CHAPTER 11

THE UNION EXECUTIVE

1. The President and the Vice-President.

At the head of the Union Executive stands the President of India.

Election of President

The President of India is elected[1] by indirect election, that is, by an electoral college, in accordance with the system of proportional representation by means of the single transferable vote.[2]

The electoral college[3] shall consist of—

(a) The elected members of both Houses of Parliament; (b) the elected members of the Legislative Assemblies of the States; and (c) the elected members of the Legislative Assemblies of Union Territories of Delhi and Pondicherry [*Art.* 54].

As far as practicable, there shall be uniformity of representation of the different States at the election, according to the population and the total number of elected members of the Legislative Assembly of each State, and parity shall also be maintained between the States as a whole and the Union [*Art.* 55]. This second condition seeks to ensure that the votes of the States, in the aggregate, in the electoral college for the election of the President, shall be equal to that of the people of the country as a whole. In this way, the President shall be a representative of the nation as well as a representative of the people in the different States. It also gives recognition to the status of the States in the federal system.

The system of indirect election was criticised by some as falling short of the democratic ideal underlying universal franchise, but indirect election was supported by the framers of the Constitution, on the following grounds—

(i) Direct election by an electorate of some 510 millions of people would mean a tremendous loss of time, energy and money. (ii) Under the system of responsible Government introduced by the Constitution, real power would vest in the ministry; so, it would be anomalous to elect the President directly by the people without giving him real powers.[4]

Qualifications for election as President

In order to be qualified for election as President, a person must—

(a) be a citizen of India;

(b) have completed the age of thirty-five years;

(c) be qualified for election as a member of the House of the People; and

(d) must *not* hold any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Government [*Art.* 58].

But a sitting President or Vice-President of the Union or the Governor of any State or a Minister either for the Union or for any State is not disqualified for election as President [*Art.* 58].

Term of Office of President.

The President's term of office is five years from the date on which he enters upon his office; but he is eligible for re-election[5] [*Arts.* 56-57].

The President's office may terminate within the term of five years in either of two ways—

(i) By resignation in writing under his hand addressed to the Vice-President of India,

(ii) By removal for violation of the Constitution, by the process of impeachment [*Art.* 56]. The only ground for impeachment specified in Art. 61(1) is 'violation of the Constitution'.

Procedure for impeachment of the President.

An impeachment is a quasi-judicial procedure in Parliament. *Either House* may prefer the charge of violation of the Constitution before the other House which shall then either investigate the charge itself or cause the charge to be investigated.

But the charge cannot be preferred by a House unless—

(a) a resolution containing the proposal is moved after a 14 days' notice in writing signed by not less than 1/4 of the total number of members of that House; and

(b) the resolution is then passed by a majority of not less than 2/3 of the total membership of the House.

The President shall have a right to appear and to be represented at such investigation. If, as a result of the investigation, a resolution is passed by not less than 2/3 of the total membership of the House before which the charge has been preferred declaring that the charge has been sustained, such resolution shall have the effect of removing the President from his office with effect from the date on which such resolution is passed [*Art.* 61].

Since the Constitution provides the mode and ground for removing the President, he cannot be *removed* otherwise than by impeachment, in accordance with the terms of Arts. 56 and 61.

Conditions of President's Office.

The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President. The president shall not hold any other office of profit [*Art.* 59(1)].

Emoluments and allowances of President.

The President shall be entitled without payment of rent to the use of his official residence and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law (and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule of the Constitution).[6] By passing the President's Emoluments and Pension (Amendment) Act, 1998, Parliament has raised the emoluments to Rs. *50,000/-* per mensem. The emoluments and allowances of the President shall not be diminished during his term of office [*Art.* 59(3)].

The Amendment Act, 1998 referred to above also provides for the payment of an annual pension of Rs. 3,00,000 to a person who held office as President, on the expiration of his term or on resignation, provided he is not re-elected to the office.

Vacancy in the Office of President.

A vacancy in the office of the President may be caused in any of the following ways—

(i) On the expiry of his term of five years.

(ii) By his death.

(iii) By his resignation.

(iv) On his removal by impeachment.

(v) Otherwise, *e.g.,* on the setting aside of his election as President [*Art.* 65(1)].

(a) When the vacancy is going to be caused by the *expiration of the term* of the sitting President, an election to fill the vacancy must be *completed* before the expiration of the term [*Art.* 62(1)]. But in order to prevent an 'interregnum', owing to any possible delay in such completion, it is provided that the outgoing President must continue to hold office, notwithstanding that his term has expired, until his successor enters upon his office [*Art.* 56(1)(c)]. (There is no scope for the Vice-President getting a chance to act as President in this case.)

(b) In case of a vacancy arising by reason of any cause *other than* the expiry of the term of the incumbent in office, an election to fill the vacancy must be held as soon as possible after, and in no case later than, six months from the date of occurrence of the vacancy.

Immediately after such vacancy arises, say, by the death of the President, and until a new President is elected, as above, it is the Vice-President who shall act as President [*Art.* 65(1)]. It is needless to point out that the new President who is elected shall be entitled to the full term of five years from the date he enters upon his office.

(c) Apart from a permanent *vacancy,* the President may be temporarily *unable* to discharge his functions, owing to his absence from India, illness or any other cause, in which case the Vice-President shall *discharge his functions* until the date on which the President resumes his duties [*Art.* 65(2)].

Election of Vice-President

The election[1] of the Vice-President, like that of the President, shall be indirect and in accordance with the system of proportional representation by means of the single transferable vote. But his election shall be different from that of the President inasmuch as the State Legislatures shall have no part in it. The Vice-President shall be elected by an electoral college consisting of the members of both Houses Parliament[2] [*Art.* 66(1)].

Qualifications for election as Vice-President.

As in the case of the President, in order to be qualified to be elected as Vice-President, a person must be (a) a citizen of India; (b) has completed 35 years of age; and (c) must *not* hold an office of profit save that of President, Vice-President, Governor or Minister for the Union or State [*Art.* 66].

But while in order to be a President, a person must be qualified for election as a member of the House of the People, in order to be Vice-President, he must be qualified for election as a member of the Council of States. The reason for this difference is obvious, namely, that the Vice-President is normally to act as the Chairman of the Council of States.

Whether a Member of Legislature may become President or Vice-President.

There is no bar to a member of the Union or State Legislature being elected President or Vice-President, but the two offices cannot be combined in one person. In case a member of the Legislature is elected President or Vice-President, he shall be deemed to have vacated his seat in that House of the Legislature to which he belongs on the date on which he enters upon his office as President or Vice-President [*Arts.* 59(1); 66(2)].

Term of Office of Vice-President.

The term of office of the Vice-President is five years. His office may terminate earlier that the fixed term either by resignation or by removal. A formal impeachment is *not* required for his removal. He may be removed by a resolution of the Council of States passed by a majority of its members and agreed to by the House of People [*Art.* 67, Prov. (b)].

Though there is no specific provision (corresponding to Art. 57) making a Vice-President eligible for re-election, the *Explanation* to Art. 66 suggests that a sitting Vice-President is eligible for re-election and Dr. S. Radhakrishnan was, in fact, elected for a second term in 1957.

Functions of the Vice-President.

The Vice-President is the highest dignitary of India, coming next after the President [see Table IX]. No functions are, however, attached to the office of the Vice-President as such. The normal function of the Vice-President is to act as the *ex-officio* Chairman of the Council of States. But if there occurs any vacancy in the office of the President by reason of his death, resignation, removal or otherwise, the Vice-President shall *act* as *President* until a new President is elected and enters upon his office [*Art.* 65(1)].

The Vice-President shall *discharge the functions* of the President during the temporary absence of the President, illness *or any other cause* by reason of which he is unable to discharge his functions [*Art.* 65(2)]. No machinery having been prescribed by the Constitution to determine when the President is unable to

discharge his duties owing to absence from India or a like cause, it becomes a somewhat delicate matter as to who should move in the matter on the any particular occasion. It is to be noted that this provision of the Constitution has not been put into use prior to 20th June, 1960, though President, Dr. Rajendra Prasad had been absent from India for a considerable period during his foreign tour in the year 1958. It was during the 15-day visit of Dr. Rajendra Prasad to the Soviet Union in June 1960, that for the first time, the Vice-President, Dr. Radhakrishnan was given the opportunity of acting as the President owing to the 'inability' of the President to discharge his duties.

The second occasion took place in May, 1961, when President Rajendra Prasad become seriously ill and incapable of discharging his functions. After a few days of crisis, the President himself suggested that the Vice-President should discharge the functions of the President until he resumed his duties. It appears that the power to determine when the President is unable to discharge his duties or when he should resume his duties has been understood to belong to the President himself. In the event of occurrence of vacancy in the office of both the President and the Vice-President by reason of death, resignation, removal etc. the Chief Justice of India or in his absence the seniormost Judge of the Supreme Court available shall discharge the functions until a new President is elected. In 1969 when on the death of Dr. Zakir Hussain, the Vice-President Shri V. V. Giri resigned, the Chief Justice Shri HIDYATULLAH discharged the functions from 20-7-1969.

Emoluments.

When the Vice-President acts as, or discharges the functions of the President, he gets the emolument of the President; otherwise; the gets the salary of the chairman of the Council of States.[8]

When the Vice-President thus acts as, or discharges the functions of the President he shall cease to perform the duties of the Chairman of the Council of States and then the Deputy Chairman of the Council of States shall acts as it Chairman [*Art.* 91].

Doubts and disputes relating to or connected with the election of a President or Vice-President.

Determination of doubts and disputes relating to the election of a President or Vice-President is dealt with in Art. 71, as follows—

(a) Such disputes shall be decided by the Supreme Court whose jurisdiction shall be *exclusive* and *final.*

(b) No such dispute can be raised on the ground of any vacancy in the electoral college which elected the President or Vice-President.

(c) If the election of a President or Vice-President is declared void by the Supreme Court, acts done by him prior to the date of such decision of the Supreme Court shall not be invalidated.

(d) Barring the decision of such disputes, other matters relating to the election of President or Vice-President may be regulated by law made by Parliament.

2. Powers and duties of the President.

Nature of the powers of the President.

The Constitution says that the "executive power of the Union shall be vested in the President" [*Art.* 53]. The President of India shall thus be the head of the 'executive power' of the Union.

The 'executive power' primarily means the execution of the laws enacted by the Legislature, but the business of the Executive in a modern State is not as simple as it was in the days of Aristotle. Owing to the manifold expansion of the functions of the State, all residuary functions have practically passed into the hands of the Executive. The executive power may, therefore, be shortly defined as 'the power of carrying on the business of government' or 'the administration of the affairs of the State', excepting functions which are vested by the Constitution in any other authority. The ambit of the executive power has been thus explained by *our* Supreme Court[9]—

> "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 legislative and judicial functions are taken away, subject, of course, to the provisions of the Constitutions or of any law...
>
> The executive function comprises both the determination of the policy as well as carrying it into execution, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact, the carrying on or supervision of the general administration of the State."[9]

Constitutional limitations on President's powers.

Before we take up an analysis of the different powers of the Indian President, we should note the *constitutional limitations* under which he is to exercise his executive powers.

Firstly, he must exercise these powers according to the Constitution [*Art.* 53(1)]. Thus, Art. 75(1) explicity requires that Ministers (other than the Prime Minister) can be appointed by the President only on the advice of the Prime Minister. There will be a violation of this provision if the President appoints a person as Minister from outside the list submitted by the Prime Minister. If the President violates any of the mandatory provisions of the Constitution, he will be liable to be removed by the process of impeachment.

Secondly, the executive powers shall be exercised by the President of India *in accordance with the* advice of his Council of Ministers [*Art.* 74(1)].

The 42nd Amendment.

I. Prior to 1976, there was no express provision in the Constitution that the President was bound to act in accordance with the advice tendered by the Council of Ministers, though it was *judicially established*[10] that the President of India was not a real executive, but a constitutional head, who was bound to act according to the advice of Ministers, so long as they commanded the confidence of the majority in the House of the People [*Art.* 75(3)].[10] The 42nd Amendment Act, 1976 amended Art. 74(1) to clarify this position.

Article 74(1), as so amended, reads:

"*There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.*"

The word 'shall' makes it obligatory for the President to act in accordance with ministerial advice.

The 44th Amendment.

II. The Janata Government *retained* the foregoing text of Art. 74(1), as amended by the 42nd Amendment Act. But by the 44th Amendment Act, a Proviso was added to Art. 74(1) as follows:

"Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The net result after the 44th Amendment, therefore, is that except in certain marginal cases referred to by the Supreme Court[10] (to be noticed presently), the President shall have no power to act in his discretion in any case. He *must* act according to the advice given to him by the Council of Ministers, headed by the Prime Minister, so that refusal to act according to such advice will render him liable to impeachment for violation of the Constitution. This is subject to the President's power to send the advice received from the Council of Ministers, in a particular case, back to them for their reconsideration; and if the Council of Ministers adhere to their previous advice, the President shall have no option but to act in accordance with such advice. The power to return for reconsideration can be exercised only once, on the same matter.

It may be said, accordingly, that the powers of the President will be the powers of his Ministers, in the same manner as the prerogatives of the English Crown have become the 'privileges of the people' (*Dicey*).[11] An inquiry into the powers of the Union Government, therefore, presupposes an inquiry into the provisions of the Constitution which vest powers and functions in the President.

The various powers that are included within the comprehensive expression 'executive power' in a modern State have been classified by political scientists under the following heads:

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

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

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

(d) *Judicial power, i.e.*, granting of pardons, reprieves, etc., to persons convicted of crime.

The Indian Constitution, by its various provisions, vests power in the hands of the President under each of these heads, subject to the limitations just mentioned.

I. *The Administrative Power.* In the matter of administration, not being a real head of the Executive like the American President, the Indian President shall *not* have any administrative function to discharge nor shall he have that power of control and supervision over the Departments of the Government

as the American President possesses. But though the various Departments of Government of the Union will be carried on under the control and responsibility of the respective Ministers in charge, the President will remain the *formal* head of the administration, and as such, all executive action of the Union must be expressed to be taken in the *name* of the President. The only mode of ascertaining whether an order or instrument is made by the Government of India will be to see whether it is expressed in the name of the President and authenticated in such manner as may be prescribed by rules to be made by the President [*Art.* 77]. For the same reason, all contracts and assurances of property made on behalf of the Government of India must be expressed to be made by the President and executed in such manner as the President may direct or authorise [*Art.* 299].

Again, though he may not be the 'real' head of the administration, all officers of the Union shall be his 'subordinates' [*Art.* 53(1)] and he shall have a right to be informed of the affairs of the Union [*Art.* 78(b)].

The administrative power also includes the power to *appoint and remove* the high dignitaries of the State. Under *our* Constitution, the President shall have the power to appoint—(i) The Prime Minister of India. (ii) Other Ministers of the Union. (iii) The Attorney-General for India. (iv) The Comptroller and Auditor-General of India. (v) The Judges of the Supreme Court. (vi) The Judges of the High Courts of the States. (vii) The Governor of a State. (viii) A Commission to investigate interference with water-supplies. (ix) The Finance Commission. (x) The Union Public Service Commission and Joint Commissions for a group of States. (xi) The Chief Election Commissioner and other members of the Election Commission. (xii) A Special Officer for the Scheduled Castes and Tribes. (xiii) A Commission to report on the administration of Scheduled Areas. (xiv) A Commission to investigate into the condition of backward classes. (xv) A Commission on Official Language. (xvi) Special Officer for linguistic minorities.

In making some of the appointments, the President is required by the Constitution to consult persons other than his ministers as well. Thus, in appointing the Judges of the Supreme Court the President shall consult the Chief Justice of India and such other Judges of the Supreme Court and of the High Courts as he may deem necessary [*Art.* 124(2)]. These conditions will be referred to in the proper places, in connection with the different offices.

The President shall also have the power to remove (i) his Ministers, individually; (ii) the Attorney-General for India; (iii) the Governor of a State; (iv) the Chairman or a member of the Public Service Commission of the Union or of a State, on the report of the Supreme Court; (v) a Judge of the Supreme Court or of a High Court or the Election Commissioner, on an address of Parliament.

No 'Spoils System'.

It is to be noted that besides the power of appointing the above specified functionaries, the Indian Constitutions does not vest in the President any absolute power to appoint *inferior officers* of the Union as is to be found in the *American* Constitution. The Indian Constitution thus seeks to avoid the

undesirable 'spoils system' of America, under which about 20 per cent of the federal civil offices are filled in by the President, without consulting the Civil Service Commission, and as a reward for party allegiance. The Indian Constitution avoids the vice of the above system by making the 'Union Public Services and the Union Public Service Commission'—a legislative subject for the Union Parliament, and by making it obligatory on the part of the President to consult the Public Service Commission in matters relating to appointment [*Art.* 320(3)], except in certain specified cases. If in any case the President is unable to accept the advice of the Union Public Service Commission, the Government has to explain the reasons therefor in Parliament. In the matter of removal of the civil servants, on the other hand, while those serving under the Union hold office during the President's pleasure, the Constitution has hedged in the President's pleasure by laying down certain conditions and procedure subject to which only the pleasure may be exercised [*Art.* 311(2)].

II. *The Military Power.* The military powers of the Indian President shall be lesser than those of either the American President or of the English Crown.

The Supreme command of the Defence Forces is, of course, vested in the President of India, but the Constitution expressly lays down that the exercise of this power shall be regulated by law [*Art.* 53(2)]. This means that though the President may have the power to take action as to declaration of war or peace or the employment of the Defence Forces, it is competent for Parliament to regulate or control the exercise of such powers. The President's powers as Commander-in-Chief cannot be construed, as in the U.S.A., as a power independent of legislative control.

Secondly, since the Constitution enjoins that certain acts cannot be done without the authority of law, it must be held that such acts cannot be done by the President without approaching Parliament for sanction, *e.g.,* acts which involve the expenditure of money [*Art.* 114(3)], such as the raising, training and maintenance of the Defence Forces.

III. *The Diplomatic Power.* The diplomatic power is a very wide subject and is sometimes spoken of as identical with the power over foreign or external affairs, which comprise "all matters which bring the Union into relation with any foreign country". The legislative power as regards these matters as well as the power of making treaties and implementing them, of course, belongs to Parliament. But though the *final* power as regards these things is vested in Parliament, the Legislature cannot take the initiative in such matters. The task of *negotiating* treaties and agreements with other countries, subject to ratification by Parliament, will thus belong to the President, acting on the advice of his Ministers.

Again, though diplomatic representation as a subject of legislation belongs to Parliament, like the heads of other States, the President of India will represent India in international affairs and will have the power of appointing Indian representatives to other countries and of receiving diplomatic representatives of other States, as shall be recognised by Parliament.

IV. *Legislative Powers.* Like the Crown of England, the President of India is a component part of the Union Parliament and here is one of the instances where the Indian Constitution departs from the principle of Separation of Powers underlying the Constitution of the United States. The legislative powers of the Indian President, of course according to ministerial advice, [*Art.* 74(1)] are various and may be discussed under the following heads:

(a) Summoning, Prorogation, Dissolution.

Like the English Crown *our* President shall have the power to summon or prorogue the Houses of Parliament and to dissolve the lower House.[12] He shall also have the power to summon a joint sitting of both Houses of Parliament in case of a deadlock between them [*Arts.* 85, 108].

(b) The Opening Address.

The President shall address both Houses of Parliament assembled together, at the first session after each general election to the House of the People and at the commencement of the first session of each year, and "inform Parliament of the causes of its summons" [*Art.* 87].

The practice during the last five decades shows that the President's Opening Address is being used for purposes similar to those for which the 'Speech from the Throne' is used in England, *viz.,* to announce the programme of the Cabinet for the session and to raise a debate as to the political outlook and matters of general policy or administration. Each House is empowered by the Constitution to make rules for allotting time"for *discussion* of the matters referred to in such address and for the precedence of such discussion over other business of the House."

(c) The Right to Address and to send Messages.

Besides the right to address a joint sitting of both Houses at the commencement of the first session, the President shall also have the right to address either House or their joint sitting, at any time, and to require the attendance of members for this purpose [*Art.* 86(1)]. This right is no doubt borrowed from the English Constitution, but there it is not exercised by the Crown except on ceremonial occasions.

Apart from the right to address, the Indian President shall have the right to send messages to either House of Parliament either in regard to any pending Bill or to other matter, and the House must then consider the message "with all convenient despatch" [*Art.* 86(2)]. Since the time of George III, the English Crown has ceased to take any part in legislative or to influence it and messages are now sent only on formal matters. The American President, on the other hand, possesses the right to recommend legislative measures to Congress by messages though Congress is not bound to accept them.

The Indian President shall have the power to send messages not only on legislative matters but also 'otherwise'. Since the head of the Indian Executive is represented in Parliament by his Ministers, the power given to the President to send messages regarding legislation may appear to be

superfluous, unless the President has the freedom to send message differing from the Ministerial policy, in which case again it will open a door for friction between the President and the Cabinet.

It is to be noted that during the fifty nine years of the working of *our* Constitution, the President has not sent any message to Parliament nor addressed it on any occasion other than after each general election and at the opening of the first session each year.

(d) Nominating Members to the Houses.

Though the main composition of the two Houses of Parliament is elective, either direct or indirect, the President has been given the power to nominate certain members to both the Houses upon the supposition that adequate representation of certain interests will not be possible through the competitive system of election. Thus,

(i) In the Council of States, 12 members are to be nominated by the President from persons having special knowledge or practical experience of literature, science, art and social service [*Art.* 80(1)]. (ii) The President is also empowered to nominate not more than two members to the House of the People from the Anglo-Indian community, if he is of opinion that the Anglo-Indian community is not adequately represented in that House [*Art.* 331].

(e) Laying Reports, etc., before Parliament.

The President is brought into contact with Parliament also through his power and duty to cause certain reports and statements to be laid before Parliament, so that Parliament may have the opportunity of taking action upon them. Thus, it is the duty of the President to cause to be laid before Parliament—(a) the Annual Financial Statement (Budget) and the Supplementary Statement, if any; (b) the report of the Auditor-General relating to the accounts of the Government of India; (c) the recommendations made by the Finance Commission, together with an explanatory memorandum of the action taken thereon; (d) the report of the Union Public Service Commission, explaining the reasons where any advice of the Commission has not been accepted; (e) the report of the Special Officer for Scheduled Castes and Tribes; (f) the report of the Commission on backward classes; (g) the report of the Special Officer for linguistic minorities.

(f) Previous sanction to legislation.

The Constitution requires the previous sanction or recommendation of the President for introducing legislation on some matters, though, of course, the Courts are debarred from invalidating any legislation on the ground that the previous sanction was not obtained, where the President has eventually *assented* to the legislation [*Art.* 255]. These matters are:

(i) A Bill for the formation of new States or the alteration of boundaries, etc., of existing States [*Art.* 3]. The exclusive power of *recommending* such legislation is given to the President in order to enable him to obtain the views of the affected States before initiating such legislation.

(ii) A Bill providing for any of the matters specified in Art. 31A(1) [Prov. 1 to Art. 31A(1)].

(iii) A Money Bill [*Art.* 117(1)].

(iv) A Bill which would involve expenditure from the Consolidated Fund of India even though it may not, strictly speaking, be a Money Bill [*Art.* 117(3)].

(v) A Bill affecting taxation in which States are interested, or affecting the principles laid down for distributing moneys to the States, or varying the meaning of the expression of 'agricultural income' for the purpose of taxation of income, or imposing a surcharge for the purposes of the Union under Chap. I of Part XII [*Art.* 274(1)].

(vi) State Bills imposing restrictions upon the freedom of trade [*Art.* 304, *Proviso*].

(g) Assent to legislation and Veto.

Veto over Union Legislation.

(A) *Veto over Union Legislation.* A Bill will not be an Act of the Indian Parliament unless and until it receives the assent of the President. When a Bill is presented to the President, after its passage in both Houses of Parliament, the President shall be entitled to take any of the following three steps:

(i) He may declare his assent to the Bill; or

(ii) He may declare that he withholds his assent to the Bill; or

(iii) He may, *in the case of Bills other than Money Bills,* return the Bill for reconsideration of the Houses, with or without a message suggesting amendments. A Money Bill cannot be returned for reconsideration.

In case of (iii), if the Bill is passed again by both House of Parliament with or without amendment and again presented to the President, it would be obligatory upon him to declare his assent to it [*Art.* 111].

Nature of the Veto power.

Generally speaking, the object of arming the Executive with this power is to prevent hasty and ill-considered action by the Legislature. But the necessity for such power is removed or at least lessened when the Executive itself initiates and conducts legislation or is responsible for legislation, as under the Parliamentary or Cabinet system of Government. As a matter of fact, though a theoretical power of veto is possessed by the Crown in *England,* it has never been used since the time of Queen Anne.

Where, however, the Executive and the Legislature are separate and independent from each other, the Executive, not being itself responsible for the legislation, should properly have some control to prevent undesirable legislation. Thus, in the *United States,* the President's power of veto has been supported on various grounds, such as (a) to enable the President to protect his own office from aggressive legislation; (b) to prevent a particular legislation from being placed on the statute book which the President considers to be unconstitutional (for though the Supreme Court possesses the power to nullify a statute on the ground of unconstitutionality, it can exercise that power only in the case of clear violation of the Constitution,

regardless of any question of policy, and only if a proper proceeding is brought before it *after* the statute comes into effect); (c) to check legislation which he deems to be practically inexpedient or, which he thinks does not represent the will of the American people.

From the standpoint of effect on the legislation, executive vetos have been classified as absolute, qualified, suspensive and pocket vetos.

(B) *Absolute Veto.* The *English* Crown possesses the prerogative of absolute veto, and if it refuses assent to any bill, it cannot become law, notwithstanding any vote of Parliament. But this veto power of the Crown has become *obsolete* since 1700, owing to the development of the Cabinet system, under which all public legislation is initiated and conducted in the Legislature by the Cabinet. Judged by practice and usage, thus there is at present no executive power of veto in England.

(C) *Qualified* Veto. A veto is 'qualified' when it can be overridden by an extraordinary majority of the Legislature and the Bill can be enacted as law with such majority vote, overriding the executive veto. The veto of the *American* President is of this class. When a Bill is presented to the President, he may, if he does not assent to it, return the Bill within 10 days, with a statement of his objections, to that branch of Congress in which it originated. Each House of Congress then reconsiders the Bill and if it is adopted again in each House, by a two-thirds vote of the members present,—the Bill becomes a law, notwithstanding the absence of the President's signature. The qualified veto is then overridden. But if it fails to obtain that two-thirds majority, the veto stands and the Bill fails to become law. In the result, the qualified veto serves as a means to the Executive to point out the defects of the legislation and to obtain a reconsideration by the Legislature, but ultimately the extraordinary majority of the Legislature prevails. The qualified veto is thus a useful device in the United States where the Executive has no power of control over the Legislature, by prorogation, dissolution or otherwise.

(D) *Suspensive Veto.* A veto is suspensive when the executive veto can be overridden by the Legislature by an *ordinary* majority. To this type belongs the veto power of the *French* President. If, upon a reconsideration, Parliament passes the Bill again by a simple majority, the President has no option but to promulgate it.

(E) *Pocket Veto.* There is a fourth type of veto called the 'pocket veto' which is possessed by the *American* President. When a Bill is presented to him, he may neither sign the Bill nor return the Bill for reconsideration within 10 days. He may simply let the Bill lie on his desk until the ten-day limit has expired. But, if in the meantime, Congress has adjourned (*i.e.,* before expiry of the period of ten-days from presentation of the Bill to the President), the Bill fails to become a law. This method is known as the 'pocket veto', for, by simply withholding a Bill presented to the President during the last few days of the session of Congress the President can prevent the Bill to become law.

In India. The veto power of the Indian President is a combination of the absolute, suspensive and pocket vetos. Thus,—

(i) As in *England*, there would be an end to a Bill if the President declares that he withholds his assent from it. Though such refusal has become obsolete in England since the growth of the Cabinet system under which it is the Cabinet itself which is to initiate the legislation as well as to advise a veto, such a provision was made in the Government of India Act, 1935. Even with the introduction of full Ministerial responsibility, the same provision has been incorporated in the Constitution of India. Normally, this power will be exercised only in the case of 'private' members' Bills. In the case of a Government Bill, a situation may, however, be imagined, where after the passage of a Bill and before it is assented to by the President, the Ministry resigns and the next Council of Ministers, commanding a majority in Parliament, advises the President to use his veto power against the Bill. In such a contingency, it would be constitutional on the part of the President to use his veto power even though the Bill had been duly passed by Parliament.[13]

(ii) If, however, instead of refusing his assent outright, the President remits the Bill or any portion of it for reconsideration, a re-passage of the Bill by an *ordinary* majority would compel the President to give his assent. This power of the Indian President, thus, differs from the qualified veto in the United States insofar as no extraordinary majority is required to effect the enactment of a returned Bill. The effect of a return by the Indian President its thus merely 'suspensive'. [As has been stated earlier, this power is not available in the case of Money Bills.]

(iii) Another point to be noted is that the Constitution does not prescribe any time-limit within which the President is to declare his assent or refusal, or to return the Bill. Article 111 simply says that if the President wants to return the Bill, he shall do it 'as soon as possible' after the Bill is presented to him. By reason of this absence of a time-limit, it seems that the Indian President would be able to exercise something like a 'pocket veto', by simply keeping the Bill on his desk for an indefinite time,[14] particularly, if he finds that the Ministry is shaky and is likely to collapse shortly.

(F) *Disallowance of State legislation.* Besides the power to veto Union legislation, the President of India shall also have the power of disallowance or return for reconsideration of a Bill of the State Legislature, which may have been reserved for his consideration by the Governor of the State [*Art.* 201].

Reservation of a State Bill for the assent of the President is a discretionary power[15] of the Governor of a State. In the case of any Bill presented to the Governor for his assent after it has been passed by both Houses of the Legislature of the State, the Governor may, instead of giving his assent or withholding his assent, reserve the Bill for the consideration of the President.

In one case reservation is compulsory, *viz.*, where the law in question would derogate from the powers of the High Court under the Constitution [*Art.* 200, 2nd Proviso].

In the case of a Money Bill so reserved, the President may either declare his assent or withhold his assent. But in the case of a Bill, other than

a Money Bill, the President may, instead of declaring his assent or refusing it, direct the Governor to *return* the Bill to the Legislature for reconsideration. In this latter case, the Legislature must reconsider the Bill within six months and if it is passed again, the Bill shall be presented to the President again. But it shall not be obligatory upon the President to give his assent in this case too [*Art.* 201].

It is clear that a Bill which is reserved for the consideration of the President shall have no legal effect until the President declares his assent to it. But no time limit is imposed by the Constitution upon the President either to declare his assent or that he withholds his assent. As a result, it would be open to the President to keep a Bill of the State Legislature pending at his hands for an indefinite period of time, without expressing his mind.

Disallowance of State legislation.

In a strictly Federal Constitution like that of the *United States,* the States are autonomous within their sphere and so there is no scope for the Federal Executive to veto measures passed by the State Legislatures. Thus, in the Constitution of *Australia,* too, there is no provision for reservation of a State Bill for the assent of the Governor-General and the latter has no power to disallow State Legislation.

But *India* has adopted a federation of the Canadian type. Under the *Canadian* Constitution the Governor-General has the power not only of refusing his assent to a Provincial legislation, which has been reserved by the Governor for the signification of the Governor-General's assent, but also of directly disallowing a Provincial Act, even where it has not been reserved by the Governor for his assent. These powers thus give the Canadian Governor-General a control over Provincial legislation, which is unknown in the United States of America or Australia. This power has, in fact, been exercised by the Canadian Governor-General not only on the ground of encroachment upon Dominion powers, but also on grounds of policy, such as injustice, interference with the freedom of criticism and the like. The Provincial Legislature is to this extent subordinate to the Dominion Executive.

There is no provision in the Constitution of India for a direct disallowance of State legislation by the Union President, but there is provision for disallowance of such bills as are *reserved* by the State Governor for assent of the President. The President may also direct the Governor to return the Bill to the State Legislature for reconsideration; if the Legislature again passes the Bill by an ordinary majority, the Bill shall be presented again to the President for his reconsideration. But if he refuses his assent again, the Bill fails. In short, there is no means of overriding the President's veto, in the case of State legislation. So, the Union's control over State legislation shall be absolute, and no grounds are limited by the Constitution upon which the President shall be entitled to refuse his assent. As to reservation by the Governor, it is to be remembered that the Governor is a nominee of the President. So, the power of direct disallowance will be virtually available to the President through the Governor.

These powers of the President in relation to State legislation will thus serve as one of the bonds of Central control, in a federation tending towards the unitary type.

(h) The Ordinance-making Power.

The President shall have the power to legislate by Ordinances at a time when it is not possible to have a Parliamentary enactment on the subject, immediately [*Art.* 123].

The ambit of this Ordinance-making power of the President is co-extensive with the legislative powers of Parliament, that is to say, it may relate to any subject in respect of which Parliament has the right to legislate and is subject to the same constitutional limitations as legislation by Parliament. Thus, an Ordinance cannot contravene the Fundamental Rights any more than an Act of Parliament. In fact, Art.13(3)(a) doubly ensures this position by laying down that " 'law' includes an 'Ordinance'."

Subject to this limitation, the Ordinance may be of any nature as Parliamentary legislation may take, *e.g.,* it may be retrospective or may amend or repeal any law or Act of Parliament itself. Of course, an Ordinance shall be of temporary duration.

This independent power of the Executive to legislate by Ordinance is a relic of the Government of India Act, 1935, but the provisions of the Constitution differ from that of the Act of 1935 in several material respects as follows:

Firstly, this power is to be exercised by the President on the advice of his Council of Ministers (and not in the exercise of his 'individual judgment' as the Governor-General was empowered to act, under the Government of India Act, 1935).

Secondly, the Ordinance must be laid before Parliament when it reassembles, and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly unless disapproved earlier by Parliament. In other words an Ordinance can exist at the most only for six weeks from the date of re-assembly. If the Houses are summoned to re-assemble on different dates the period of six weeks is to be counted from the later of those dates.

Thirdly, the Ordinance-making power will be available to the President only when *either* of the two Houses of Parliament has been prorogued or is otherwise not in session, so that it is not possible to have a law enacted by Parliament. He shall have no such power while both Houses of Parliament are in session. The President's Ordinance-making power under the Constitution is, thus, *not* a co-ordinate or parallel power of legislation available while the Legislature is capable of legislating.

Any legislative power of the executive (independent of the legislature) is unimaginable in the *U.S.A.,* owing to the doctrine of Separation of Powers underlying the American Constitution and even in *England*, since the *Case of Proclamations* [(1610) 2 St. Tr. 723]. But the power to make Ordinances during recesses of Parliament has been justified in *India*, on the ground that

the President should have the power to meet with a pressing need for legislation when either House is not in session.

> "It is not difficult to imagine cases where the powers conferred by the ordinary law existing at any particular moment may be difficult to deal with a situation which may suddenly and immediately arise. The Executive must have the power to issue an Ordinance as the Executive cannot deal with the situation by resorting to the ordinary process of law because the Legislature is not in session."

Even though the legislature is not in session, the President cannot promulgate an Ordinance unless he is satisfied that there are circumstances which render it necessary for him to take 'immediate action'. Clause (1) of Art. 123 says—

> "If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require."

Possibility of abuse of the Ordinance making power.

But 'immediate action' has no necessary connection with an 'emergency' such as is referred to in Art. 352. Hence, the promulgation of an Ordinance is not dependent upon the existence of an armed rebellion or external aggression. The only test is whether the circumstances which call for the legislation are so serious and imminent that the delay involved in summoning the Legislature and getting the measure passed in the ordinary course of legislation cannot be tolerated. But the sole judge of the question whether such a situation has arisen is the President himself and it was held in some earlier cases a Court cannot enquire into the propriety of his satisfaction even where it is alleged that the power was not exercised in good faith.[16]

But if on the expiry of an Ordinance it is repromulgated and this is done repeatedly then it is an abuse of the power and a fraud on the Constitution.[17]

In *Cooper's* case,[18] however, the Supreme Court expressed the view that the genuineness of the President's satisfaction could possibly be challenged in a court of law on the ground that it was *mala fide, e.g.,* where the President has prorogued a House of Parliament in order to make an Ordinance relating to a controversial matter, so as to by-pass the verdict of the Legislature.

The 38th Amendment.

(I) The Indira Government wanted to silence any such judicial interference in the matter of making an Ordinance by inserting Cl. (4) in Art. 123, laying down that the President's satisfaction shall be *final* and could not be questioned in *any* Court on *any* ground.

The 44th Amendment.

(II) The Janata Government overturned the foregoing change. The net result is that the observation in *Cooper's* case[18] re-enters the field and the door for judicial interference in a case of *mala fides* is reopened.[16] To establish *mala fides* may not be an easy affair; but the revival of *Cooper's* observation[18] may serve as a potential check on any arbitrary power to prorogue the House of Parliament in order to legislate by Ordinance.

It is true that when the Ordinance-making power is to be exercised on the advice of a Ministry which commands a majority in Parliament, it makes little difference that the Government seeks to legislate by an Ordinance instead of by an Act of Parliament, because the majority would have ensured a safe passage of the measure through Parliament even if a Bill had been brought instead of promulgating the Ordinance. But the argument would not hold good where the Government of the day did *not* carry an overwhelming majority. Article 123 would, in such a situation, enable the Government to enact a measure for a temporary period by an Ordinance, not being sure of support in Parliament if a Bill had been brought. Even where the Government has a clear majority in Parliament, a debate in Parliament which takes place where a Bill is introduced not only gives a nation-wide publicity to the 'pros and cons' of the measure but also gives to the two Houses a chance of making amendments to rectify unwelcome features or defects as may be revealed by the debate. All this would be absent where the Government elects to legislate by Ordinance. It is evident, therefore, that there is a likelihood of the power being abused even though it is exercisable on the advice of the Council of Ministers,[19] because the Ministers themselves might be tempted to resort to an Ordinance simply to avoid a debate in Parliament[16] and may advise the President to prorogue Parliament at any time, having this specific object in mind.

Parliamentary safeguard.

It is clear that there should be some safeguard against such abuse. So far as the merits of the Ordinance are concerned, Parliament, of course, gets a chance to review the measure when Government seeks to introduce a Bill to replace it. It may also pass resolutions disapproving of the Ordinance, if and when the Government is obliged to summon the Parliament for other purposes [*Art.* 123(2)(a)]. But the real question is how to enable Parliament to tell the Government, short of passing a vote of censure or of no-confidence, that it does not approve of the conduct of the Government in making the Ordinance instead of bringing a Bill for the purpose? The House of the people has made a Rule requiring that whenever the Government seeks to replace an Ordinance by a Bill, a statement "explaining the circumstances which necessitated immediate legislation by Ordinance" must accompany such Bill. The statement merely informs the House of the grounds advanced by the Government. A general discussion takes place on the resolution approving the Ordinance and generally a resolution is moved by the opposition disapproving the Ordinance.

(V) *The Pardoning Power.* Almost all Constitutions confer upon the head of the Executive the power of granting pardons to persons who have been tried and convicted of some offence. The object of conferring this 'judicial' power upon the Executive is to correct possible judicial errors, for, no human system of judicial administration can be free from imperfections.

In *Kehar Singh's* case[20] the following principles were laid down (a) The convict seeking relief has no right to insist on oral hearing, (b) No guideline need be laid down by the Supreme Court for the exercise of the power, (c) The power is to be exercised by the President on the advice of the Central Government, (d) The President can go into the merits of the case and take a different view, (e) Exercise of the power by the President is not open to

judicial review, except to the limited extent as indicated in *Maru Ram's* case.[21] The Court can interfere only where the Presidential decision is wholly irrelevant to the object of Art. 72 or is irrational, arbitrary, discriminatory or *mala fide*.

It should be noted that what has been referred to above as the 'pardoning power' comprises a group of analogous powers each of which has a distinct significance and distinct legal consequences, *viz.,* pardon, reprieve, respite, remission, suspension, commutation. Thus, while a *pardon rescinds* both the sentence and the conviction and absolves the offender from all punishment and disqualifications, *commutation* merely substitutes one form of punishment for another of a lighter character, *e.g.,* each of the following sentences may be commuted for the sentence next following it: death; rigorous imprisonment; simple imprisonment; fine. *Remission,* on the other hand, reduces the amount of sentence without changing its character, *e.g.,* a sentence of imprisonment for one year may be remitted to six months. *Respite* means awarding a lesser sentence instead of the penalty prescribed, in view of some special fact, *e.g.,* the pregnancy of a woman offender. *Reprieve* means a stay of execution of a sentence, *e.g.,* pending a proceeding for *pardon* or *commutation.*

Pardoning power of President and Governor compared.

Under the Indian Constitution, the pardoning power shall be possessed by the President as well as the State Governors, under Arts. 72 and 161, respectively as follows—

	President		*Governor*
1.	Has the power to grant pardon, reprieve, respite, suspension, remission or commutation in respect of punishment or sentence by *court-martial.*	1.	No such power.
2.	Do., where the punishment or sentence is for an offence against a law relating to a matter to which the *executive power of the union extends.*	2.	Powers similar to those of President in respect of an offence against a law relating to a matter to which the *executive power of the State* extends (except as to death sentence for which see *below*).
3.	Do., in *all cases* where the sentence is one of *death.*	3.	No power to pardon in case of sentence of death. But the power to suspend, remit or commute a sentence of death, if conferred by law, remains, unaffected.

In the result, the President shall have the pardoning power in respect of—

(i) All cases of punishment by a Court Martial. (The Governor shall have no such power.)

(ii) Offences against laws made under the Union and Concurrent Lists. (As regards laws in the Concurrent sphere, the jurisdiction of the President shall be concurrent with that of the Governor.) Separate provision has been made as regards sentences of death.

(iii) The *only* authority for pardoning a sentence of death is the President.

But though the Governor has no power to pardon a sentence of death, he has, under s. 54 of the Indian Penal Code and ss. 432-433 of the Criminal Procedure Code, 1973, the power to suspend, remit or commute a sentence of death in certain circumstances. This power is left intact by the Constitution, so that as regards suspension, remission or commutation, the Governor shall have a concurrent jurisdiction with the President.

(VI) *Miscellaneous Powers.* As the head of the executive power, the President has been vested by the Constitution with certain powers which may be said to be residuary in nature, and are to be found scattered amongst numerous provisions of the Constitution. Thus,

Rule-making Power.

(a) The President has the constitutional authority to make *rules* and regulations relating to various matters, such as, how his orders and instruments shall be authenticated; the paying into custody of and withdrawal of money from, the public accounts of India; the number of members of the Union Public Service Commission, their tenure and conditions of service; recruitment and conditions of service of persons serving the Union and the secretarial staff of Parliament; the prohibition of simultaneous membership of Parliament and of the Legislature of a State; the procedure relating to the joint sittings of the Houses of Parliament in consultation with the Chairman and the Speaker of the two Houses; the manner of enforcing the orders of the Supreme Court; the allocation among States of emoluments payable to a Governor appointed for two or more States; the discharge of the functions of a Governor in any contingency not provided for in the Constitution; specifying Scheduled Castes and Tribes; specifying matters on which it shall not be necessary for the Government of India to consult the Union Public Service Commission.

(b) He has the power to give instructions to a Governor to promulgate an Ordinance if a Bill containing the same provisions requires the previous sanction of the President under the Constitution [*Art.* 213(1), Proviso].

(c) He has the power to refer any question of public importance for the opinion of the Supreme Court and already 14 such references have been made since 1950 till 2007. The last one has not yet been decided. [*Art.* 143; see Chap. 22 under 'Advisory Jurisdiction'].

(d) He has the power to appoint certain Commissions for the purpose of reporting on specific matters, such as, Commissions to report on the administration of Schedules Areas and welfare of Scheduled Tribes and Backward Classes; the Finance Commission; Commission on Official Language; an Inter-State Council.

(e) He has some special powers relating to 'Union Territories', or territories which are directly administered by the Union. Not only is the

administration of such Territories to be carried on by the President through an Administrator, responsible to the President alone, but the President has the final legislative power (to make regulations) relating to the Andaman and Nicobar Islands; the Lakshadweep; Dadra and Nagar Haveli;[22] and may even repeal or amend any law made by Parliament as may be applicable to such Territories [*Art.* 240].

(f) The President shall have certain special powers in respect of the administration of Scheduled Area and Tribes, and Tribal Area in Assam:

(i) Subject to amendment by Parliament, the president shall have the power, by order, to declare an area to be a Scheduled Area or declare that an area shall cease to be a Scheduled Area, alter the boundaries of Scheduled Areas, and the like [Fifth *Sch., Para* 6.]

(ii) A Tribes Council may be established by the direction of the President in any State having Scheduled Areas and also in States having Scheduled Tribes therein *but* not Scheduled Areas [Fifth *Sch., Para* 4].

(iii) All regulations made by the Governor of a State for the peace and good government of the Scheduled Areas of the State must be submitted forthwith to the President and until assented to by him, such regulations shall have no effect [Fifth *Sch., Para* 5(4)].

(iv) The President may, at any time, require the Governor of a State to make a report regarding the administration of the Scheduled Areas in that State and give directions as to the administration of such Areas [*Sch.* V, *Para* 3].

(g) The President has certain special powers and responsibilities as regards Scheduled Castes and Tribes:

(i) Subject to modification by Parliament, the President has the power to draw up and notify the lists of Scheduled Castes and Tribes in each State and Union Territory. Consultation with the Governor is required in the case of the list relating to a State [*Arts.* 341-342].

(ii) The President shall appoint a Special Officer to investigate and report on the working of the safeguards provided in the Constitution for the Scheduled Castes and Tribes [*Art.* 338].

(iii) The President may at any time and shall at the expiration of ten years from the commencement of the Constitution, appoint a Commission for the welfare of the Scheduled Tribes in the States [*Art.* 339].

(VII) *Emergency Powers.* The foregoing may be said to be an account of the President's normal powers. Besides these, he shall have certain extraordinary powers to deal with emergencies, which deserve a separate treatment [Chap. 28, *post*]. For the present, it may be mentioned that the situations that would give rise to these extraordinary powers of the President are of three kinds :

(a) *Firstly,* the President is given the power to make a "Proclamation of Emergency" on the ground of threat to the security of India or any part thereof, by war, external aggression or *armed rebellion.*[23] The object of this Proclamation is to maintain the security of India and its effect is, *inter alia,* assumption of wider control by the Union over the affairs of the States or any of them as may be affected by armed rebellion or external aggression.

(b) *Secondly,* the President is empowered to make a Proclamation that the Government of a State cannot be carried on in accordance with the provisions of the Constitution. The break-down of the constitutional machinery may take place either as a result of a political deadlock or the failure by a State to carry out the directions of the Union [*Arts.* 356, 365]. By means of a Proclamation of this kind, the President may assume to himself any of the governmental powers of the State and to Parliament the powers of the Legislature of the State.

(c) *Thirdly,* the President is empowered to declare that a situation has arisen whereby "the financial stability or credit of India or of any part thereof is threatened" [*Art.* 360]. The object of such Proclamation is to maintain the financial stability of India by controlling the expenditure of the States and by reducing the salaries of the public servants, and by giving directions to the States to observe canons of financial propriety, as may be necessary.

3. The Council of Ministers

The framers of *our* Constitution intended that though formally all executive powers were vested in the President, he should act as the constitutional head of the Executive like the English Crown, acting on the advice of Ministers responsible to the popular House of the Legislature.

A body recognised by the Constitution.

But while the *English* Constitution leaves the entires system of Cabinet Government to convention, the Crown being legally vested with absolute powers and the Ministers being in theory nothing more than the servants of the Crown, the framers of *our* Constitution enshrined the foundation of the Cabinet system in the body of the written Constitution itself, though, of course, the details of its working had necessarily to be left to be filled up by convention and usage.[24]

Appointment of Ministers.

While the Prime Minister is selected by the President, the other Ministers are appointed by the President on the advice of the Prime Minister [*Art.* 75(1)] and the allocation of portfolios amongst them is also made by him. Further, the President's power of dismissing an individual Minister is virtually a power in the hands of the Prime Minister. In selecting the Prime Minister, the President must obviously be restricted to the leader of the party in majority in the House of the People, or, a person who is in a position to win the confidence of the majority in that House.

Council of Ministers and Cabinet.

The number of members of the Council of Ministers is not specified in the Constitution. It is determined according to the exigencies of the time. At the end of 1961, the strength of the Council of Ministers of the Union was 47, at the end of 1975, it was raised to 60, and in 1977, it was reduced to 24, while in July 1989, it was again raised to 58. The National Front Government (headed by Sri V.P. Singh) started with only 22 Ministers. All the Ministers, however, do not belong to the same rank.[25] The National Democratic Alliance Government (headed by Mr. A.B. Bajpai) had 29 Cabinet Ministers and 44 State Ministers (no Deputy Ministers). However, sub-clause (1A) has been inserted to Art. 75 by the Constitution (Ninety-first Amendment) Act, 2003 which provides that the total number of Ministers, including the Prime Minister, shall not exceed 15% of the total number of the members of the

House of People (w.e.f. 1.1.2004). The Constitution does not classify the members of the Council of Ministers into different ranks. All this has been done informally, following the English practice. It has now got legislative sanction, so far as the Union is concerned, in s. 2 of the Salaries and Allowances of Ministers Act, 1952, which defines "Minister" as a "Member of the Council of Ministers, by whatever name called, and includes a Deputy Minister." [25]

Salaries of Ministers.

The Council of Ministers is thus a composite body, consisting of different categories. At the Centre, these categories are three, as stated above. The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine. Each Minister gets a sumptuary allowance at a varying scale, according to his rank, and a residence, free of rent.

The rank of the different Ministers is determined by the Prime Minister according to whose advice the President appoints the Ministers [*Art.*75(1)], and also allocates business amongst them [*Art.*77]. While the Council of Ministers is collectively responsible to the House of the People [Art. 75(3)], Art. 78(c) enjoins the Prime Minister, when required by the President, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council,—in practice, the Council of Ministers seldom meets as a body. It is the Cabinet, an inner body *within the Council,* which shapes the policy of the Government.

While Cabinet Ministers attend meetings of the Cabinet of their own right, Ministers of State are not members of the Cabinet and they can attend only if invited to attend any particular meeting. A Deputy Minister assists the Minister in charge of a Department of Ministry and takes no part in Cabinet deliberations.

Ministers may be chosen from members of either House and a Minister who is a member of one House has a right to speak in and to take part in the proceedings of the other House though he has no right to vote in the House of which he is not a member [*Art.* 88].

Under *our* Constitution, there is no bar to the *appointment* of a person from outside the Legislature as Minister. But he cannot continue as Minister for more than 6 months unless he secures a seat in either House of Parliament (by election or nomination, as the case may be), in the meantime. Article 75(5) says—

> "A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister."

Ministerial Responsibility to Parliament.

As to Ministerial responsibility, it may be stated that the Constitution follows in the main the English principle except as to the *legal* responsibility of individual Ministers for acts done by or on behalf of the President.

Collective Responsibility.

(A) The principle of collective responsibility is codified in Art. 75(3) of the Constitution—

> "The Council of Ministers shall be collectively responsible to the House of the People."

So, the Ministry, as a body, shall be under a constitutional obligation to resign as soon as it loses the confidence of the popular House of the Legislature. The collective responsibility is to the House of the People even though some of the Ministers may be members of the Council of States.

The 'collective responsibility' has two meanings : the first that all the members of a government are unanimous in support of its policies and exhibit that unanimity on public occasions although while formulating the policies, they might have differed in the cabinet meeting; the second that the Ministers, who had an opportunity to speak for or against the policies in the Cabinet are thereby personally and morally responsible for their success and failure.[26]

Of course, instead of resigning, the Ministry shall be competent to advise the President or the Governor to exercise his power of dissolving the Legislature, on the ground that the House does not represent the views of the electorate faithfully.

Individual Responsibility to the President.

(B) The principle of individual responsibility to the head of the State is embodied in Art. 75(2)—

"The Ministers shall hold office during the pleasure of the President."

The result, is that though the Ministers are collectively responsible to the Legislature, they shall be individually responsible to the Executive head and shall be liable to dismissal even when they may have the confidence of the Legislature. But since the Prime Minister's advice will be available in the matter of dismissing other Ministers individually, it may be expected that this power of the President will virtually be, as in England, a power of the Prime Minister against his colleagues,—to get rid of an undesirable colleague even where that Minister may still possess the confidence of the majority in the House of the People. Usually, the Prime Minister exercises this power by asking an undesirable colleague to resign, which the latter readily complies with, in order to avoid the odium of a dismissal.

(C) But, as stated earlier, the English principle of legal responsibility has not been adopted in *our* Constitution. In *England,* the Crown cannot do any public act without the counter-signature of a Minister who is liable in a Court of law if the act done violates the law of the land and gives rise to a cause of action in favour of an individual. But *our* Constitution does not expressly say that the President can act only *through* Ministers and leaves it to the President to make rules as to how his orders, etc., are to be authenticated; and on the other hand, provides that the Courts will not be entitled to enquire what advice was tendered by the Ministers to the executive head. Hence, if an act of the President is, according to the rules made by him, authenticated by a Secretary to the Government of India, there is no scope for a Minister being legally responsible for the act even though it may have been done on the advice of the Minister.

Legal Responsibility.

As in England, the Prime Minister is the "keystone of the Cabinet arch". Article 74(1) of *our* Constitution expressly states that the Prime Minister shall be "at the head" of the Council of Ministers. Hence, the other Ministers cannot function when the Prime Minister dies or resigns.

Special position of the Prime Minister in the Council of Ministers.

In *England*, the position of the Prime Minister has been described by Lord MORLEY as '*primus inter pares*', *i.e.*, 'first among equals'. In theory, all Ministers or members of the Cabinet have an equal position, all being advisers of the Crown, and all being responsible to Parliament in the same manner. Nevertheless, the Prime Minister has a pre-eminence, by convention and usage. Thus,—

(a) The Prime Minister is the leader of the party in majority in the popular House of the legislature.

(b) He has the power of selecting the other Ministers and also advising the Crown to dismiss any of them individually, or require any of them to resign. Virtually, thus, the other Ministers hold office at the pleasure of the Prime Minister.

(c) The allocation of business amongst the Ministers is a function of the Prime Minister. He can also transfer a Minister from one Department to another.

(d) He is the chairman of the Cabinet, summons its meetings and presides over them.

(e) While the resignation of other Ministers merely creates a vacancy, the resignation or death of the Prime Minister dissolves the Cabinet.

(f) The Prime Minister stands between the Crown and the Cabinet. Though individual Ministers have the right of access to the Crown on matters concerning their own departments, any important communication, particularly relating to policy, can be made only through the Prime Minister.

(g) He is in charge of co-ordinating the policy of the Government and has, accordingly, a right of supervision over all the departments.

In *India,* all these special powers will belong to the Prime Minister inasmuch as the conventions relating to Cabinet Government are, in general, applicable. But some of these have been codified in the Constitution itself. The power of advising the President as regards the appointment of other Ministers is, thus, embodied in Art. 75(1). As to the function of acting as the channel of communication between the President and the Council of Ministers, Art. 78 provides—

"It shall be the duty of the Prime Minister—

(a) to communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation;

(b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; and

(c) if the President so requires to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council."

Thus, even though any particular Minister has tendered any advice to the President without placing it before the Council of Ministers, the President has (through the Prime Minister) the power to refer the matter to be considered by the Council of Ministers. The unity of the Cabinet system will thus be enforced in India through the provisions of the written Constitution.

4. The President in relation to his Council of Ministers.

It is no wonder that the position of the President under *our* Constitution has evoked much interest amongst political scientists in view of the plentitude of powers vested in an elected President holding for a fixed term, saddled with limitations of Cabinet responsibility.

In a Parliamentary form of government, the tenure of office of the virtual executive is *dependent* on the will of the Legislature; in a Presidential Government the tenure of office of the executive is *independent* of the will of the Legislature (*Leacock*). Thus, in the Presidential form of which the model is the *United States*,—the President is the *real* head of the Executive who is elected by the people for a fixed term. He is independent of the Legislature as regards his tenure and is not responsible to the Legislature for his acts. He may, of course, act with the advice of ministers, but they are appointed by him as his *counsellors* and are responsible to him and not to the Legislature. Under the Parliamentary system represented by *England,* on the other hand, the head of the Executive (the Crown) is a mere titular head, and the virtual executive power is wielded by the Cabinet, a body formed of the members of the Legislature and responsible to the popular House of the Legislature for their office and actions.

Being a Republic, *India* could not have a hereditary monarch. So, an elected President is at the head of the executive power in India. The tenure of his office is for a fixed term of years as of the American President. He also resembles the American President inasmuch as he is removable by the Legislature under the special quasi-judicial procedure of impeachment. But, on the other hand, he is more akin to the English King than the American President insofar as he has no 'functions' to discharge, on his own authority. *All* the powers and 'functions' [*Art.* 74(1)] that are vested by the Constitution in the President are to be exercised on the advice of the Ministers responsible to the Legislature as in England. While the so-called Cabinet of the American President is responsible to himself and not to Congress, the Council of Ministers of *our* President shall be responsible to Parliament.

Indian President compared with American President and English Crown.

The reason why the framers of the Constitution discarded the *American* model after providing for the election of the President of the Republic by an electoral college formed of members of the Legislatures not only of the Union but also of the States, has thus been explained[27]: In combining stability with responsibility, they gave more importance to the latter and preferred the system of 'daily assessment of responsibility' to the theory of 'periodic assessment' upon which the American system is founded. Under the American system, conflicts are bound to occur between the Executive, Legislature and Judiciary; and on the other hand, according to many modern American writers the absence of co-ordination between the Legislature and the Executive is a source of weakness of the American political system. What is wanted in India on her attaining freedom from one and a half century of bondage is a *smooth* form of Government which would be conducive to the manifold development of the country without the least friction,—and to this end, the Cabinet or Parliamentary system of Govern-

ment of which India has already had some experience, is better suited than the Presidential.

A more debatable question that has been raised is whether the Constitution *obliges* the President to act only on the advice of the Council of Ministers, on every matter. The controversy, on this question, was highlighted by a speech delivered by the President Dr. Rajendra Prasad at a ceremony of the Indian Law Institute (November 28, 1960)[28] where he urged for a study of the relationship between the President and the Council of Ministers, observing that—

> "There is no provision in the Constitution which in so many words lays down that the President shall be bound to act in accordance with the advice of his Council of Ministers."

Status of the President of India.

The above observation came in contrast with the words of Dr. Rajendra Prasad himself with which he, as the President of the Constituent Assembly, summed up the relevant provisions of the Draft Constitution:[28]

> "Although there is no specific provision in the Constitution itself making it binding on the President to accept the advice of his ministers, it is hoped that the convention under which in England the King always acted on the adviced of his ministers would be established in this country also and the President would become a constitutional President in all matters."

Politicians and scholars, naturally, took sides on this issue, advancing different provisions of the Constitution to demonstrate that the "President under *our* Constitution is not a figure-head" (*Munshi*)[29] or that he was a mere constitutional head similar to the English Crown.

When the question went up to the Supreme Court, the Court took the latter view, relying on the interpretation of the words 'aid and advise' in the Dominion Constitution Acts, in these words, in *Ram Jawaya's* case[9]:

> "Under article 53(1) of our Constitution the executive power of the Union is vested in the President. But under article 74 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. *The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.* The same provisions obtain in regard to the Government of States; the Governor, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. 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."[9]

The foregoing interpretation[9] was reiterated by the Supreme court in several later decisions,[30] so that, so far as judicial interpretation was concerned, it was settled that the Indian President is a constitutional head of the Executive like the British Crown. In *Rao v. Indira*[30] a unanimous Court observed—

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

The 42nd Amendment.

The Indira Government sought to put the question beyond political controversy, by amending the Constitution itself. Article 74(1) was thus substituted, by the Constitution (42nd Amendment) Act, 1976:

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

The 43rd and 44th Amendments.

Though the Janata Government sought to wipe off the radical changes infused into the Constitution by Mrs. Gandhi's Government, it has *not* disturbed the foregoing amendment made in Art. 74(1). The only change made by the 44th Amendment Act over the 1976-provision is to add a Proviso which gives the President one chance to refer the advice given to the Council of Ministers back for a reconsideration; but if the Council of Ministers reaffirm their previous advice, the President shall be *bound* to act according to that advice. Article 74(1), as it stands after the 44th Amendment, 1978, stands thus:

"(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration."

The position to-day, therefore, is that the debate whether the President of India has any power to act contrary to the advice given by the Council of Ministers has become *meaningless.* By amending the Constitution in 1976 and 1978, a seal has been put to the controversy which had been mooted by President Rajendra Prasad at the Indian Law Institute[28] that there was no provision in the Indian Constitution to make it obligatory upon the President to act only in accordance with the advice tendered by the Council of Ministers, on each occasion and under all circumstances.

But, at the same time, the amendment so made has erred on the other side, by making it an *absolute* proposition, without keeping any reserve for situations when the advice of a Prime Minister is not available (*e.g.,* in the case of death);[19] or the advice tendered by the Prime Minister is improper, according to British conventions, *e.g.,* when Prime Minister defeated in Parliament successively asks for its dissolution.[31]

(a) So far as the contingency arising from the death of the Prime Minster is concerned, it instantly operates to dissolve the existing Council of Ministers. Hence, it would appear that notwithstanding the 1976-78 amendments of Art. 74(1), the President shall have the power of acting without ministerial advice, during the time taken in the matter of choosing a new Prime Minister, who, of course, must command majority in the House of the People. In this contingency, no Council of Ministers exists, on the death of the erstwhile Prime Minister.

(b) But as regards the contingency arising out of a demand for dissolution by a Prime Minister who is defeated in the House of the People, it cannot be said that no Council of Ministers is in existence. On the amended Art. 74(1), the President of India, must act upon the request of the defeated Council of Ministers even if such request is improper, *e.g.,* on a second occasion of defeat. If so, the position in India would differ from the principles of Cabinet Government as they prevail in the U.K. [24]

5. The Attorney-General for India.

The office of the Attorney-General is one of the offices placed on a special footing by the Constitution. He is the first Law Officer of the Government of India, and as such, his duty shall be—

(i) to give advice on such legal matters and to perform such other duties of a legal character as may, from time to time, be referred or assigned to him by the President; and (ii) to discharge the functions conferred on him by the Constitution or any other law for the time being in force [*Art.* 76].

Though the Attorney-General of India is not (as in England) a member of the Cabinet, he shall also have the right to speak in the Houses of Parliament or in any Committee thereof, but shall have no right to vote [*Art.* 88]. By virtue of his office, he is entitled to the privileges of a member of Parliament [*Art.* 105(4)]. In the performance of his official duties, the Attorney-General shall have a right of audience in all Courts in the territory of India.

The Attorney-General for India shall be appointed by the President and shall hold office during the pleasure of the President. He must have the same qualifications as are required to be a Judge of the Supreme Court. He shall receive such remuneration as the President may determine. He is not a whole-time counsel for the Government nor a Government servant.

6. The Comptroller and Auditor-General of India.

Another pivotal office in the Government of India is that of Comptroller and Auditor-General who controls the entire financial system of the country [*Art.* 148]—at the Union as well as State levels.

As observed by Ambedkar, the Comptroller and Auditor-General of India shall be the most important officer under the Constitution of India. For, he is to be the guardian of the public purse and it is his duty to see that not a farthing is spent out of the Consolidated Fund of India or of a State without the authority of the appropriate Legislature. In short, he shall be the impartial head of the audit and accounts system of India. In order to discharge this duty properly, it is highly essential that this office should be independent of any control of the Executive.

The foundation of parliamentary system of Government, as has been already seen, is the responsibility of the Executive to the Legislature and the essence of such control lies in the system of financial control by the Legislature. In order to enable the Legislature to discharge this function properly, it is essential that this Legislature should be aided by an agency, fully independent of the Executive, who would scrutinise the financial transactions of the Government and bring the results of such scrutiny before the Legislature. There was an Auditor-General of India even under the Government of India Act, 1935, and that Act secured the independence of the Auditor-General by making him irremovable except "in like manner and on the like grounds as a Judge of the Federal Court". The office of the Comptroller and Auditor-General, in the Constitution, is substantially

modelled upon that of the Auditor-General under the Government of India Act, 1935.

Conditions of service.

The *independence* of the Comptroller and Auditor-General has been sought to be secured by the following provisions of the Constitution—

a. Though appointed by the President, the Comptroller and Auditor-General may be *removed* only on an address from both Houses of Parliament, on the grounds of (i) 'proved misbehaviour', or (ii) 'incapacity'.

He is thus excepted from the general rule that all civil servants of the Union hold their office at the pleasure of the President [Ch. *Art.* 310(1)].

b. His salary and conditions of service shall be statutory (*i.e.*, as laid down by Parliament by law) and shall not be liable to variation to his disadvantages during his term of office. Under this power, Parliament has enacted the Comptroller and Auditor-General's (Conditions of Service) Act, 1971 which, as amended, provides as follows:

(i) The term of office of the Comptroller and Auditor-General shall be six years from the date on which he assumes office. But—

(a) He shall vacate office on attaining the age of 65 years, if earlier than the expiry of the 6-year term;

(b) He may, at any time, resign his office, by writing under his hand, addressed to the President of India;

(c) He may be removed by impeachment [*Arts.* 148(1); 124(4)].

(ii) His salary shall be equal to that of a Judge of the Supreme Court (which is now Rs. 30,000, w.e.f. 1-1-1996).

(iii) On retirement, he shall be eligible to an annual pension of Rs. 15,000.

(iv) In other matters his conditions of service shall be determined by the Rules applicable to a member of the I.A.S., holding the rank of a Secretary to the Government of India.

(v) He shall be disqualified for any further Government 'office' after retirement[32] so that he shall have no inducement to please the Executive of the Union or of any State.

(vi) The salaries, etc., of the Comptroller and Auditor-General and his staff and the administrative expenses of his office shall be charged upon the Consolidated Fund of India and shall thus be non-votable [*Art.* 148].

On the above points, thus, the position of the Comptroller and Auditor-General shall be similar to that of a Judge of the Supreme Court.[33]

Duties and powers.

The Comptroller and Auditor-General shall perform such *duties* and exercise such *powers* in relation to the accounts of the Union and of the States as may be prescribed by Parliament. In exercise of this power, Parliament has enacted the Comptroller and Auditor-General's (Duties, Powers and Conditions of

Service) Act, 1971, which, as amended in 1976, relieves him of his pre-Constitution duty to *compile* the accounts of the Union; and the States may enact similar legislation with the prior approval of the President,—to separate accounts from audit also at the State level, and to relieve the Comptroller and Auditor-General of his responsibility in the matter of preparation of accounts, either of the States or of the Union.

The material provisions of this Act relating to the duties of the Comptroller and Auditor-General are—

(a) to audit and report on all expenditure from the Consolidated Fund of India and of each State and each Union Territory having a Legislative Assembly as to whether such expenditure has been in accordance with the law;

(b) similarly, to audit and report on all expenditure from the Contingency Funds and Public Accounts of the Union and of the States;

(c) to audit and report on all trading, manufacturing, profit and loss accounts, etc., kept by any Department of the Union or a State;

(d) to audit the receipts and expenditure of the Union and of each State to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue;

(e) to audit and report on the receipts and expenditure of (i) all bodies and authorities 'substantially financed' from the Union or State revenues; (ii) Government companies; (iii) other corporations or bodies, when so required by the laws relating to such corporations or bodies.

Compared with his British counterpart.

As has been just stated, the duty of preparing the accounts was a relic of the Government of India Act, 1935, which has no precedent in the British system, under which the accounts are prepared, not by the Comptroller and Auditor-General, but by the respective Departments. The legislation to separate the function of preparation of accounts from the Comptroller and Auditor-General of India, thus, brings this office at par with that of his British counterpart in one respect.

But there still remains another fundamental point of difference. Though the designation of his office indicates that he is to function both as Comptroller and Auditor, *our* Comptroller and Auditor-General is so far exercising the functions only of an Auditor. In the exercise of his functions as Comptroller, the English Comptroller and Auditor-General controls the receipt and issue of public money and his duty is to see that the whole of the public revenue is lodged in the account of Exchequer at the Bank of England and that nothing is paid out of that account without legal authority. The Treasury cannot, accordingly, obtain any money from the public Exchequer without a specific authority from the Comptroller, and, this he issues on being satisfied that there is proper legal authority for the expenditure. This system of control over issues of the public money not only prevents withdrawal for an unauthorised purpose but also prevents expenditure in excess of the grants made by Parliament.

In India, the Comptroller and Auditor-General has no such control over the *issue* of money from the Consolidated Fund and many Departments are authorised to draw money by issuing cheques without specific authority from the Comptroller and Auditor-General, who is concerend only *at the audit stage* when the expenditure has already taken place. This system is a relic of the past, for, under the Government of India Acts, even the designation 'Comptroller' was not there and the functions of the Auditor-General were ostensibly confined to audit. After the commencement of the Constitution, it was thought desirable that *our* Comptroller and Auditor-General should also have the control over issues as in England, particularly for ensuring that "the grants voted and appropriations made by Parliament are not exceeded". But no action has as yet been taken to introduce the system of Exchequer Control over issues as it has been found that the entire system of accounts and financial control shall have to be overhauled before the control can be centralised at the hands of the Comptroller and Auditor-General.

The functions of the Comptroller and Auditor-General have recently been the subject of controversy, in regard to two questions:

(a) The first is, whether in exercising his function of audit, the Comptroller and Auditor-General has the jurisdiction to comment on extravagance and suggest economy, apart from the legal authority for a particular expenditure. The orthodox view is that when a statute confers power or discretion upon an authority to sanction expenditure, the function of audit comprehends a scrutiny of the *propriety* of the exercise of such power in particular cases, having regard to the interests of economy, besides its legality. But the Government Departments resent on the ground that such interference is incompatible with their responsibility for the administration. In this view, the Departments are supported by academicians such as Appleby,[34] according to whom the question of economy is inseparably connected with the efficiency of the administration and that, having no responsibility for the administration, the Comptroller and Auditor-General or his staff has no competence on the question of economy:

> "Auditors do not know and cannot be expected to know very much about good administration; their prestige is highest with others who do not know much about administration... Auditing is a necessary but highly pedestrian function with a *narrow perspective and very limited usefulness.*"[34]

(b) Another question is whether the audit of the Comptroller and Auditor-General should be extended to industrial and commercial undertakings carried on by the Government through private limited companies, who are governed by the Articles of their Association, or to statutory public corporations or undertakings which are governed by statute. It was rightly contended by a former Comptroller and Auditor-General[35] that inasmuch as money is issued out of the Consolidated Fund of India to invest in these companies and corporations on behalf of the Government, the audit of such companies must necessarily be a right and responsibility of the Comptroller and Auditor-General, while, at present, the Comptroller and Auditor-General can have no such power unless the Articles of Association of such companies or the governing statutes provide for audit by the Comptroller and Auditor-General. The result is that the report of the Comptroller and

Auditor-General does not include the results of the scrutiny of the accounts of these corporations and the Public-Accounts Committee or Parliament have little material for controlling these important bodies, spending pubic money. On behalf of the Government, however, this extension of the function of the Comptroller and Auditor-General has been resisted on the ground that the Comtroller and Auditor-General lacks the business or industrial experience which is essential for examining the accounts of these enterprises and that the application of the conventional machinery of the Comptroller and Auditor-General is likely to paralyse these enterprises which are indispensable for national development.

As has just been stated, this defect has been partially remedied by the Act of 1971 which enjoins the Comptroller and Auditor-General to audit and report on the receipts and expenditure of 'Government companies' and other bodies which are 'substantially financed' from the Union or State revenues, irrespective of any specific legislation in this behalf.

REFERENCES

1. For the results of the elections so far held, see Table X.
2. As to how the system of Proportional Representation would work, see Author's *Commentary on the Constitution of India*, 7th Ed., Vol. E/1, pp. 84-90.
3. At the Presidential election held in 2007, the electoral college consisted of 4896 members of which the break-up was 543 Lok Sabha + 233 Rajya Sabha + 4120 State Assembly members.
4. C.A.D. , Vol. IV, pp. 734, 846.
5. In his speech in Parliament in 1961, Prime Minister Nehru observed that we should adopt a *convention* that no person shall be a President for more than two terms, and that no amendment of the Constitution was necessary to enjoin this.
6. Rs. 10,000 originally, raised to Rs. 20,000 in 1990 and to Rs. 50,000 in 1998 (w.e.f. 1-1-1996).
7. The original Constitution provided that the Vice-President would be elected by the two Houses of Parliament, assembled at *a joint meeting*. This cumbrous procedure of a joint meeting of the two Houses for this purpose has been done away with, by amending Art. 66(1) by the Constitution (11th Amendment) Act, 1961. As amended, the members of both Houses remain the voters, but they may vote by secret ballot, without assembling at a joint meeting.
8. Article 65(3) is to be read with para 4 of Part A of the 2nd Schedule,—the result of which is that until Parliament legislates on this subject (no such law has so far been passed by Parliament till 1987), a Vice-President, while acting as or discharging the functions of the President, shall receive the same emoluments and privileges and allowances as the President gets under Art. 59(3). Since 1996, that emolument is a sum of Rs. 50,000/- per mensem.

   When the Vice-President does not act as President, his only function is that of the Chairman, Council of States, under Art. 97. By passing the Salaries and Allowances of Officers of Parliament (Amendment) Act, 1998, the salary of the Chairman of the Council of States has been raised to Rs. 40,000/- per mensem, *vide* Act 26 of 1998 (w.e.f. 1-1-1996). He is entitled to daily allowance as admissible to Members of Parliament.
9. *Ram Jawaya* v. *State of Punjab*, (1955) 2 S.C.R. 225 (*238-39*).
10. *Shamser Singh* v. *State of Punjab*, AIR 1974 S.C. 2192; *Rao* v. *Indira*, AIR 1971 S.C. 1002 (*1005*); *Sanjeevi* v. *State of Madras*, AIR 1970 S.C. 1102 (*1106*).
11. DICEY, *Law of the Constitution*, 10th Ed., p. 468.
12. The Council of States, also called the upper House, is *not* subject to dissolution, but is a permanent body. One-third of its members retire every two years [*Art.* 83(1)].
13. The only instance of the exercise of the President's veto power over a Bill passed by Parliament, so far, has been in regard to the PEPSU Appropriation Bill. It was passed by Parliament under Art. 357, by virtue of the Proclamation under Art. 356. The

Proclamation was, however revoked on 7-3-1954, and the Bill was presented for assent of the President on 8-3-1954. The President withheld his assent to the Bill on the ground that on 8-3-1954, Parliament had no power to exercise the legislative powers of the PEPSU State and that, accordingly, the President could not give his assent to the Bill to enact a law which was beyond the competence of Parliament to enact on that date.

The Salary, Allowances and Pension of Members of Parliament (Amendment) Bill, 1991 was passed by the Houses of Parliament on the last day of its sitting, without obtaining the President's recommendation as required by Art. 117(1). It was presented to the President for his assent on 18th March, 1991. The President withheld his assent to it. (*Rajya Sabha, Parliamentary Bulletin Part I*, dated March 9, 1992).

This shows that the veto power is necessary to prevent the enactment of Bills which appear to be *ultra vires* or unconstitutional at the time when the Bill is ready for the President's assent. It also shows that there may be occasions when Government may have to advise the President to veto a Bill which had been introduced by the Government itself.

14. In 1986 both the Houses passed the Indian Post Office (Amendment) Bill, 1986. It was widely criticised as curtailing the Freedom of the Press. President Zail Singh did not declare his assent or that he withheld his assent. It was all the time in the 'pocket' of the President.

After the formation of the National Front Government in December, 1989, the President R. Venkataraman referred it back for reconsideration and the Prime Minister declared that it would be brought again before the Houses of Parliament, with suitable changes. It appears certain that it has been given up.

15. *Hoechst Pharmaceuticals* v. *State of Bihar*, AIR 1953 S.C. 1019 (para 89).

16. *Lakhinarayan* v. *Prov. of Bihar*, AIR 1950 F.C. 59; *State of Punjab* v. *Satya Pal*, AIR 1969 S.C. 903 (*912*).

The proposition arrived at in these cases now stand modified in a case from Bihar, decided by the Supreme Court in December, 1986—*Wadhwa* v. *State of Bihar*, AIR 1987 S.C. 579. In this case, it was established that the Government of Bihar, instead of laying before the State Legislature an Ordinance as required by Art. 213(2)(a) of the Constitution [corresponding to Art. 123(2)(a)] or having an Ordinance replaced by an Act of the Legislature, before the expiry of the Ordinance on the lapse of the time specified in the Constitution, would prolong its duration by re-promulgating it, *i.e.*, by issuing another new Ordinance to replace the Ordinance which would have otherwise expired. In this manner, some 256 Ordinances were kept alive (up to a length of 14 years in some cases) without getting an Act passed by the State Legislature in place of the expiring Ordinance. The Supreme Court held that the power of the Governor to promulgate an Ordinance was in the nature of an emergency power. Hence, though in some rare cases when an Act to replace an Ordinance could not be passed by the Legislature in time as it was loaded with other business; but if it was made a usual practice so as to establish legislation by the Executive (or an 'Ordinance Raj') instead of by the Legislature, as envisaged by the Constitution, that would amount to a *fraud* on the Constitution, on which ground, the Court would strike down the repromulgated Ordinance. The substance of this decision is, therefore, that in extreme cases, a Court may invalidate an Ordinance on the ground of *fraud* and it affirms the trend since *Cooper's* case (f.n. 18, *below*).

17. *Wadhawa* v. *State of Bihar*, AIR 1987 S.C. 579.

18. *Cooper* v. *Union of India*, AIR 1970 S.C. 564 (*588, 644*); *A.K. Roy* v. *Union of India*, AIR 1982 S.C. 710.

19. *Samsher* v. *State of Punjab*, AIR 1974 S.C. 2192 (para 30).

20. *Kehar Singh* v. *Union of India*, AIR 1989 S.C. 653.

21. *Maru Ram* v. *Union of India*, AIR 1980 S.C. 2147, paras 62, 72(a) [Const. Bench] **followed** in *S.R. Bommai* v. *Union of India*, (1994) 3 S.C.C. 1 (para 73)—9-Judge Bench.

22. As regards the Union Territories of (a) Goa, Daman & Diu, (b) Pondicherry, (c) Mizoram and (d) Arunachal Pradesh, the President's power to make regulations has ceased, since the setting up of a Legislature in each of these Territories, after the amendments of Art. 240(1), in 1962, 1971 and 1975. So far as Mizoram, Arunachal Pradesh and Goa are concerned, they have been promoted to the category of States, in 1986-87.

23. The words 'armed rebellion' have been substituted for 'internal disturbance', by the 44th Amendment Act, 1978.
24. For further study of the Cabinet system in India, see Author's *Commentary on the Constitution of India* (7th Ed.), Vol. E/1, pp, 195-293.
25. In July, 1989, their number was (a) Members of the Cabinet—18; (b) Ministers of State—40 (total 58). In July 1990 (a) the Members of the Cabinet—18; (b) Ministers of State—18; and (c) Deputy Ministers—5. In March 1992 the total was 57. In September, 1995—(a) Members of the Cabinet—20, and (b) Ministers of State—50. In December 1996 there were 20 cabinet ministers and 19 ministers of State. In November 2000 there were 29 Cabinet Ministers, 44 State Ministers and no Deputy Ministers. On 22.5.2008, there were 32 Cabinet Ministers, 8 Ministers of State (independent charge) and 40 other Ministers of State.
26. *Common Cause, A Registered Society* v. *Union of India,* (1999) 6 S.C.C. 667 (para 3) : A.I.R. 1999 S.C. 2979.
27. C.A.D., Vol. IV, pp. 580, 734; Vol. VII, pp. 32, 974, 984.
28. The suggestion of President Dr. Rajendra Prasad, in his speech at the Indian Law Institute, that the position of the Indian President was not identical with that of the British Crown, must be read with his quoted observation in the Constituent Assembly [X C.A.D. 988] which, as a contemporaneous statement, has a great value in assessing the intent of the makers of the Constitution, and the meaning behind Art. 74(1), as it stood up to 1976.
29. K.M. Munshi, the President under the Indian Constitution (1963), p. viii.
30. *Sanjeevi* v. *State of Madras*, AIR 1970 S.C.. 1102 (*1106*); *Rao* v. *Indira*, AIR 1971 S.C. 1002 (*1005*); *Shamser Singh* v. *State of Punjab*, AIR 1974 S.C. 2192.
31. BASU, *Commentary on the Constitution of India*, 5th Ed., Vol. II, p. 593, where it is stated—

    "Constitutional writers agree that a dismissal of the Cabinet by the Crown, would now be an unconstitutional act, except in the abnormal case of a Cabinet refusing to resign or to appeal to the electorate upon a vote of no confidence in the Commons." See the instances given in *Shamser Singh's* case [AIR 1974 S.C. 2192 (para 153)].
32. There was a vehement public criticism that this prohibition in Art. 148(4) was violated by the appointment of a retired Comptroller and Auditor-General as the Chairman of the Finance Commission. According to judicial decisions, an 'office' is an employment, which embraces the ideas of tenure, duration, emolument and duties. Now, the Finance Commission is an office created by Art. 280 of the Constitution itself, with a definite tenure, emoluments and duties as defined by the Finance Commission (Miscellaneous Provisions) Act, 1951, read with Art. 280 of the Constitution. Apparently, therefore, the membership of the Finance Commission is an office under the Government of India, which comes within the purview of Art. 148(4).
33. But, as Dr. Ambedkar pointed out in the Constituent Assembly (C.A.D., VIII, p. 407), in one respect the independence of the Comptroller and Auditor-General falls short of that of the Chief Justice of India. While the power of appointment of the staff of the Supreme Court has been given to the Chief Justice of India [*Art.* 146(1)], the Comptroller and Auditor-General has no power of appointment, and, consequently, no power of disciplinary control with respect to his subordinates. In the case of the Comptroller and Auditor-General, these powers have been retained by the Government of India though it is obviously derogatory to the administrative efficiency of this highly responsible functionary.
34. APPLEBY, A., *Re-examination of India's Administrative System,* p. 28.
35. Narhari Rao's statement before the Public Accounts Committee, 1952.