his personal knowledge.[49]

The principle of Minister's individual responsibility for the acts of his subordinate was reiterated in India rather dramatically in what is known as the *Mundhra* affair. The principal Finance Secretary in the Ministry of Finance negotiated the purchase of a large number of shares from an individual industrialist for the Life Insurance Corporation. This transaction was later found to be improper and against business principles. Dealing with the question whether the Finance Minister was in any way responsible for the acts of his Secretary, Justice Chagla enquiring into the transaction observed: "In any case, it is clear that constitutionally the Minister is responsible for the action taken by his Secretary with regard to this transaction. It is clear that a Minister must take the responsibility for actions done by his subordinates. He cannot take shelter behind them, nor can he disown their actions."

Further, Justice Chagla observed: "The doctrine of ministerial responsibility has two facets. The Minister has complete autonomy within his own sphere of authority. As a necessary corollary, he must take full responsibility for the actions of his servants. It is true that this may throw a very great burden on the Minister because it is impossible to expect that in a highly complicated system of administration which we have evolved the Minister could possibly know, leave alone give his consent to, every action taken by his subordinates. But it is assumed that once the policy is laid down by the Minister, his subordinates must reflect that policy and must loyally carry out that policy. If any subordinate fails to do so, he may be punished or dismissed, but, however vicariously, the responsibility of his action must be assumed by the Minister".

In conclusion, Justice Chagla held that in the instant case the Minister must fully and squarely accept the responsibility for what the Secretary did and "if the transaction is improper although the Secretary be actually responsible for the transaction, constitutionally the responsibility is that of the Minister."[50]

The convention of a Minister's responsibility for the acts of his subordinates was thus established in India. Writing to the Finance Minister, while accepting his resignation as a sequel, Prime Minister Nehru observed, "Whoever might be responsible for this ..... according to our conventions, the Minister has to assume responsibility, even though he might have had little knowledge of what others did and was not directly responsible for any of these steps."

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49. *Crichel Down Enquiry*, Cmd. 9176 (1954).
50. *The* HINDUSTAN TIMES, Feb. 14, 1958, p. 13. *P. M's letter, Ibid*, at p. 7.

Later, the Prime Minister observed, in the course of a debate in Parliament on the Chagla Report, "The Government accepted the broad principles of ministerial responsibility in this matter but to say that the Minister was always responsible for all the actions of the officers working under him would be taking this much too far."

In the State sphere, where practically the same principles of ministerial responsibility apply as at the Centre, the Agriculture Minister of Madhya Pradesh resigned because information pertaining to his Ministry's budget demands in the Legislature leaked from his department. The Minister's responsibility in the matter of leakage could at best be regarded as vicarious.[51]

The principle of responsibility of a Minister for the acts of his subordinates has been specifically reiterated by the Supreme Court in the under mentioned case.[52] The Court has pointed out that the government functions through bureaucrats, who shape its social, economic and administrative policies to further the social stability and progress socially, economically and politically. Therefore, the actions of the individuals do reflect upon the actions of the government.

The Court has stated that a Minister is responsible not only for his own actions but also for the job of the bureaucrats who work under him. The government acts through its bureaucrats. The Minister owes the responsibility to the electors for all his actions taken in the name of the Governor in relation to the department of which he is the head.

No Minister can possibly get acquainted with all the detailed decisions involved in the working of his department. The ministerial responsibility, therefore, would be that the Minister must be prepared to answer questions in the House about the actions of his department and the resultant enforcement of the policies. Even for actions performed without his concurrence, he will be required to provide explanations and also bear responsibility for the actions of the bureaucrats who work under him. "Therefore, he bears not only moral responsibility but also in relation to all the actions of the bureaucrats who work under him bearing actual responsibility in the working of the department under his ministerial responsibility." Despite the de facto control that may be exercised by the Government either directly or through its appointees, ministers are, as yet, not responsible for the actions of autonomous statutory corporations. The laws setting up the Corporations do not expressly so provide and the issue is yet to be agitated before the Courts.

The principle of vicarious liability is in the highest traditions of parliamentary government, but in modern administration it is becoming more and more difficult to observe it in practice. Because of the vast expansion of administrative responsibilities of a Minister, chances of errors by his subordinates have very much increased and it cannot, therefore, be asserted that the Minister must resign for every lapse of his subordinates. The limits of this responsibility are hard to define. For example, Lal Bahadur Shastri resigned as the Railway Minister because of a railway accident caused by the negligence of some railway servants. In 1999, Nitish Kumar resigned as Railway Minister owning moral responsibility for the August 2 Gaisal rail disaster that claimed over 280 lives. These resignations are

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51. See, *infra*, Ch. VII.

52. *Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain*, (1997) 1 SCC 35, 45 : (1996) 8 JT 387.

exceptional and have not served as precedents in other departments of government.

C. INTERACTION BETWEEN THE EXECUTIVE AND PARLIAMENT

India has parliamentary form of government at the Centre which implies a government not by Parliament itself but by Ministers responsible to Parliament. As ILBERT has stated: "Parliament does not govern, and is not intended to govern. A strong executive government, tempered and controlled by constant, vigilant and a representative criticism is the ideal at which Parliamentary institution aim."[53] The Constitution amply fulfils this ideal by fully underlining the responsibility of the Ministers to the Lok Sabha.

In the first place, a Minister must be a member of a House of Parliament.[54] Such membership ensures contact between the Executive and the Legislative wings, facilitates co-operation and interaction between them and makes parliamentary control over the Executive somewhat real.

In the second place, Ministers stay in office so long as they enjoy the support of a majority in the Lok Sabha.[55] This helps Parliament in calling the Ministers to account, keeping a watch on them, eliciting information from them on matters of public importance and influencing the policy-making process. Defeat of the Ministry in the Lok Sabha on a major question of policy is counted as an expression of want of confidence leading to the resignation of the Ministry. A motion of want of confidence in the Council of Ministers may be moved in the Lok Sabha though not in the Rajya Sabha as the Council of Ministers is not responsible to it.

Thirdly, both Houses of Parliament take a number of opportunities to discuss, question, criticise and debate government policy and conduct of administration. Legislation provides an opportunity for Parliament discussing the executive's programme as many policies of the executive need laws for effective implementation. Taxation and appropriations are not authorised without parliamentary law. Discussions on the annual budget, demands for grants, *etc*. provide a useful opportunity to the members of Parliament to review and criticise the policies and working of each department. Each House has a number of committees which constantly scrutinise several aspects of the working of the Executive.[56]

Fourthly, the Executive cannot ignore and by-pass Parliament because the Constitution enjoins that not more than six months should pass between the end of one session and the beginning of another. Therefore, sooner or later the Executive must face Parliament.

Lastly, a number of constitutional provisions assign to Parliament a role in certain matters pertaining to the Executive, *e.g*., Parliament is empowered to fix the emoluments, allowances and privileges of the President, Vice-President and the Ministers. Houses of Parliament may impeach the President for violation of the Constitution; the elected members of Parliament constitute an important seg-

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53. ILBERT, *PARLIAMENT*, 103.
54. Sec. A(iii), (c), *supra.*
But for six months, a non-member can remain a Minister, *supra.*
55. *Supra*, Sec. B(d).
56. *Supra*, Ch. II, Sec. J(iv).

ment of the electoral college for electing the President; the Vice-President may be removed from his office by a resolution of the Rajya Sabha agreed to by the Lok Sabha; the Vice-President is elected by the members of both Houses of Parliament. Powers of the Executive to issue ordinances and declare an emergency are subject to parliamentary control.[57]

In the modern set up, however, in effect, more than Parliament controlling the Executive, it is the other way round, *viz*. the Executive controlling the Parliament.[58] Summoning, prorogation and dissolution of Houses lie in the hands of the Executive. The Executive also has a veto on legislation enacted by the Houses and, in financial matters, the executive plays a very important role. Practically, all legislation is sponsored by the Ministers. The Cabinet is in complete control of the Houses and virtually monopolises business therein.

The dominant role now played by the Cabinet in parliamentary affairs is the result of the emergence of party governments. There are well organised and disciplined political parties which solicit votes. The party securing majority in the lower House forms the Council of Ministers which consists of practically all the leading members of the party. The party members follow the lead given by the party leaders. The party members do not vote against the party Ministry.

Further, defeat of a Ministry in the House often leads to the dissolution of the Lower House resulting in a general election.[59] The power to dissolve the House is a potent weapon in the hands of the Prime Minister which he wields to control the House, for the M.Ps. do not want to undergo the ordeal of a general election until it is absolutely essential. For one thing, it is a very costly proposition to contest an election; for another, no one can be sure of the result of an election and it is possible that political power may pass to the opposing political party which no one likes. A modern election cannot possibly be contested without the support of a party. Therefore, a member of the majority party supports the government while in Parliament lest he should offend the party leaders and make it difficult for him to get the party nomination at the time of the next election.

The threat to dissolve results in promoting cohesion and discipline within the party. Not only this, the Cabinet's power of dissolution instils responsibility even in its political opponents who cannot create a crisis on every issue by defeating the Ministry, for they know that in that case the Ministry may appeal to the electorate and seek its verdict. The opposition has thus to select the issue very carefully to defeat the Ministry, for it should be such on which the risks and hazards of a general election are well worth taking.[60]

All these circumstances place an enormous amount of power in the hands of the Cabinet and the Prime Minister. Rarely will a Ministry lose office by an adverse vote so long as it holds its majority in Lok Sabha. The result is that while in

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57. For discussion on the power to issue ordinances, see, *infra,* Sec. D(ii)(d)*;* for emergency provisions, see, Ch. XIII, *infra.*

58. LORD HAILSHAM describes the British system as follows: "To a great and greater degree Parliament is becoming the House of Commons, the House of Commons is becoming the government majority and the government majority is a rubberstamp for government".
The Dilemma of Democracy, 107 (1978).
This is also true of India.

59. On dissolution of Lok Sabha, see, *supra,* Ch. II, Sec. I(c).

60. JENNINGS, *PARLIAMENT*, 7, 135, 136; KEETON, *THE PASSING OF PARLIAMENT*, 56-63 (1954); *PARLIAMENT—A SURVEY*, 89-120; BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM*, 15, 16.

theory Parliament is supreme in that it can make or unmake a Ministry, in practice, a Ministry once in power controls and leads the Parliament. This however is subject to this rider that as the Cabinet is dependent on the continuous support of a majority, it has to take into account the opinions of its supporters. "Just as Parliament must accept direction from the Government, so the Government must remember that Parliament represents the electorate. A Government which does not take care that its general policy retains the confidence of the public risks defeat either in Parliament or when it faces the electorate, which it must do at least every five years."

Behind the parliamentary scene, Ministers often meet their supporters and exchange views with them: party meetings are held to discuss matters of current importance and all these processes have an impact on the executive policy and decision-making. The truth, therefore, is that mutual controls and checks between the executive and the legislative organs generate mutual interdependence and co-operation, which is essential for the smooth operation of the parliamentary system.

D. FUNCTIONS AND POWERS OF EXECUTIVE

The Central Executive exercises very broad and varied functions. It exercises not only 'executive' functions but also, in a limited way, judicial and legislative functions as well.

(i) JUDICIAL FUNCTIONS

The Central Executive appoints the Judges of the Supreme Court[61] and the High Courts.[62] Whether a member of a House of Parliament has become subject to a disqualification or not is decided formally by the President, though, in effect, by the Election Commission.[63]

POWER OF PARDON

Article 72 empowers the President to grant pardon, reprieve, respite or remission of punishment, or to suspend, remit or commute the sentence of any person convicted of any offence in all cases—

(*a*) where the punishment or sentence is by a court martial;

(*b*) where the punishment or sentence is for an offence against a law relating to a matter to which the Union's executive power extends; and

(*c*) of a death sentence.[64]

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61. Art. 124(2); *infra*, Ch. IV.
62. Art. 217(1); *infra*, Ch. VIII.
63. *Supra*, Ch. II, Sec. D(b).
64. Reprieve means stay of the execution of sentence; respite denotes postponement of execution of a sentence; pardon means to forgive, to excuse; remission reduces the amount of a sentence without changing its character and commutation is changing the sentence to a higher penalty of a different form.

A pardon is an act of grace which releases a person from punishment for some offence. A pardon may be either full, limited or conditional. A full pardon wipes out the offence in the eyes of law; a limited pardon relieves the offender from some but not all the consequences of the guilt and a conditional pardon imposes some condition for the pardon to be effective.

This, however, does not affect the power conferred by law on any officer of the Union armed forces to suspend, remit or commute a sentence passed by a court martial, as well as the power exercisable by the State Executive to suspend, remit or commute a death sentence.[65]

The President acts in this matter on the advice of the Home Minister.

The offences relating to currency and coinage included in Ss. 489-A to 489-D of the Indian Penal Code are matters exclusively within the legislative competence of Parliament and the executive power of the Central Executive extends to these matters.[66] Accordingly, the Central, and not the State, Government is the appropriate Government competent to remit the sentence passed in relation to such offences.[67]

The question whether the power of pardon can be exercised when the Court has sentenced the contemnors to imprisonment or imposed any other penalty has not yet been decided. It is arguable that since the power of the Courts to punish for contempt is derived from the Constitution,[68] the phrase "offence against any law relating to a matter to which the Executive power of the Union extends" in Article 72 (1), would not cover such punishments.[69]

The scope of the power conferred on the President by Art. 72 is very extensive. It extends to the whole of India. The power to grant pardon may be exercised either before conviction by amnesty to the accused or under-trial prisoner or after conviction.[70]

This power is practically similar to that in America or Britain. The American President has power to grant reprieves and pardons for offences committed against the United States except in cases of impeachment. In Britain, the Crown enjoys a prerogative to grant a pardon to any criminal; but the prerogative is exercised on ministerial advice.

As regards the nature of the power of pardon vested in the President by Article 72, the Supreme Court has propounded the American, rather than the British, view. In Britain, the power is regarded as the royal prerogative of pardon exercised by the Sovereign. It is regarded as an act of grace issuing from the Sovereign. On the other hand, in the U.S.A., a pardon by the President is regarded not as a private act of grace but as a part of the constitutional scheme.[71] The Supreme Court of India, in *Kehar Singh v. Union of India*,[72] has preferred to adopt the view propounded by HOLMES, J., in the context of India. PATHAK, CJ, has observed on behalf of a unanimous Court:

> "The power to pardon is a part of the constitutional scheme, and we have no doubt, in our mind, that it should be so treated also in the Indian Republic. It has

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65. *Infra*, Ch. VII, Sec. C.
66. *Infra*, Chs. X and XII.
67. *G.V. Ramaniah v. Supdt., Central Jail*, AIR 1974 SC 31 : (1974) 3 SCC 531.
68. Articles 129 and 215.
69. The power of the Union and the States to legislate is concurrent (Entry 14; List III; Seventh Schedule) and expressly excludes contempt of the Supreme Court.
70. *In re Channugadu*, AIR 1954 Mad 511, See, BALKRISHNA, Presidential Power of Pardon, 13 *J.I.L.I*, 103.
71. MR. JUSTICE HOLMES, in *WI Biddle v. Vuco Perovich*, 71 L Ed 1161.
72. AIR 1989 SC 653 : (1989) 1 SCC 204. See also *Epuru Sudhakar v. Govt. of A.P.* (2006) 8 SCC 161, 172, 190 : AIR 2006 SC 3385.

> been reposed by the people through the Constitution in the Head of the State, and enjoys high status. It is a constitutional responsibility of great significance, to be exercised when occasion arises in accordance with the discretion contemplated by the context."

The reason for taking this view is, as explained by PATHAK, CJ., earlier in the judgment that 'to any civilized society, there can be no attributes more important than the life and personal liberty of its members'. In most civilised societies, 'the deprivation of personal liberty and the threat of the deprivation of life by the action of the State' is regarded seriously, and, therefore, recourse is provided to the judicial organ for its protection. But there is always remaining the possibility of 'fallibility of human judgment' even in 'the most trained mind', and it has been considered appropriate that in the matter of life and personal liberty, 'the protection should be extended by entrusting power further to some high authority to scrutinise the validity of the threatened denial of life or the threatened or continued denial of personal liberty. The power so entrusted is a power belonging to the people and reposed in the highest dignitary of the State'.

In *Kehar Singh*, the fact situation was as follows: Kehar Singh was convicted under S. 120B read with S. 302, IPC, for the assassination of Indira Gandhi, the then Prime Minister of India, and was sentenced to death. His appeal to the Supreme Court was dismissed. His son then presented a petition before the President of India for grant of pardon to his father under Art. 72. The President rejected the petition. Kehar Singh's request for a personal hearing was rejected by the President on the ground of not being in conformity with the "well established practice in respect of consideration of mercy petitions". In response to a communication by the counsel on behalf of Kehar Singh, the President stated that "he cannot go into the merits of a case finally decided by the highest court of the land".

Thereafter, Kehar Singh's son filed a writ petition in the Delhi High Court seeking an order restraining the Central Government from executing the death sentence on Kehar Singh. On this petition being dismissed by the High Court, a special leave appeal under Art. 136 was filed in the Supreme Court. A Bench of five Judges considered the matter and the judgment of the Court was delivered by PATHAK, C.J.

The most significant question considered by the Court was : To what areas does the President's power to scrutinise evidence extend in exercising his power to pardon? On this question, again, the Court exhibited the most liberal view. The Court expressed the view that it is open to the President in the exercise of the pardon power vested in him by Article 72 'to scrutinise the evidence on the record of the criminal case and come to a different conclusion from that recorded by the Court in regard to the guilt of, and sentence imposed on, the accused'. Explaining the matter, the Court observed:[73]

> "In doing so, the President does not amend or modify or supersede the judicial record. The judicial record remains intact, and undisturbed. The President acts in a wholly different plane from that in which the Court acted. He acts under a constitutional power, the nature of which is entirely different from the judicial power and cannot be regarded as an extension of it. And this is so, not-

73. (1989) 1 SCC at 213 : AIR 1989 SC 653.

withstanding that the practical effect of the Presidential act is to remove the stigma of guilt from the accused or to remit the sentence imposed on him."

Thus, the Court took the view that in exercising his power of pardon, the President can go into the merits of the case notwithstanding the fact that it has been judicially concluded by the court. The President can examine the record of evidence of the criminal case and determine for himself whether the case is one deserving the grant of the relief falling within that power. As regards the plenitude of power conferred by Article 72 on the President, the Court observed:[74]

> "... The power under Article 72 is of the widest amplitude, can contemplate a myriad kinds and categories of cases with facts and situations varying from case to case, in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional scheme."

The Court asserted that 'the question as to the area of the President's power under Article 72 falls squarely within the judicial domain and can be examined by the court by way of judicial review'. The Court asserted that the function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self denial on an erroneous appreciation of the full amplitude of the power, is a matter for the court. In view of this clarification, the Court ruled in *Kehar Singh* that the petition of the petitioner invoking power under Art. 72 "shall be deemed to be pending before the President to be dealt with and disposed of afresh." After reconsideration of the matter in the light of Supreme Court's observations, Kehar Singh's mercy petition was again rejected by the President.

The exercise of this power over time has not been free from controversy. A number of questions have cropped up before the courts as regards the exercise of the power of pardon, as for example—

(*i*) Does the President exercise any personal discretion in the matter or does he act merely as a constitutional head?

(*ii*) Should he give a personal hearing to the convicted or his lawyer before disposing of the matter?

(*iii*) Is the power to pardon subject to any norms, *e.g.*, Art. 14?[75]

(*iv*) Is the exercise of this power subject to any judicial review?

It has now been judicially clarified that though the power to pardon is formally vested in the President, he exercises this power, as he exercises any other power, as per Art. 74(1)[76], on the advice of the concerned Minister, *i.e.*, the Home Minister. The Supreme Court clarified in *Maru Ram v. Union of India*[77] that it is not open to the President to take an independent decision or to direct release or refuse release of any one of his own choice. "It is fundamental to the Westminister system that the Cabinet rules and the Queen reigns being too deeply rooted as foundational to our system….." "The President is an abbreviation for the Central Government."

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74. *Ibid*, 218.
75. For a full discussion on Art. 14, see, Ch. XXI, *infra.*
76. *Supra*, Sec. B(a).
77. AIR 1980 SC 2147 : (1981) 1 SCC 107.

In *Kehar Singh*, the Supreme Court has denied that there is any right in the condemned person to insist on an oral hearing before the President on his petition invoking his powers under Art. 72. The matter lies within the discretion of the President and it is for him to decide how he will deal with the case. The proceeding before the President is of an executive character[78] and when the petitioner files his petition it is for him to submit with it all the requisite information necessary for the disposal of the petition.

From time to time, the Supreme Court has considered the question whether there should be some guidelines for the exercise of power to pardon by the President. In *Maru Ram*, the Court expressed a view in favour of laying down some guidelines for the purpose of exercising power under Art. 72 in order to avoid any allegation of arbitrary exercise of power. The Court observed:

> "The proper thing to do, if the Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty."

The matter again cropped up before the Court in *Kuljeet Singh v. Lt. Governor*,[79] In a writ petition, it was argued before the Supreme Court that under Art. 72, President's power is coupled with a duty and that it must be exercised fairly and reasonably. Has the Government formulated any uniform standard or guidelines by which the exercise of the constitutional power under Art. 72 is intended to be or is in fact governed? The Court said that the question was of far-reaching importance and that it was necessary that it be examined with care.

But, then, later the Court did not really examine this question and left it open and dismissed the writ petition on the ground that, in view of the circumstances in which murder was committed by the accused in the instant case, the only sentence which could possibly be imposed on him was death and there was no reason to interfere with that sentence. In the instant case, the Court opined that in refusing to commute the death sentence to a lesser sentence, the President did not in any manner transgress his discretionary power under Art. 72.[80] The question, therefore, of standards and guidelines for the exercise of the power under Art. 72 (as well as Art. 161)[81] remained an open one.

But in *Kehar Singh*, the Court has given a very broad ambit to this power and has also changed its stance on the question of laying down any guidelines. The Court has said that "there is sufficient indication in the terms of Art. 72 and in the history of the power enshrined in that provision as well as existing case-law, and specific guidelines need not be spelled out." In fact, the Court has now realised that it may not be possible to lay down any "precise, clearly defined and sufficiently channelised guidelines" as Art. 72 has very wide amplitude and contemplates "a myriad kinds and categories of cases with facts and situations varying

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78. The Court has characterized the power to pardon as "executive" for two reasons : (i) There is no inherent right in the petitioner to claim an oral hearing; (2) the President acts in this matter on the advice of the concerned Minister. The author has however characterised the power as 'Judicial' because the power does involve interference with the Judicial process.

79. AIR 1981 SC 2239.

80. *Kuljeet Singh v. Lt. Governor*, AIR 1982 SC 774 : (1982) 1 SCC 417.

81. See, *infra*, Ch. VII, Sec. C.

from case to case, in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time."[82]

A significant question which has cropped up before the Supreme Court several times has been whether there can be any judicial review of the exercise of the power of pardon by the President. The Court considered this question as early as 1976 in *G. Krishna Goud v. State of Andhra Pradesh*.[83] Two persons were sentenced to death for committing murder in implementing their ideology of social justice through terrorist technology. The President refused to commute the death sentence. Before the Supreme Court, it was argued on their behalf that their crime was of a political nature which merited different considerations. Rejecting the petition, the Supreme Court described the nature of the power as follows:

> "Article 72 designedly and benignantly vest in the highest executive the humane and vast jurisdiction to remit, reprieve, respite, commute and pardon criminals—on whom judicial sentences may have been imposed. Historically, it is a sovereign power; politically, it is a residuary power; humanistically, it is in aid of intangible justice where imponderable factors operate for the well-being of the community, beyond the blinkered court process."

But the Court pointed out that all public power—'all power, however, majestic the dignitary weilding it, shall be exercised in good faith, with intelligent and informed care and honestly for the public weal'. In the instant case, the Court had not been shown any demonstrable reason or glaring ground to consider the refusal of commutation' as 'motivated by malignity or degraded by abuse of power'.

In *Maru Ram*,[84] the Supreme Court insisted that although the power of pardon is very wide, 'it cannot run riot'. The Court emphasized that no constitutional power is to be exercised arbitrarily. Public power vested on a high pedestal has to be exercised justly. '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 the valid play of power'. On this aspect, the Court stated further:

> "Article 14 is an expression of the egalitarian spirit of the Constitution and is a clear pointer that arbitrariness is anathema under our system. It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism."[85]

Although considerations for the exercise of power under Art. 72 (and the same goes for Art. 161)[86], may be "myriad and their occasion protean", and best be left to the government, yet, if in any case, the power to pardon, commute or remit is exercised on irrational, irrelevant, discriminatory or *mala fide* considerations, the courts could examine the case and intervene if necessary. There may be grounds, such as, political vendetta or party favouritism which may make the actual exer-

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82. Also see, *Ashok Kumar v. Union of India*, AIR 1991 SC 1792 : (1991) 3 SCC 498. In this case, the Court has reiterated the *Kehar Singh* ruling on the question of laying down guidelines for exercising power under Art. 72.

83. (1976) 2 SCR 73 : (1976) 1 SCC 157. Also see, *Kuljeet Singh v. Lt. Governor*, AIR 1982 SC 774 : (1982) 1 SCC 417.

84. AIR 1980 SC 2147 : (1981) 1 SCC 107.

85. For discussion on Art. 14, see, *infra*, Ch. XXI, Sec. B.

86. *Infra*, Ch. VII, Sec. C.

cise of the constitutional power vulnerable. 'The order which is the product of extraneous or *mala fide* factors will vitiate the exercise' and likewise 'capricious criteria will avoid the exercise'. Thus, the power under Article 72 is not to be exercised on 'wholly irrelevant, irrational, discriminatory or *mala fide*' considerations. 'Only in these rare cases will the Court examine the exercise.' The Court then went on to suggest:

> "The proper thing to do, if the Government is to keep faith with the founding fathers, is to make rules for its own guidance in the exercise of the pardon power keeping, of course, a large residuary power to meet special situations or sudden developments. This will exclude the vice of discrimination such as may arise where two persons have been convicted and sentenced in the same case for the same degree of guilt but one is released and the other refused, for such irrelevant reasons as religion, caste, colour or political loyalty."

But the Court resiled from the above approach in *Kehar Singh*[87] with the following observation :

> "It seems to us that there is sufficient indication in the terms of Art. 72 and in the history of the power enshrined in that provision as well as existing case law, and specific guidelines need not be spelled out."

The Court went on to say that it may indeed not be possible to lay down any "precise, clearly defined and sufficiently channelised guidelines", for the power under Art. 72 "is of the widest amplitude", and it can contemplate "a myriad kinds of and categories of cases with facts and situations varying from case to case, in which the merits and reasons of state may be profoundly assisted by prevailing occasion and passing time. And it is of great significance that the function itself enjoys high status in the constitutional status."

The Court later explained away the apparent contradiction between *Maru Ram* and *Kehar Singh* in a later case[88] by saying that what was said in *Maru Ram* was "a mere recommendation and not a *ratio decidendi* having a binding effect." In *Satpal v. State of Haryana*,[89] the Governor's order granting pardon was set aside on the ground that the Governor had not been advised properly with all the relevant materials.

In *Kehar Singh*, the Supreme Court has accepted the proposition laid down in *Maru Ram* as regards the exercise of pardon power by the President. The Court has expressed the view that the order of the President cannot be subjected to judicial review on its merits except within the strict limitations defined by the Court in *Maru Ram*. The Court has observed:

> "The function of determining whether the act of a constitutional or statutory functionary falls within the constitutional or legislative conferment of power, or is vitiated by self-denial on an erroneous appreciation of the full amplitude of the power is a matter for the court."

It will thus be noted from *Kehar Singh* and *Maru Ram* that while the Supreme Court has conceded to the President a wide plenitude scope to consider all facets of the matter to exercise his power, the President's power is not absolute and

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87. AIR 1989 SC 653 : (1989) 1 SCC 204.
88. *Ashok Kumar v. Union of India*, AIR 1991 SC 1792, 1803-1804 : (1991) 3 SCC 498.
89. (2000) 5 SCC 170 : AIR 2000 SC 1702; See also *Dhananjoy Chatterjee @ Dhana v. State of West Bengal*, (2004) 9 SCC 751 : AIR 2004 SC 3454.

completely beyond judicial purview. Of course, the courts will interfere only if the power is exercised *mala fide* or in an arbitrary or discriminatory manner.[90]

In *Epuru Sudhakar v. Govt. of A.P.*,[91] KAPADIA J.in a concurring judgment, held that considerations of religion, caste or political loyalty are irrelevant and prohibited. It was also held that the power of executive clemency is not only for the benefit of the convict, but while exercising such a power the President or the Governor, as the case may be, has to keep in mind the effect of the decision on the family of the victim and society and the precedent it sets for the future.[92]

The U.S. Supreme Court has justified the existence of the power of clemency in the executive in *Grossman*[93] in the following words:

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular Governments, as well as in monarchies, to vest in some authority other than the court, power to ameliorate or avoid particular judgments…Our Constitution confers this discretion on the highest office in the nation in confidence that he will not abuse it."

The Law Commission of India has also justified the existence of the prerogative of mercy in the executive.[94] The Commission has observed in this connection:

> "There are many matters which may not have been considered by the courts. The hands of the court are tied down by the evidence placed before it. A sentence of death passed by a court after consideration of all the materials placed before it may yet require reconsideration because of: (*i)* facts not placed before the court; (*ii*) facts placed before the court but not in the proper manner; (*iii*) facts discovered after the passing of the sentence; (*iv*) events which have developed after the passing of the sentence, and (*v*) other special features. Nor can one codify and select these special features which would be too numerous to lend themselves to codification. For these reasons, we do not recommend any change in the scope of these powers".

The Supreme Court has ruled in *State of Punjab v. Joginder Singh*[95] that the power under Art. 72 "is absolute and cannot be fettered by any statutory provision such as Ss. 432, 433 and 433A of the Criminal Procedure Code. This power cannot be altered, modified or interfered with in any manner whatsoever by any statutory provisions or Prison Rules.". A decision of the President of India on a petition under Art. 72 is subject to judicial review but on very limited grounds.[96]

Under Art. 161, a parallel power to grant pardon vests in the State Governors. There have been cases where the exercise of the power by the Governors has

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90. See *Bikas Chatterjee v. Union of India*, (2004) 7 SCC 634 : (2004) 10 Scale 190.
91. (2006) 8 SCC 161 at 163 : AIR 2006 SC 3385.
92. *Ibid* at pp. 190-191. *For further discussion see under Note Chapter VII (infra).*
93. *Ex parte, Grossman*, 267 US 87 (1925).
94. *Report on Capital Punishment*, 317-18 (1967).
95. AIR 1990 SC 1396, 1400 : (1990) 2 SCC 661. Also, *Ashok Kumar v. Union of India*, AIR 1991 SC 1792 : (1991) 3 SCC 498; *State Government of NCT of Delhi v. Premraj*, (2003) 7 SCC 121: (2003) 8 JT 17.
96. *Bikas Chatterjee v. Union of India*, (2004) 7 SCC 634 : (2004) 10 Scale 109.

been quashed by the Supreme Court on the ground of misuse of power by the concerned Governor.[1]

(ii) LEGISLATIVE FUNCTIONS

Legislative power of the Central Executive can be discussed under the following heads:

(1) participation of the Executive in the legislative process;

(2) power of rule-making under the Constitution;

(3) power to proclaim an emergency; and (4) power to make ordinances.

(a) PARTICIPATION

The Council of Ministers being an integral part of Parliament participates intimately in the legislative process, and discharges several important functions in relation to Parliament. This concept is underlined by making President a component part of Parliament.[2]

The Executive's power to convene and prorogue Parliament, to dissolve Lok Sabha,[3] presentation of Bills to Parliament and the requirement of Presidential assent for transforming a Bill passed by the two Houses into an Act,[4] are some of the indicia which denote the intimate role played by the Executive in relation to the legislative process.

Because the government enjoys majority support in Lok Sabha, no bill is passed by the House unless the government supports it. Therefore, a private members's bill has no chance of getting through the House without government support. In practice, government monopolises legislative process in Parliament. Practically, all bills passed by the House of Parliament are those presented by the government.

Then, the Central Executive also participates, to some extent, in the legislative process in the States. Its consent is needed for certain types of State legislation: in some cases, *before* a Bill is introduced in the State Legislature, like a Bill imposing restrictions on freedom of trade, commerce and intercourse within the State,[5] and in some cases, *after* a Bill is passed by a State Legislature.[6] Thus, State Bills falling under Art. 288(2) do not become law unless approved by the Central Executive.[7]

Besides, as already stated, the President may address any or both Houses of Parliament,[8] and send messages to either House with respect to a Bill pending in Parliament or otherwise.[9]

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1. For these cases, see, Ch. VII, *infra.*
2. *Supra*, Ch. II, Sec. A.
3. *Supra*, Ch. II, Secs. G and I.
4. *Supra*, Ch. II, Sec. J(i)(c).
5. Art. 304(*b*)*; infra*, Ch. XV.
6. See, Art. 31A Proviso; *infra*, Ch. XXXII, Sec. A*;* Art. 200, *infra*, Ch. VI, Sec. D.
7. *Infra*, Ch. X, Sec. F.
8. Art. 86(1)*; Supra*, Ch. II, Sec. G(b).
9. Art. 86(2); *Supra*, Ch. II, Sec. G(c).

Further, several provisions in the Constitution require prior recommendation of the President for introducing legislation on some matters in a House of Parliament. As for example—

(*i*) President's recommendation is required to introduce in either House a Bill for the formation of new States or alteration of areas boundaries or names of existing States [Art. 3].[10]

(*ii*) A Money Bill cannot be introduced without the recommendation of the President [Art. 117(1)].[11]

(*iii*) President's recommendation is required for consideration by a House of a bill involving expenditure from the Consolidated Fund of India [Art. 117(3)].[12]

(*iv*) Prior recommendation of the President is required for introducing in either House of Parliament any bill affecting any tax in which States are interested [Art. 274].[13]

It may however be noted that because of Art. 255(*c*), an Act of Parliament, or any provision is not to be regarded invalid on the ground that previous sanction was not obtained, if assent to that Bill is eventually given by the President.

(b) RULE MAKING

Several constitutional provisions confer rule-making powers on the Central Executive enabling it to prescribe detailed provisions for several matters, as for example:

(*a*) authentication of orders and instruments made and executed in the name of the President [Art. 77(2)];[14]

(*b*) the more convenient transaction of the government's business [Art. 77(3)];[15]

(*c*) conditions of services *etc*. of Audit and Accounts Department [Art. 148(5)],[16] Chairman and Members of the Union and Joint Public Service Commissions [Art. 318],[17] Secretariat and staff of Houses of Parliament [Art. 98(3)];[18]

(*d*) consultation with the U.P.S.C. regarding appointment of officials of the Supreme Court [Art. 146(1)];[19]

(*e*) dual membership of Parliament and State Legislatures [Art. 101(2)];[20]

(*f*) procedure to be followed at the joint sittings of the two Houses of Parliament [Art. 118(3)];[21]

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10. See, *infra*, Ch. V.
11. See, *supra*, Ch. II, Sec. J(ii)(c).
12. See, *supra*, Ch. II, Sec. J(ii)(a).
13. See, *infra*, Ch. XI, Sec. D.
14. *Supra*, Ch. III, Sec. B(a),
15. *Supra*, Ch. III, Sec. B(a),
16. *Supra*, Ch. II, Sec. J(ii)(s).
17. *Infra*, Part V, Ch. XXXVI.
18. *Supra*, Ch. II, Sec. H(c).
19. *Infra*, Ch. XXXVI.
20. *Supra*, Ch. II, Sec. E(a).
21. *Supra*, Ch. II, Sec. J(i)(b).

(*g*) regulating the requirements and conditions of service of persons appointed to services and posts in connection with the affairs of the Union [Proviso to Art. 309].[22]

(c) DECLARATION OF EMERGENCY

In certain contingencies, the Central Executive has power to proclaim emergency. The declaration of an emergency effects several important changes in the normal working of the Constitution. This matter has been discussed in detail later in this book.[23]

(d) ORDINANCE-MAKING POWER

The Central Executive has power to issue ordinances and thus promulgate laws for a short duration. The technique of issuing an ordinance has been devised with a view to enabling the Executive to meet any unforeseen or urgent situation arising in the country when Parliament is not in session, and which it cannot deal with under the ordinary law.[24]

Ordinarily, under the Constitution, the President is not the repositary of the legislative power of the Union. This power belongs to Parliament. But, with a view to meet extraordinary situations demanding immediate enactment of laws, the Constitution makes provision to invest the President with legislative power to promulgate ordinances. An ordinance is only a temporary law. The executive in Britain or the U.S.A. enjoys no such power.

Article 123 empowers the President to promulgate such ordinances as the circumstances appear to him to require when—

(1) both Houses of Parliament are not in session; and

(2) he is satisfied that circumstances exist which render it necessary for him to take immediate action.

The provision confers the power formally on the President; but, as already stated, he acts in this matter, as he does in other matters, on the advice of the Council of Ministers and, therefore, the ordinance-making power is vested effectively in the Central Executive. As the Supreme Court has stated: "The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction: it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction."[25]

The power to issue an ordinance is legislative power. An ordinance issued by the President partakes fully of the legislative character and is made in the exercise of legislative power.[26]

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22. *Infra*, Ch. XXXVI.

23. Ch. XIII, *infra.*

24. AMBEDKAR, VIII *CAD*, 213. See also, PANDEY, Hundred Years of Ordinance in India, 10 *JILI* 259 (1968).

Reference may also be made to the discussion on Ordinance-making power of the State Governors, see, *infra*, Ch. VII, Sec. D(ii)(c).

25. *R.C. Cooper v. Union of India*, AIR 1970 SC 564, 587 : (1970) 1 SCC 248. Also see, *R.K. Garg v. Union of India*, AIR 1981 SC 2138, 2144 : (1981) 4 SCC 675; *A.K. Roy v. Union of India*, AIR 1982 SC 710 : (1982) 1 SCC 271; *Venkata v. State of Andhra Pradesh*, AIR 1985 SC 724; *Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551.

26. *A.K. Roy v. Union of India*, *op. cit.*

An ordinance is to be promulgated when the 'President', or rather the Central Executive, is satisfied that circumstances exist which render it necessary to take immediate action. Whether or not circumstances exist which make the promulgation of an ordinance necessary is a matter to be decided by the Executive in its subjective satisfaction. Whether this satisfaction is non-justiciable or subject to judicial review on any ground still remains an open question.

Section 72 of the Government of India Act, 1935, authorised the Governor-General to make and promulgate ordinances for the peace and good government of British India 'in cases of emergency'. Discussing this provision in *Bhagat Singh v. King-Emperor*,[27] LORD DUNEDIN observed: "Who is to be judge of whether a state of emergency exists? A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the ordinance." In *Lakhi Narayan v. State of Bihar*,[28] the Federal Court had observed that whether the requisite circumstances existed for promulgating the ordinance was a 'matter which is notwithin the competence of courts to investigate. The language of the provision shows clearly that it is the Governor and Governor alone who has got to satisfy himself as to the existance of circumstances necessitating the promulgation of an ordinance. The existence of such necessity is not a justiciable matter which the courts could be called upon to determine by applying an objective test..." In *King-Emperor v. Benoari Lal*,[29] the Privy Council emphasized that the Governor-General was not required by the constitutional provision to state that there was an emergency, or what the emergency was, either in the text of the ordinance or at all, and assuming that "he acts *bona fide* and in accordance with his statutory powers it cannot rest with the courts to challenge his view that the emergency exists".

The above cases arose under the Government of India Act, 1935. A few cases have arisen under the Constitution as well.

In *S.K.G. Sugar Ltd. v. State of Bihar*[30] the Supreme Court stated as regards Governor's satisfaction to make an ordinance under Art. 213 (which is similar to Art. 123) that "the necessity of immediate action and of promulgating an ordinance is a matter purely for the subjective satisfaction of the Governor. He is the sole judge as to the existence of the circumstances necessitating the making of an ordinance. His satisfaction is not a justiciable matter. It cannot be questioned on the ground of error of judgment or otherwise in a court." Thus, on the basis of these cases,[31] it could be asserted that an enquiry into the question of satisfaction of the President as to the need for promulgating an ordinance is not a justiciable matter.

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27. 58 I.A. 169, 172.
28. AIR 1950 FC 59. The case referred to the State (at that time, a Province), see, *infra*, Ch. IX.
29. 72 I.A. 57. Also, *Lakhi Narayan v. State of Bihar*, AIR 1950 FC 59.
30. AIR 1974 SC 1533 : (1974) 4 SCC 827.
31. Also see, *Prem Narain v. State of Uttar Pradesh*, AIR 1960 All. 205; *Sarju Prasad v. State of U.P.*, AIR 1970 All. 571; *Kalyan Bhadra v. Union of India*, AIR 1975 Cal. 72; *Fathima v. Ravindranathan*, AIR 1975 Ker. 202.

But in the *Bank Nationalisation* case,[32] the constitutional validity of the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969, was challenged. By this ordinance, the Central Government nationalised a number of private banks. It was argued that the Ordinance was invalid because the condition precedent to the exercise of the power under Art. 123 did not exist. It was argued that Art. 123 does not make the President as the final arbiter of the exercise of the conditions on which the power to promulgate an ordinance may be exercised. On the other hand, the Government's argument was that "the condition of satisfaction of the President" "is purely subjective" and the Government was "under no obligation to disclose the existence of, or to justify the circumstances of the necessity to take immediate action". But as the Ordinance had been replaced by an Act of Parliament, the Supreme Court left the question open saying that the question had become 'academic'.[33]

The Court expressed no opinion on the extent of the Court's jurisdiction to examine, whether the condition relating to satisfaction of the President was fulfilled in the instant case. RAY, J., (minority opinion) however ruled that "the satisfaction of the President is subjective" and the only way in which the exercise of power by the President can be challenged in by establishing "bad faith or *mala fide* and corrupt motive".[34]

To remove any doubt on this point, in 1975, the 38th Amendment of the Constitution had added Art. 123(4) making satisfaction of the President to issue an ordinance non-justiciable.[35] In spite of Art. 123(4), the Supreme Court suggested that presidential satisfaction under Art. 123(1) could still be questioned on the ground of mala fides.[36]

However, in 1978, the 44th Amendment deleted this provision, and restored the *status quo ante*.[37] Again, in *A.K. Roy v. Union of India*,[38] the question of judicial review of the President's satisfaction to promulgate the National Security Ordinance, 1980, providing for preventive detention was raised. The Supreme Court left the question open whether the satisfaction of the President under Art. 123(1) is justiciable or not. The Court did say however that it was arguable that "judicial review is not totally excluded in regard to the question relating to the President's satisfaction." As to whether the preconditions to the exercise of power under Art. 123 have been satisfied or not cannot be regarded as a purely political question and kept beyond judicial review. In the instant case, since the Ordinance in question had been replaced by an Act of Parliament, the Court felt no need to go into the question of the President's satisfaction to issue the Ordinance in question. Further, the Court felt that the material placed before it was not sufficient to enable it to reach any conclusion one way or another on this question. The Court also pointed out that a *prima facie* case must be established by the petitioners as regards the non-existence of the circumstances necessary for the promulgation of the Ordinance before the burden can be cast on the President

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32. *Cooper v. Union of India*, AIR 1970 SC 564 : (1970) 1 SCC 248.
33. *Ibid*, at 588.
34. *Ibid*, at 644.
35. See, *infra*, Ch. XLII.
36. *State of Rajasthan v. Union of India*, AIR 1977 SC 1361 : 1977 (2) SCC 592 : 1978 (1) SCR 1; see, *infra*, Ch. XIII.
37. See, *infra*, Ch. XLII.
38. AIR 1982 SC 710 : (1982) 1 SCC 271.

to establish those circumstances. A passing and a casual challenge to the existence of the circumstances leading to the President's satisfaction to issue the ordinance in question cannot be entertained by the Court. The Court did however observe that the power to issue ordinances is not meant to be used recklessly or under imaginary state of affairs or *mala fide* against the normal legislative process.

This argument is further strengthened after the Supreme Court has ruled in *Bommai*,[39] that a proclamation by the President under Art. 356 can be challenged on the ground of *mala fides*, or that it is based on wholly extraneous and irrelevant grounds. Repeal of the 38th Amendment by the 44th Amendment of the Constitution also indicates that the argument of *mala fides* is not foreclosed to challenge an ordinance.

In *T. Venkata Reddy v. State of Andhra Pradesh*,[40] the Supreme Court has ruled that since the power to make an ordinance is legislative and not executive power, its exercise cannot be questioned on such grounds as improper motives, or non-application of mind[41], or on grounds of its propriety, expediency and necessity. An ordinance 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". The courts can declare a statute unconstitutional when it transgresses constitutional limits, but they cannot inquire into the propriety of the exercise of legislative power. It has to be assumed that the legislative discretion is properly exercised. The Court has observed:[42]

> "The motives of the legislature in passing a statute is beyond the scrutiny of the courts. Nor can the courts examine whether the legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for the determination of the courts."

Similarly, the Supreme Court has observed in *Nagaraj*: [43]

> "It is impossible to accept the submission that the ordinance can be invalidated on the ground of non-application of mind. The power to issue an ordinance is not an executive power but is the power of the executive to legislate... 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, though an ordinance can be invalidated for contravention of the constitutional limitations which exist upon the power of the State Legislature to pass laws it cannot be declared invalid for the reason of non-application of mind, any more than any other law can be. An executive act is liable to be struck down on the ground of non-application of mind. Not the act of a Legislature".

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39. See, *infra*, Ch. XIII.
40. AIR 1985 SC 724 : (1985) 3 SCC 198.
41. For explanation of these grounds, see, M.P. JAIN, *A TREATISE OF ADMINISTRATIVE LAW*, I. Ch. XIX.
42. AIR 1985 SC at 731 : (1985) 3 SCC 198.
For further discussion on this topic, see, *infra*, Ch. VII, Sec. D(ii)(c).
Also see, Ch. II, Sec. M.
43. *K. Nagaraj v. State of Andhra Pradesh*, AIR 1985 SC 551, 565 : (1985) 1 SCC 523.

In these cases, the Supreme Court seems to have gone too far in immunizing an ordinance from judicial review. In the view of the author, it does not seem to be correct to treat an ordinance on all fours with an Act passed by Parliament. While it is one thing to say that a validly made ordinance has the same effect as an Act of Parliament, the two—an ordinance and an Act—are not the same in all respects. The essential difference between the two is that while legislation through Parliament, an elected body, is open and transparent and is subjected to criticism on the floor of the House and even outside the House, making and promulgating an ordinance is purely an executive decision, neither transparent nor open nor subject to any open discussion in any forum.

It is the legislative act of the executive but not the act of the legislature. Therefore, challenging the executive decision on the ground of *mala fides* should always remain a possibility so that the executive is deterred from using its power to issue an ordinance in an improper manner.

Recently the Constitutional Bench of the Supreme Court[44] has disapproved the view expressed in *State of Rajasthan v. Union of India (supra)* and reaffirmed the ratio in *Bommai's* case that the subjective satisfaction of a Constitutional authority including the Governor, is not exempt from judicial review. It was said that " it is open to the Court, in exercise of judicial review, to examine the question whether the Governor's report (recording his satisfaction) is based upon relevant material or not; whether it is made bona fide or not; and whether the facts have been duly verified or not". No doubt the opinion was expressed in connection with executive action under Article 356 which was not legislative in character, nevertheless it indicates an assertion that unless specifically barred every executive action is subject to judicial review.

The Delhi High Court has observed on this point :[45]

> "It is settled law that it is for the petitioner to make out a *prima facie* case that there could not have existed any circumstances whatsoever necessitating the issuance of ordinances before the Government could be called upon to disclose the facts which are within its knowledge. Every casual challenge to the existence of such circumstances would not be enough to shift the burden of proof to the Executive to establish those circumstances."

A single Judge of the Karnataka High Court in *Hasanahba*[46] declared an ordinance promulgated by the State Governor as being *mala fide.* The learned Judge maintained that "an ordinance is an emergency or a stop gap measure and the power is required to be used for purposes of sub-serving conserving and enhancing the constitutional process and should not be and cannot be used for purposes of bypassing it." He also referred to the *Bommai* case in support of his approach. But, on appeal, a bench of two judges reversed the single judge's judgment and ruled that the power to make an ordinance being legislative in nature, the concept of *mala fides* cannot apply thereto.[47] The court said that *mala fides* cannot be attributed to the legislature as a body and the governor acts as the substitute of the Legislature while making the ordinance. The court said :

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44. *Rameshwar Prasad v. Union of India,* (2006) 2 SCC 1 : AIR 2006 SC 980.
45. *Gyanendra Kumar v. Union of India,* AIR 1997 Del 58, 61.
46. *B.A. Hasanahba v. State of Karnataka,* AIR 1998 Kant. 91.
47. *State of Karnataka v. B.A. Hasanahba,* AIR 1998 Kant 210.

> "The *mala fides* in making the law or passing the ordinance could not make such law unconstitutional".

The Court depended on *Nagaraj* for support and did not at all refer to *Bommai.* This author commends the approach of the single judge mentioned above rather than the division bench approach which has taken recourse to a mythical argument in preference to a realistic argument. It is beyond comprehension as to how can an executive body be treated as a "substitute" for the legislature. This amounts to taking recourse to a fiction in preference to reality.

An ordinance cannot be promulgated when both Houses of Parliament are in session. [Art. 123(1)]. Accordingly, an ordinance made when the two Houses are in session is void. It may, however, be made when only one House is in session, the reason being that a law can be passed by both Houses and not by one House alone, and, thus, it cannot meet a situation calling for immediate legislation and recourse to the ordinance-making power becomes necessary.

The House in session may, however, regard it as a discourteous act on the part of the government if it promulgates an ordinance without consulting it. What, therefore, may be done in such a situation is that a Bill embodying the necessary provisions may be got passed by the House in session and the same may then be promulgated as an ordinance. The Bill as passed by one House may later be passed by the other House and the ordinance revoked. This was done in 1957 when the Central Government servants threatened to go on strike. The Lok Sabha but not the Rajya Sabha was in session. A Bill was passed by the Lok Sabha to provide for maintaining essential services and the Essential Services Maintenance Ordinance was then issued embodying the provisions thereof.

The executive's ordinance-making power is not unrestrained. An ordinance can remain in force only for a short duration and is brought under the parliamentary scrutiny at the earliest possible opportunity. The scheme of Art. 123 is to place the ordinance-making power subject to the control of Parliament rather than that of the courts.

The ordinance is to be laid before each House of Parliament when it reconvenes after the making of the ordinance [Art. 123(2)(a)]. The ordinance shall cease to operate at the expiry of six weeks from the assembly of Parliament [Art. 123(2)(a)]. When the two Houses of Parliament assemble on different dates, the period of six weeks is to be reckoned from the later of the two dates.[48] It means that Parliament must pass a law to replace the ordinance within six weeks of its assembling. Thus, the maximum duration for which an ordinance may last is 7½ months as under Art. 85, six months cannot intervene between two sessions of Parliament, and the ordinance would cease to operate six weeks after the Parliament meets.

An ordinance may cease to have effect even earlier than the prescribed six weeks, if both Houses of Parliament pass resolution disapproving it [Art. 123(2)(*a*)]. It may be withdrawn by the Executive at any time [Art. 123(2)(*b*)]. Parliament's control over the Central Executive's ordinance-making power is thus *ex post facto, i.e.* it is exercised after the ordinance has been promulgated and not before.

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48. Explanation to Art. 123(2)(a).

To ensure that the Executive uses the ordinance-making power only when circumstances are such as admit of no delay, rules of both Houses provide that a Bill seeking to replace an ordinance should be introduced in the House along with a statement explaining the circumstances which made immediate legislation by an ordinance necessary.

If the provisions made through the ordinance are to continue even after the ordinance comes to an end, Parliament has to enact a law incorporating the provisions made through the ordinance. Since the government enjoys majority in the Lok Sabha, there is no difficulty in the House passing the Act. But situation in Rajya Sabha may be different. If the government does not have majority in that House, passage of the Act by that House may become a problem.

The normal democratic legislative process involves the people's representatives in the two Houses openly enacting a law after a full consideration and discussion. An ordinance seeks to circumvent this process for it is drafted secretly in government chambers and is promulgated without an open discussion. The ordinance-making power should therefore be invoked not lightly but only when it is absolutely necessary to do so, and the situation cannot otherwise be met effectively. However, an ordinance partakes of legislative character; it is made in exercise of legislative power and is subject to the same limitations as an Act passed by Parliament.[49]

The Supreme Court has held that the power to make ordinance is not antidemocratic even though the power is vested in the Executive and not the legislature. An ordinance is promulgated on the advice of the Council of Ministers which remains answerable to the Parliament. If the executive misuses or abuses its power, the House of Parliament may not only disapprove the ordinance but may also pass a vote of no confidence against the Council of Ministers.[50]

An ordinance has the same force and effect as an Act of Parliament [Art. 123(2)]. An ordinance comes to an end in the following situations—

(a) Resolutions disapproving the ordinance are passed by both Houses of Parliament;

(b) if the ordinance is not replaced by an Act within the stipulated period;

(iii) the executive lets it lapse without bringing it before the Houses of Parliament;

(iv) if it is withdrawn by the Government at any time.

The power of the President to issue ordinances is co-extensive with the legislative power of Parliament.[51] The President's power to promulgate ordinances is no higher and no lower than the power of Parliament to make laws.[52] An ordinance cannot make a provision which Parliament is not competent to enact [Art. 123(3)]. Conversely, an ordinance can make any provision which Parliament can enact, except that an appropriation from out of the Consolidated Fund cannot be made by an ordinance [Art. 114(3)].[53] Thus, an ordinance may make provision with respect to a matter in Lists I and III, but not in List II, except when procla-

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49. *A.K. Roy, infra,* footnote 59.
50. *R.K. Garg v. Union of India,* AIR 1981 SC 2138 : (1981) 4 SCC 675.
51. *Satpal & Co. v. Lt. Governor of Delhi*, AIR 1979 SC 1550.
52. See, *infra,* Ch. X.
53. *Supra*, Ch. II, Sec. J(ii)(j).

mation of emergency is in operation.[54] Further, like a law made by Parliament, an ordinance is also subject to Fundamental Rights.[55]

Again, in *A.K. Roy v. Union of India*, the Supreme Court has emphasized that an ordinance is law and is a product of exercise of legislative power. It is 'law' for the purposes of Art. 21. The Court has rejected the contention in *R.K. Garg v. Union of India*[56] that under Art. 123, the President has no power to issue an ordinance amending or altering the tax laws. An ordinance has the same force and effect as an Act of Parliament. There is no qualitative difference between an ordinance and an Act passed by Parliament. President's legislative power under Art. 123 is co-extensive with Parliament's power to make laws and, therefore, no limitation can be read into the legislative power of the President so as to make it ineffective to alter or amend tax laws. Conversely, it would also mean that an ordinance cannot do what Parliament could not do by enacting an Act.[57]

Prima facie it can be said that an ordinance which signifies law-making by the executive is an undemocratic instrument. But an analysis of Art. 123 would show that the power to make ordinances has been given only to deal with unforeseen or urgent matters, and it is subject to proper parliamentary controls. In the first place, the power is exercised by a government accountable to Parliament. In the second place, it is to be exercised when Parliament is not in session. In the third place, the ordinance has to be placed before both Houses which can disapprove the ordinance if they so like. If the executive misuses its power, the *Lok Sabha* can pass a vote of no confidence to remove the government from office. However, all said and done, it cannot be denied that a government enjoying majority support in the House can misuse or abuse this power. It can use this power to bypass Parliament and enact a law through an ordinance which it feels would raise controversies on the floor of the House.[58]

Under Art. 123, an ordinance can be issued to deal with the emergent situation which might arise as a result of a law being declared unconstitutional by a court. There is no inhibition on the ordinance-making power that it shall not deal with a matter already covered by a law made by Parliament.[59]

In *Union of India (UOI) v. C. Dinakar, I.P.S.*[60] the C.B.I. (Senior Police Posts) Recruitment Rules, 1996 framed under Proviso to Article 309 of the Constitution of India specifically provided for the grade from which promotion to the post of Director, CBI was to be made. In *Vineet Narain v. Union of India*,[61] directions were issued by the Supreme Court regarding the procedure for appointment of the Director, CBI. An Ordinance was subsequently promulgated by the President of India known as the Central Vigilance Commission Ordinance, 1998 which came into force on or about 25.8.1998 and which provided for the process of selection to the post of Director CBI. Parliament then incorporated the provisions

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54. Chs. X, XI and XIII, *infra.*
55. For discussion on Fundamental Rights, see *infra*, Chs. XX-XXXIII.
56. AIR 1981 SC 2138 : (1981) 4 SCC 675.
57. *Garg v. Union of India, supra*.
58. On this aspect also see the discussion under Governor's power to make ordinance, *infra*, Ch. VII.
59. *A.K. Roy v. Union of India*, AIR 1982 SC 710 at 725 : (1982) 1 SCC 271.
Also see, *infra*, Ch. VII, Sec. D(ii)(c) for discussion on Misuse of Power to Promulgate Ordinances.
60. (2004) 6 SCC 118 : AIR 2004 SC 2498.
61. (1998) 1 SCC 226 : AIR 1998 SC 889.

of the said Ordinance by enacting the Central Vigilance Commission Act, 2003. The selection process adopted by the Central Government in appointing the Director was challenged on the ground that the same was contrary to and inconsistent with the directions of the Court in *Vineet Narain's* case (supra). The court negatived the submission holding that the 1996 Rules being subordinate legislation ceased to exist as soon as the Ordinance came into force and that the directions issued by the Court were to operate only till legislation was passed in that regard.

At times, the government may misuse its ordinance-making power by repeatedly reissuing an ordinance over and over again without placing it before the legislature. This aspect of the ordinance-making power was brought to the notice of the Supreme Court in *Wadhwa,* as regards the State of Bihar.[62] The Court trenchantly criticised this practice characterising it as anti-democratic. The Court insisted that the government cannot by-pass the legsilature and keep ordinances alive indefinitely without enacting their provisions into Acts of legislature. *Wadhwa's* case has been taken note of in the discussion on the ordinance-making power of the State Governments [Art. 213] which is on all fours with the ordinance-making power of the Centre.

In *Gyanendra,*[63] a similar situation was presented to the Delhi High Court concerning the Central Government. Several ordinances had been reissued over and over again during the period Oct. 95 to March, 96 without being brought before Parliament. For example, the Industrial Disputes (Amendment) Ordinance, was issued on 11/10/95; it was re-issued on 5/1/96 and again on 27/3/96. Ordinarily, such a practice would be characterised as unconstitutional within the *Wadhwa* ruling, but in the instant case the court desisted from declaring the ordinances invalid accepting the government plea that Parliament had been very busy with urgent and emergent public business and so it could not find sufficient time to enact the laws to replace the ordinances. In such a situation, repromulgation of the ordinance could not be regarded as unconstitutional or illegal. In fact, in *Wadhwa,* the Supreme Court has itself recognised such a contingency.[64]

The ordinance comes into effect as soon as it is promulgated. If later the ordinance comes to an end for any reason, the ordinance does not become void *ab initio.* It was valid when promulgated and whatever transactions have been completed under the ordinance cannot be reopened when the ordinance comes to an end.

In *Venkata Reddy,*[65] in 1984, the State Government promulgated an ordinance abolishing posts of part-time village officers in the State. The ordinance was not replaced by an Act of the Legislature though it was succeeded by 4 ordinances. It was argued that the ordinance having lapsed as the Legislature did not pass an Act in its place, the posts which had been abolished should be deemed to have been revived and the issue of successive ordinances, the subsequent one replacing the earlier one did not serve any purpose. The Supreme Court rejected the argument. The Court argued that an ordinance comes into effect as soon as it is promulgated. If later the ordinance comes to an end for any reason, the ordinance

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62. See, *infra,* Ch. VII, Sec. D(ii)(c).
63. *Gyanendra Kumar v. Union of India,* AIR 1997 Del. 58.
64. See, *infra,* Ch. VII, Sec. D(ii)(c).
65. *T. Venkata Reddy v. State of Andhra Pradesh,* AIR 1985 SC 724 : (1985) 3 SCC 198.

does not become void *ab initio.* It is valid when promulgated and whatever transaction has been completed under the ordinance cannot be reopened when the ordinance comes to an end. Art. 123 or 213 does not say that the ordinance shall be void from the commencement on the Parliament/State Legislature disapproving it. It says that it shall cease to operate. It only means that the ordinance should be treated as being effective till it ceases to operate.

The ordinance in question in the instant case abolished the posts of part-time village officers. Therefore, because of the ordinance, all posts of part-time village officers stood abolished and these officers ceased to be employees of the State Government. This was an accomplished matter. Therefore, even if the ordinance ceased to operate later, what had been accomplished became irreversible. The abolition of the posts having become completed events, "these is no questions of their revival."

Elections were held for the Cuttack Municipality and 27 councillors were declared elected. A defeated candidate challenged these elections and the High Court voided them on the ground that the electoral roll had not been prepared according to law. Apprehending that on this ground, elections to municipalities other than those of the Cuttack Municipality, might also be declared void, the State Government promulgated an ordinance validating the electoral rolls, and all elections held on the basis of these rolls were declared to be valid "notwithstanding any judgment to the contrary." Later, the ordinance lapsed and no Act was enacted to replace it.

Thereafter, a writ petition was filed questioning the elections. It was argued that the ordinance being temporary in nature, the invalidity in the elections stood revived as soon as the ordinance lapsed. But the Supreme Court rejected the argument in *Orissa v. Bhupendra Kumar Bose.*[66] The Court ruled that the validation of the elections was not intended to be temporary in nature and the same did not come to an end as soon as the ordinance expired. Having regard to the object of the ordinance, and to the rights created by its 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."

An ordinance was promulgated by the President in 1996 declaring a section of the population of Assam as Scheduled Tribes. The same ordinance was repeated several times and ultimately it lapsed without Parliament passing an analogous Act. The High Court of Gauhati ruled in *Maitreyee Mahanta v. State of Assam*[67] that as Parliament did not pass the necessary law, the ordinance would lapse and, accordingly, the rights vested in the communities by the ordinance would also lapse.

(iii) EXECUTIVE FUNCTIONS

The Central Executive is entitled to exercise executive functions with respect to all those subjects which fall within the legislative sphere of Parliament [Art. 73].[68] It can also exercise such executive functions as are exercisable by the Government of India under any treaty or agreement.

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66. AIR 1962 SC 945 : 1962 Supp (2) SCR 380.
67. AIR 1999 Gau. 32.
68. See, Chs. X and XI, *infra.*

A few provisions in the Constitution confer on the President, *i.e*., the Central Executive, some specific executive powers, such as *inter alia*:

(i) the power to appoint various high officials like the Attorney-General [Art. 76(1)][69], Comptroller and Auditor-General [Art. 148(1)],[70] a State Governor [Art. 155],[71] Members of the Union Public Service Commission [Arts. 315-323],[72] Election Commissioners [Art. 324(2)],[73] *etc*.; The Constitutional scheme, is that when a Constitutional post is required to be filled up by a person having the qualification specified therefor, he alone would perform the duties and functions, be it Constitutional or statutory, attached to the said office. The Constitution does not envisage that such functions be performed by more than one person. The office of the Advocate General is a public office. He not only has a right to address the Houses of Legislature under Art. 177 but also is required to perform other statutory functions in terms of Section 302 of Cr. P.C.

The question of interpretation of a Constitution would arise only in the event the expressions contained therein are vague, indefinite and ambiguous as well as capable of being given more than one meaning. If by applying the golden rule of literal interpretation, no difficulty arises in giving effect to the constitutional scheme, the question of application of the principles of interpretation of a statute would not arise. Thus the state in exercise of its jurisdiction under Article 162 is competent to appoint a lawyer of its choice and designate him in such manner as it may deem fit and proper. Once it is held that such persons who are although designated as Additional Advocates General are not authorised to perform any constitutional or statutory functions, indisputably, such appointments must be held to have been made by the State in exercise of its executive power and not in exercise of its constitutional power.[74]

(ii) the power to appoint Commissions, like Inter-State Council [Art. 263],[75] Finance Commission [Art. 280],[76] Commission for Scheduled Tribes [Art. 339(1)];[77], and Backward Classes [Art. 340(1)];[78] Official Language Commission [Art. 344(1)];[79]

(iii) power to enter into contracts on behalf of the Indian Union [Art. 299];[80]

(iv) power to issue directions to the States in certain circumstances.[81]

Besides the above, Art. 53 confers executive power on the President in a general way. Thus, under Art. 53, the Central Executive has a large unspecified reservoir of powers and functions to discharge. The Constitution makes no attempt to define 'executive power', or to enumerate exhaustively the functions to be exercised by the Executive, or to lay down any test to suggest as to which activity

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69. *Infra*, Sec. G.
70. *Supra*, Ch. II, Sec. J(ii).
71. *Infra*, Ch. VII, Sec. A.
72. *Infra*, Ch. XXXVI.
73. *Infra*, Ch XIX.
74. *M. T. Khan v. Govt. of A.P.*, (2004) 2 SCC 267 : AIR 2004 SC 2934.
75. *Infra*, Ch. XIV, Sec. C.
76. *Infra*, Ch. XI, Sec. L.
77. *Infra*, Ch. XXXV, Sec. G.
78. *Infra*, Ch. XXXV, Sec. G.
79. *Infra*, Ch. XVI, Sec. B.
80. *Infra*, Ch. XXXIX, Sec. C.
81. Arts. 256, 257, 339(2); See **further** on this point, Chs. XII, XIII.

or function would legitimately fall within the scope of the executive power. The truth is that the executive power of a modern state is not capable of any precise or exhaustive definition.

The government in exercise of its executive power is charged with the duty and the responsibility of carrying on the general administration of the state. The scope of the executive power may be said to be residual, that is to say, any function not assigned to Parliament or the Judiciary may be performed by the Executive[82], or governmental functions that remain after the legislative and judicial functions are taken away.[83]

The Supreme Court has observed in *Madhav Rao* : "The functions of the state are classified as legislative, judicial and executive; the executive function is the residue which does not fall within the other two functions."[84] To the same effect is the following observation of MUKHERJEA, C.J., in *Ram Jawaya:*[85]

> "It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislature and judicial functions are taken away."

A primary function of the Executive is to administer and execute the laws enacted by Parliament and maintain law and order. But executive function is not limited only to this. A modern state does not confine itself to a mere collection of taxes, maintaining law and order and defending the country from external aggression. It engages in multifarious activities. The Executive operates over a very large area and discharges varied and complex functions.

In a parliamentary type government, the Council of Ministers enjoys a majority support in the Legislature, and even controls the same to a large extent. It directs foreign policy; it enters into treaties with foreign countries;[86] it carries on and supervises general administration; promotes socio-economic welfare of the people. It formulates and executes policies, and changes policies from time to time to suit changing circumstances;[87] it initiates legislation. In such a context, the Executive is not confined to discharging only those functions which have been specifically conferred on it by the Legislature or the Constitution.

Nor can it be said that before the Executive can act there ought to be a law to back it and that it cannot do anything except administering the law. So long as the Executive enjoys the majority support in the Legislature, it can go on discharging its policies and no objection can be taken on the ground that a particular policy has not been sanctioned by legislation. This, however, is subject to some limitations, *e.g.,* the Executive cannot ignore a constitutional prohibition or provision.[88] Executive power must be exercised in accordance with the Constitution.[89] Thus, it cannot spend money from the Consolidated Fund without an Ap-

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82. *Jayantilal Amarathlal v. F.N. Rana,* AIR 1964 SC 648 : (1964) 5 SCR 294.
83. *Chandrika Jha v. State of Bihar,* AIR 1984 SC 322 : (1984) 2 SCC 41.
84. *Madhav Rao Scindia v. Union of India,* AIR 1971 SC 530, 565 : (1971) 1 SCC 85.
85. *Rai Sahib Ram Jawaya Kapur v. State of Punjab,* AIR 1955 SC 549 : (1955) 2 SCR 225.
86. *Maganbhai v. Union of India,* AIR 1969 SC 783 : (1970) 3 SCC 400; *Satwant Singh v. Asstt. Passport Officer,* AIR 1967 SC 1836 : (1967) 3 SCR 525.
87. *A.S. Sangwan v. Union of India,* AIR 1981 SC 1545 : 1980 Supp SCC 559.
88. *Wazir Chand v. State of Himachal Pradesh,* AIR 1954 SC 415 : (1955) 1 SCR 408.
89. *U.N.R. Rao v. Indira Gandhi,* AIR 1971 SC 1002 : (1971) 2 SCC 63.

propriation Act,[90] or impose a tax without law: it cannot encroach upon the sphere assigned to any other instrumentality like Parliament or the Judiciary.[91]

The Executive cannot act against a statute or exceed its statutory powers;[92] if there exists a law on a particular matter, the Executive must act in accordance with it.[93] Also, the Executive cannot infringe the rights of private individuals without legal sanction. Where rights of a private person are affected prejudicially, executive action could be taken only if supported by law. Thus, a restriction requiring a person to reside in a specified place cannot be imposed merely by an executive order without the backing of the law.[94]

The State of Uttar Pradesh amended Section 24 of the Code of Criminal Procedure so that the State was not required to consult the High Court before appointing a Public Prosecutor for the High Court. The amendment was made on the ground that similar provisions exist in the Legal Remembrancer Manual. The Supreme Court held that the Legal Remembrancer Manual is merely a compilation of executive orders and is not a 'law' within the meaning of Article 13 of the Constitution of India and that *"a law cannot be substituted by executive instructions which may be subjected to administrative vagaries"*.[95]

If to pursue a policy, the Executive needs some additional powers over what it already possesses generally under the prevailing law or the Constitution, then a specific law will be needed for the purpose. But, apart from such matters, it cannot be said that in order to undertake any function, such as, entering into any trade or business, the Executive must obtain prior legislative sanction.

This question regarding the scope of the executive power has been elaborately discussed by the Supreme Court in *Ram Jawaya v. State of Punjab*.[96] The recognised schools in Punjab used only such text books as were prescribed by the Education Department. In 1950, the Government embarked on the policy of nationalising text books and, thus, took over the work of printing and publishing them. The author of the book selected by the Government for the purpose by contract vested the copyright of the book in the Government in lieu of royalty. The scheme was challenged on the ground, *inter alia*, that the Executive could not engage in any trade or business activity without any law being passed for the purpose.

The Supreme Court negatived the contention saying that the expenses necessary to carry on the business of publishing text books had been approved by the Legislature in the Appropriation Act. The Government required no additional power to carry on the business as whatever was necessary for that purpose, it could secure by entering into contracts with authors and other people. No private right was being infringed as the publishers were not being debarred from publishing books. In the circumstances, the carrying on of the business of publishing

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90. *Supra*, Ch. II, Sec. J(ii)(g).
91. *Pratap Singh v. State of Jharkhand*, (2005) 3 SCC 551 : AIR 2005 SC 2731.
92. *Madhav Rao v. Union of India*, AIR 1971 SC 530 : (1971) 1 SCC 85; *A Sanjeevi Naidu v. State of Madras*, AIR 1970 SC 1102 : (1970) 1 SCC 443.
93. *Guruswamy v. State of Mysore*, AIR 1954 SC 592 : (1955) 1 SCR 305.
94. *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332; *Hindustan Times v. State of UP*, 2003 (1) SCC 591 : AIR 2004 SC 3800.
95. *State of U.P. v. Johri Mal*, (2004) 4 SCC 714 : AIR 2005 SC 2731,
96. AIR 1955 SC 549 : (1955) 2 SCR 225. See, *supra*.

text books without a specific law sanctioning the same was not beyond the competence of the Executive.[1]

Following *Ram Jawaya*, the Supreme Court has held that the government can prescribe text books for schools in the exercise of its executive power so long as it does not infringe the rights of any one.[2]

In a number of cases, courts have reiterated the principle that the Executive can engage in several activities in exercise of its executive powers without any prior legislation. In fact, the Executive is competent to represent the State in all matters international and may by agreement, convention or treaties incur obligations which in international law are binding on the State. But the obligations are not by their own force binding upon Indian nationals. In 1969, the Supreme Court, in keeping with the classical dualist view, said "[I]n India the making of a law by Parliament is necessary when the treaty or agreement operates to restrict the rights of citizens or modifies the laws of the State."[3]

That the Government can engage in trading activities, is made clear by Article 298.[4] By virtue of Art. 298, the executive power also includes—(a) the carrying on of trading opera-tions; (b) the acquisition, holding and disposing of property; and (c) the making of contracts for any purpose.[5]

The Government can make appointments under its executive power without there being a law or rule for that purpose.[6] However, if rules have been made under Art. 309, then the government can make appointments only in accordance with the rules. Having made the rules, the executive cannot then fall back upon its general executive power under Art. 73.[7]

The Government can also issue administrative directions to regulate promotions to selection grades.[8] The Government cannot amend or supersede statutory rules, if any, by administrative instructions, but if the rules are silent on any particular point, the Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.[9] "The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law but would only supplement the law."

In *Union of India v. Naveen Jindal*[10] the prohibition to fly the National flag under the Flag Code was held to be unconstitutional on two grounds. First, the field was already occupied by The Emblems and Names (Prevention of Improper

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1. Also see, *Sarkari Sasta Anaj Vikreta Sangh v. State of Madhya Pradesh*, AIR 1981 SC 2030 : (1981) 4 SCC 471; *Bishambar v. State of Uttar Pradesh*, AIR 1982 SC 33 : (1982) 1 SCC 39.

2. *Naraindas Indurkhya v. State of Madhya Pradesh*, AIR 1974 SC 1232 : (1974) 2 SCC 788.

3. *Maganbhai v. Union of India*, (1970) 3 SCC 400 : AIR 1969 SC 783. See also *Union of India v. Azadi Bachao Andolan*, (2004) 10 SCC 1, 23 : AIR 2004 SC 1107.

4. *Infra*, Ch. XII, Sec. C. Also see, *Jayantilal v. Rana*, AIR 1964 SC 648 : (1964) 5 SCR 294.

5. See, *infra*, Ch. XXXIX, Sec. C.

6. *B.N. Nagarajan v. State of Mysore*, AIR 1966 SC 1942 : (1966) 3 SCR 682. Also see, *infra*, Ch. XXXIV.

7. *J.K. Public Service Commission v. Narinder Mohan*, AIR 1994 SC 1808 : (1994) 2 SCC 630.

8. *Sant Ram v. State of Rajasthan*, AIR 1967 SC 1910 : (1968) 1 SCR 111.

9. *Fernandez, G.J. v. State of Mysore*, AIR 1967 SC 1753 : (1967) 3 SCR 636.
Also see, *infra*, under *Mandamus*, Ch. VIII, Sec. E and Ch. XXXVI, Sec. B.
For a detailed discussion on directions, see, JAIN & JAIN, *Principles of Administrative Law*, Ch. III.

10. (2004) 2 SCC 510 : AIR 2004 SC 1559.

Use) Act, 1950 and the Prevention of Insults to National Honour Act, 1971and could not be supplanted by the Flag Code which only contains the executive instructions of the Central Government and second, the right to fly the National flag was a fundamental right under Article 19(1)(a); the Flag Code is not a law within the meaning of Article 13(3)(a) of the Constitution of India for the purpose of Clause (2) of Article 19 and as such could not restrictively regulate the free exercise of the right of flying the National Flag.

Thus, it is not always necessary to have a law before the Executive can function nor are its powers limited merely to the carrying out of the laws. However, once a law is passed to cover any area of the activities of the Executive, the executive power can then be exercised only in accordance with such a law insofar as it goes.

Article 73 defines the extent of the executive power of the Centre. "Subject to the provisions of the constitution", the executive power of the Centre extends to—

(i) the matters with respect to which Parliament has power to make laws;

(ii) the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement.

The principle underlying (i) above is that executive power is co-extensive with legislative power. So, the extent of the executive power of the Centre is co-extensive with Parliament's legislative power. But in the concurrent area, where both Parliament as well as the State Legislatures can make laws, Centre's executive power extends to this area only when either the Constitution or a law made by Parliament expressly provides for.[11] The expression "agreement' in the second clause of Article 73 has been held as referable to Article 299.[12]

It may not be out of place to mention here that to-day, by law, multifarious functions of all types—administrative, *quasi*-judicial, legislative—are being conferred on the executive-administrative organs, and such is the plethora of functions exercised by these organs that a whole branch of law, known as the Administrative Law, has now come into existence. The primary purpose of this newly developing jurisprudence is to study the functions of the Executive, the manner in which, and subject to what controls, are these exercised, and what safeguards are available to those whose rights may be infringed by administrative action.[13]

E. RULES OF BUSINESS

The essence of collective responsibility is that the Cabinet is responsible to the Parliament for all acts of the Ministers. But that does not mean that the Cabinet itself can attend to numerous matters that come up before the government or that the Cabinet itself ought to take each and every decision. As the Supreme Court has observed : "The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all

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11. The matter has been discussed further in Ch. XII, *infra*.

12. *Sharma Transport v. Govt. of A.P.,* (2002) 2 SCC 188 : AIR 2002 SC 322.

13. M.P. JAIN, *A TREATISE ON ADMINISTRATIVE LAW;* M.P. JAIN, *CASES AND MATERIALS ON INDIAN ADMINISTRATIVE LAW.*

or any of the governmental functions."[14] The main function of the Council of Ministers is to settle the major policies and programmes of the government.

Similarly, an individual Minister is responsible to the Parliament for every action taken or omitted to be taken in his Ministry. This again is a political responsibility. The Minister is not expected to burden himself with day to day routine administration; he does not have to take each and every decision himself. His main function is to lay down policies and programmes of his ministry subject to which decisions in individual cases are taken by the officials in the Ministry.

Although under Art. 77(1), an order is issued in the name of the President, it does not mean that every order is passed by him personally. Even when a constutitonal or statutory provision specifically vests power in the President, the power is not to be exercised by the President himself.

Article 77(3) says *inter alia :* "The President shall make rules for the more convenient transaction of the business of the Government of India". This means that the decisions of the Government of India are not always taken personally by the President. The decision may be taken by the Minister concerned or even by the official authorised to take the decision under the Rules of Business made by the President under Art. 77(3). The decision taken by the officer authorised under the Rules of Business is regarded as the decision of the Government of India. The wheels of the government will stop grinding if all decision were required to be taken by the President or even by the Ministers.[15]

This also means that an order issued in the name of the President, not being his personal order, cannot claim immunity under Art. 361 from judicial review. As the Supreme Court has observed in *Common Cause.*[16]

> "The authenticity, validity and correctness of such an order can be examined by this Court in spite of the order having been expressed in the name of the President. The immunity available to the President under Art. 361 of the Constitution cannot be extended to the orders passed in the name of the President under Art. 77(1) or Art. 77(2) of the Constitution".

To smoothen the running of the administration, Art. 77(3) makes two crucial provisions :

(i) to authorise the President to make Rules for the more convenient transaction of the government business;

(ii) to allocate the said business among the Ministers.

The Rules made under (i) are known as the Rules of Business. These Rules are made by the Executive in the name of the President. These rules authorise officials in the department to take various decisions. Thus, most of the decisions within a Ministry are taken by the officials authorised by the Rules of Business. The Minister exercises over-all control over the working of his department; he can call for any file, pass an order or issue directions, but actual decisions in a large number of cases are taken by officials authorised by the Rules of Business on behalf of the government.

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14. *Sanjeevi v. State of Madras,* AIR 1970 SC 1102, 1106 : (1970) 1 SCC 443.

15. *Ram Jawaya Kapur v. State of Punjab,* AIR 1955 SC 549 : (1955) 2 SCR 225; *Samsher Singh v. State of Punjab,* AIR 1974 SC 2192 : (1974) 2 SCC 831; *G.D. Zalani v. Union of India,* AIR 1995 SC 1178, 1189 : 1995 Supp (2) SCC 512; *Common Cause, A Regd. Society v. Union of India,* AIR 1999 SC 2979, 2990 : (1999) 6 SCC 667.

16. *Common Cause, ibid.,* at 2991.

When a minister puts his signature with the endorsement file returned, such signature meant his approval.[17]

When a decision is taken by such an authorised officer, it becomes the decision of the government. The validity of any such decision taken cannot be challenged on the ground that it is not the decision of the Minister. As the Supreme Court has emphasized in *Sanjeevi:*[18] "When those officials discharge the functions allotted to them, they are doing so as limbs of the Government and not as persons to whom the power of the Government had been delegated". Similarly, in *Samsher*,[19] the Court has stated that the decision of any Minister or officer under the rules of business made under Art. 77(3) is the decision of the President for these rules do not provide for any delegation.

These rules have statutory force and are binding. Therefore, sanction for prosecution of an employee of the Central Government under the Prevention of Corruption Act was held not valid when it was granted by a Ministry other then the one authorised to do so under the Rules of Business.[20]

Under the Rules of Business of the Maharashtra Government, both the Home Secretary and the Home Minister can deal with a matter of preventive detention. The order of detention was made by the Secretary, but the representation of the detenu was considered and rejected by the Home Minister. There was nothing wrong in this as both the Secretary and the Minister could act on behalf of the State Government.[21]

The Supreme Court has ruled in *State of Haryana v. P.C. Wadhwa*[22] that the Business Rules cannot override a provision made by an Act or by any statutory rule.[23]

F. INDIAN V. U.S. FORMS OF GOVERNMENT

The functionary at the head of the Indian Union, like that of the U.S.A., is called the President, but India's form of government is very different from that of the U.S.A. India has parliamentary, and not presidential, form of government. India's form of government differs substantially from that of America. Beyond the identity of names between the Indian and the American Presidents, there is not much in common between them.

The position of the President of India is more akin to the British monarch rather than the American President. He is the head of the state and only a formal, not an effective, head of the Executive. The effective repository of the executive power is the Council of Ministers. On the other hand, the U.S. President is both

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17. *Tafcon Projects (I) (P) Ltd. v. Union of India*, (2004) 13 SCC 788 : AIR 2004 SC 949.
18. *Sanjeevi*, *supra*, footnote 14, at 1107.
19. *Samsher v. State of Punjab*, AIR 1974 SC 2194, 2198, 2202 : (1974) 2 SCC 831.
20. *State of Rajasthan v. A.K. Datta*, AIR 1981 SC 20.
21. *Raverdy Marc Germain Jules v. State of Maharashtra*, AIR 1982 SC 311 : (1982) 3 SCC 135. Also, *Smt. Masuma v. State of Maharashtra*, AIR 1981 SC 1753 : (1981) 3 SCC 566; *Kavita v. State of Maharashtra*, AIR 1981 SC 1641 : (1981) 3 SCC 558; *Sanwal Ram v. Addl. District Magistrate*; AIR 1982 Raj 139 : (1987) 2 SCC 602; *R.J. Singh v. Delhi*, AIR 1971 SC 1552 : (1970) 3 SCC 451; *infra*, Chs. VII and XXVII.
22. AIR 1987 SC 1201 : (1987) 2 SCC 602. See also *Union of India v. Naveen Jindal*, 2004 (2) SCC 510 : AIR 2004 SC 1559.
23. For further discussion on the Rules of Business, see, *infra*, Ch. VII, Sec. B.

the head of the state as well as the effective head of the Executive. The system is known as the presidential form of government because the President is the chief executive. The administration of the country is vested in him.

The U.S. Constitution makes the President responsible for ensuring that the laws of the country are faithfully executed. He alone is vested with the power to appoint and remove executive officers and, thus, can effectively control the government departments.

The President has under him Secretaries of State in charge of different executive departments who are appointed by him and who are his personal advisers. He is not bound to accept the advice tendered by them; he enjoys ultimate power of decision and therefore, has complete political responsibility for all executive action. The President dominates the Cabinet completely as the Secretaries of State hold their offices entirely at his pleasure and are accountable to him. They are merely the instruments through whom the President's policy is carried out. As has been aptly said, "The cabinet is not a device for sharing responsibility among a group; it is a necessary result of the President's inability to supervise all affairs directly."[24]

The Indian President, on the other hand, acts generally on the advice of the Ministers. The U.S. President is free to dismiss any of his Secretaries as and when he likes. The President of India has a formal power to that effect but exercises it on the advice of the Prime Minister, or when the Cabinet has forfeited the confidence of the Lok Sabha. The Secretaries of State in the U.S.A., on the other hand, are neither responsible to Congress, nor are its members, nor do they function on the basis of collective responsibility. This is very different from the underlying principles on which the Executive functions in India.

The truth of the matter is that America hardly has a Cabinet corresponding to the classic idea of a Cabinet in the parliamentary form of government. "Because of his unfettered power of removal over them and the fact that his tenure of office is not in any way dependent upon the effect which his dismissal of the Cabinet members may have upon the Congress, the President is able to dominate his Cabinet to an extent which would be almost impossible in the case of a Prime Minister."[25]

The presidential form of government is based on the principle of Separation of Powers between the executive and the legislative organs. The doctrine of Separation of Powers, ascribed to Montesquieu, a Frenchman, exercised a potent influence on the public mind in the 18th century when the American Constitution was drafted. It envisaged that the legislative, executive and judicial functions in a state ought to be kept separate and distinct from each other. There ought to be separate organs for each, working together, but none of them should be dependent on, and discharge the function belonging to, the other, as for example, the Executive should have no legislative or judicial power.[26]

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24. BOWIE AND FRIEDRICH, *STUDIES IN FEDERALISM*, 65.

25. SCHWARTZ, *AMERICAN CONST. LAW*, 111. Also see, Corwin, *THE CONSTITUTIION & WHAT IT MEANS TO-DAY*, 111-60 (1973); CORWIN, *THE PRESIDENT, OFFICE AND POWERS.*

26. JENNINGS, *LAW AND THE CONST.*, App. 1., 280-304 (1959); FINKELMAN, SEPARATION OF POWERS, 2 *Toranto* L.J., 313; VANDERBITT, *THE DOCTRINE OF SEPARATION OF POWERS*; ILBERT, *PARLIAMENT*, 193; ROSSITER, *AMERICAN PRESIDENCY.*

Till recently, developments in the area of Administrative Law were progressively eroding the efficacy of the doctrine of Separation of Powers in the U.S.A. See Laurence Tribe : American Constitutional Law (2nd ed.) 18 (1988).

The thesis underlying the doctrine is that the merger of all powers in one body will lead to autocracy and negation of individual liberty. Basing itself on this doctrine, the American Constitution vests the executive power in the President who is elected for a fixed term of four years; legislative power is vested in the Congress, and the judicial power is vested in a system of courts with the Supreme Court at the apex.

An implication of the doctrine of Separation is that each of the three branches of government ought to be composed of different persons. Neither the President nor any of his Secretaries of State can be a member of the Congress. A member of the Congress can join the government only after resigning his membership therein.

While basically the U.S. Constitution is designed on the basis of the principle of Separation of Powers, the framers of the U.S. Constitution also introduced, to some extent, the principle of checks and balances. The framers adopted both these strategies with a view to ensure a weak government so that the government may not act in an arbitrary manner. The doctrine of Separation weakens the government by dividing its powers, for a divided government is intrinsically weaker than a government having all powers concentrated therein.

The principle of checks and balances further limits government power. The underlying idea is that if one organ of government is left free to exercise the power assigned to it without any control, it may run amok with its power and act arbitrarily in exercising its assigned power. For example, if the Congress is left free to make any law it likes, it may make harsh or unjust laws. Therefore, the doctrine of checks and balances envisages that one organ of government be controlled, to some extent, by the other two organs. For example, the President may veto a bill passed by the two Houses of Congress and, thus, the President controls the Congress so that it may not pass arbitrary or discriminatory legislation. But President's veto may be overridden by the two Houses passing the bill in question again by a 2/3 vote in each House. Also, the Supreme Court has power to declare an Act *passed* by the Congress as unconstitutional, but the Judges of the Supreme Court are appointed by the President with the consent of the Senate.

The Congress through its committees continuously probes into the functioning of the government departments. Similarly, the Secretaries of State are appointed by the President with the consent of the Senate. In the U.S.A., the Executive and Legislative organs are kept separate from each other.[27]

The parliamentary system, on the other hand, is based on an intimate contact, a close liaison, or co-ordination, between the Executive and the Legislative wings. India recognises no doctrine of Separation between them. As the Supreme Court has stated, there may be in India a differentiation and demarcation of functions between the Legislature and the Executive, and, generally speaking, the Constitution does not contemplate that one organ should assume the functions belonging essentially to the other organ, yet, nevertheless, there is no separation between them in its absolute rigidity.[28]

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27. Also see, Delegation of Legislative Powers, *supra*, Ch. II, Sec. N.

28. *Ram Jawaya v. State of Punjab, supra*, footnote 15. Also see, *In re, Delhi Laws Act, 1912*, AIR 1951 SC 332 : 1951 SCR 747; *supra*, Ch. II, Sec. N.

The Indian Constitution itself does not indicate a separation of powers as is commonly understood. There is, to a large extent, a parallelism of power, with hierarchies between the three organs in particular fields. It is this balance of hierarchies which must be maintained by each organ subject to checks by the other two. To illustrate this is the requirement for the executive to fill the legislative vacuum by executive orders[29]. Where there is inaction even by the executive for whatever reason, the judiciary can step in and in exercise of its obligations to implement the Constitution provide a solution till such time as the legislature or the executive act to perform their roles either by enacting appropriate legislation or issuing executive orders to cover the field[30]. Similarly while the legislature and executive may reject a judicial decision by amending the law, the judiciary may in turn test that law against the touchstone of the Constitution.

The U.S. Executive does not depend for its survival on a majority in the Congress as the President has a fixed tenure of four years. He cannot be dismissed before the expiry of his term by an adverse vote in the Congress. He can be removed only by the rare process of impeachment. Correspondingly, the President has no power to dissolve the Congress. The House of Representatives has a fixed term of two years. The American system produces a stable government having a fixed tenure because it is independent of the legislative whim. It has happened often that the President may belong to one political party, but the majority in either House or both Houses, may belong to another political party.

Members of Congress enjoy a good deal of freedom to oppose or support the programme and policies proposed by the President even when the majority in the Houses of Congress may belong to the same party as the President. On the other hand, the distinctive feature of the parliamentary system is that the Cabinet depends on the majority in the Lok Sabha, and holds office so long as it enjoys the confidence of the majority in the House which can depose the Cabinet at its pleasure, but the Cabinet has the corresponding right to dissolve the House. In a parliamentary system, the government has no fixed tenure as it may have to go out any moment the majority in Parliament withdraws its support.

The parliamentary system works best with two strong and disciplined political parties with one party having a clear majority. If the Legislature is fragmented into many small groups, the Cabinet has to be based on a coalition of parties and the Cabinet becomes unstable as it is constantly exposed to the danger of disintegration due to disagreements amongst the members of the coalition, or the constantly changing alignments of various parties in the Legislature, or because of the danger of defection of members from one party to another, and even the Executive's power to dissolve the House may not be effective to create the necessary discipline for a stable government in such a situation.

The American Executive not being directly accountable to the Legislature, tends to become less responsible to it than the parliamentary government which has constantly to seek the majority support. In America, the responsibility of the

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29. Articles 73 and 162.

30. Articles 32 and 226: *Vineet Narain v. Union of India*, (1998) 1 SCC 226 : AIR 1998 SC 889, "to fill the void in the absence of suitable legislation to cover the field..[i]t is the duty of the executive to fill the vacuum by executive orders…and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations…to provide a solution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field".

Executive is assessed by the electorate once in four years when election is held for the Presidential office. In India, on the other hand, the responsibility of the Executive is assessed daily by the Legislature through resolutions, questions, debates, *etc.*, and periodically by the electorate through general elections.

Though the Executive in the U.S.A. is constitutionally not directly accountable to the Legislature, yet it will be wrong to suppose that the Legislature has absolutely no control over the Executive. The Congress can bring indirect pressure over the Executive through its powers to levy taxes, make appropriations for government expenses, enact legislation, investigate executive work and policies through its committees and the Senate's power to confirm treaties and appointments. On the other hand, the President also is not completely powerless in relation to Congress. Though he cannot dissolve the Congress yet he does exercise some influence over it through his power to send messages and veto legislation; the efficacy of his veto, however, is limited as it can be overridden by the vote of 2/3rd members in each House of Congress. On the whole, therefore, legislative control over the Executive and *vice versa* is much weaker in the U.S.A. than it is in India where the Legislature and the Executive can dissolve each other.

The executive-legislative relation is one of co-ordination in a parliamentary government.[31] All Ministers are members of Parliament and this creates an intimate relationship between the two organs. The Executive is in a strong position to carry the Legislature along with it in its programmes and policies. The executive-legislative conflict or deadlock is resolved soon, for in that case either the Cabinet must resign, or, the House be dissolved and fresh elections held. By its power to dissolve the lower House and submit the issue to the electorate, the Executive exercises a substantial check on frivolous disagreements amongst its own party members as well as those in the opposition. This power is an essential counter-weight to the power of the Legislature to force the resignation of the Cabinet. The Ministers effectively influence the deliberations of the Legislature; in fact, the Cabinet acts as an effective leader of the Legislature.

The position in the U.S.A. is entirely different where due to the doctrine of Separation of Powers,[32] formal means of co-ordination between the Executive and the Legislature are lacking. No member of the Executive participates immediately in the legislative process in the Congress. Party discipline in Congress is loose and members enjoy considerable freedom to oppose or support any proposal even though it may be a part of the President's programme. President's leadership of the Congress is much looser than that of the Prime Minister in a parliamentary system mainly because the President has no power to dissolve the Congress or to participate in legislative deliberations. He rarely has at his disposal the almost automatic legislative majority which is available to the government in a parliamentary system. He does not have the means available to the Prime Minister to enforce disciplined voting along party lines.

The President, unlike the Prime Minister, cannot directly ensure that the measures which he desires will be enacted by the Congress. This may happen even when the President and the majority in the Congress belong to the same political party. But lack of co-ordination between the Executive and the Legislature in the U.S.A. may be heightened if the President and the majority in the Houses

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31. BROGAN in *PARLIAMENT—A SURVEY*, (ed. Campion) 74-75; SCHWARTZ, *op. cit*., 98.
32. See, *supra*, pp. 256-257 for discussion on this doctrine.

belong to different political parties as happens quite often. Sometimes the impasse between the President and the Congress can be resolved only when fresh elections are held in due course of time.[33]

In the Constituent Assembly some members advocated presidential form of government for India. Their hypothesis was that the presidential form of government leads to a strong and stable government while a parliamentary government constitutes a weak, unstable and vaccilating government, the reason being that the Ministers depend on their party members for support. Ultimately, however, the choice was made in favour of the parliamentary form, mainly because Indians were somewhat familiar with the system as in some form or other, such a system had been in operation in the country during the pre-Constitution era.

Further, as Ambedkar emphasized, in combining stability with responsibility, the Constitution-makers preferred the system of daily assessment of responsibility to the other system of periodic assessment. They also wanted to avoid the Legislative-Executive conflicts and friction such as arise in the presidential system. The framers of the Constitution thought that an infant democracy could not afford to take the "risk of a perpetual cleavage, feud or conflict or threatened conflict" between the Executive or Legislative organs. They preferred a system where the Executive being a part of the Legislature is in a position to give guidance to it and where both co-operate with each other. There is 'confusion of responsibility' and 'not necessarily a clear direction of policy'[34] in the U.S.A., but this is not so in a parliamentary system.[35]

Should India adopt the Presidential system instead of the present-day Parliamentary system? This question has been debated from time to time. India is presently undergoing a phase of coalition governments at the Centre because no single party has a majority in the Lok Sabha, and a number of disparate parties have to come together to form a coalition to form the Cabinet.

With the advent of the phase of coalition governments, the trend of governmental instability has set in. A coalition government is intrinisically unstable because of contradictory policies of the parties coming together to form the coalition. During 1995-1998, three governments fell at the Centre. The parties do not have a common outlook and it becomes a herculean task for the Prime Minister to arrive at a consensus on any point. Frequent elections to Lok Sabha are also not possible in the context of India with its huge population. In this context, it has been suggested that India should opt for the presidential system.

It is indeed a very difficult choice as both systems have their advantages and disadvantages. A liberal and democratic presidential system (such as prevails in the U.S.A.) has the advantage of enabling the President to appoint experts as his Ministers; he can select persons of competence and integrity as his Ministers without political considerations for he will not be bound to appoint only members of Parliament as Ministers as happens in the parliamentary system. The Prime Minister has an extremely limited choice in the matter of appointing Ministers as

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33. ALLEN, *LAW AND ORDERS*, 19; BERMAN, The Legislative Process in the U.S. Congress, II(2). *JI of Constitution & Parl. Studies*, 34 (1968).

34. GHOSH, *supra*; IV *CAD*, 544, 573, 580, 635, 968, 984 and 985; VII *CAD*, 32, 33, 243, 263, 266, 295; MORRIS-JONES, *op. cit*., 117; AUSTIN, *THE INDIAN CONSTITUTION*, 116.

35. LASKI, *PARL. GOVT. IN ENG*., 224 (1959).

he can only appoint members of Parliament as Ministers and there may not be many experienced and expert members in Parliament.

The presidential system may also be an answer to the present-day constitutionally and politically immoral system of defections to serve personal interests,[36] since in a presidential system the life of the Cabinet no longer depends on parliamentary majority. The President is elected directly by the people and holds office for a fixed tenure. This results in stability of the government.

In the presidential system, the President enjoys a fixed tenure and he does not depend on majority support in the Legislature, and this results in government stability. The President may be freer to adopt policies on their merits rather than adopt populist measures. The Legislature also has more say in the governance of the country and may have more control over the administration.

However the presidential system as it prevails in the U.S.A. has its own problems, the major problem being lack of co-ordination between the Executive and the Legislature resulting in fragmented policies. Also, in a Parliamentary system, different interests may have an opportunity to participate in the government.

The general public opinion (and even of political parties) by and large does not favour a change from parliamentary to the presidential system. If India seeks to adopt the presidential system, the system will have to be so devised as to promote better co-ordination between the Executive and the Legislature than what exists in the U.S.A. This means that the system has to incorporate some features of both the presidential and parliamentary systems. Then, there is another big problem to consider : should the presidential system be adopted at the Centre only or in the States as well?

Thus, before a change can be thought of, there are many delicate issues to be considered. A thorough study needs to be made of the various models of the presidential system functioning in the U.S.A., France, Switzerland and Sri Lanka. The touchstone should be to promote better, more effective and moral government, but less afflicted by narrow and parochial vested interests.

G. ATTORNEY-GENERAL FOR INDIA

The President is to appoint a person who is qualified to be appointed a Supreme Court Judge to be the Attorney-General for India [Art. 76(1)]. He holds office during the President's pleasure, and receives such remuneration as may be determined by him [Art. 76(4)].

The Attorney-General gives advice to the Government of India upon such legal matters as may be referred, and performs such other duties of a legal character as may be assigned, to him by the President from time to time [Art. 76(3)]. He also discharges the functions conferred on him by or under the Constitution or any other law [Art. 76(3)].

According to the rules made by the President,[37] the Attorney-General, in addition, is required to appear on behalf of the Government of India in all cases in the Supreme Court in which the Government of India is concerned; also, he represents the Government of India in any reference made by the President to the Su-

36. On Defections, see, *supra,* Ch. II, Sec. F.
37. See Notification, 1950, S.C. J.JI. Sec.

preme Court under Art. 143.[38] The Government of India may also require him to appear in any High Court in any case in which the Government of India is concerned.

In the performance of his duties, the Attorney-General has the right of audience in all courts in India [Art. 76(3)]. He has the right to take part in proceedings of either House of Parliament, or their joint sitting, and any parliamentary committee of which he may be named as a member, but he does not have a right to vote under this provision [Art. 88].[39] He enjoys all the privileges which are available to a member of Parliament.[40]

In Britain, the appointment of the Attorney-General is 'political' in nature in the sense that it is conferred on a successful barrister who is a supporter of the party in power. He has sometimes been a member of the Cabinet though "it is generally regarded as preferable that he should remain outside the Cabinet as the Government's chief legal adviser."[41] O. Hood Phillips observes :[42]

> "The better opinion is that the Attorney-General should not be in the Cabinet because of his *quasi*-judicial functions with regard to prosecutions, and also because it is desirable to separate the giving of advice from those who decide whether to act on the advice. Indeed it must be open to question in view of his unfettered discretion to refuse to initiate proceedings and his power to terminate criminal proceedings whether the appointment should be non-political".

According to the practice followed in India so far, the Attorney-General is appointed on the basis of professional competence and not on political considerations. He is a non-party man, is appointed because of his competence as a lawyer and he is not a member of the Cabinet.

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38. *Infra*, Ch. IV, Sec. F.
39. *Supra*, Ch. II, Sec. G(h).
40. Art. 105(3); *supra*, Ch. II, Sec. L.
41. WADE & PHILLIPS, *op. cit.*, 333.
42. *CONSTITUTIONAL & ADM. LAW*, 332.