Chapter - I

The President of India: An Overview

In our constitutional system, the President occupies a very special place. He is the Head of the State and the symbol of the Nation. Every important authority mentioned in the Constitution is directly or indirectly attached to him.

But nonetheless, the question of President's powers has been the subject of debate among intellectuals, lawyers, and others because there is a wide gap between theory and practice. In this chapter, an attempt is made to analyse the powers and actual position of the President with special reference to the Constituent Assembly Debates, the judicial interpretations, and opinions of important segments of society.

I. The Constituent Assembly and Form of Government

The Constituent Assembly of India met for the first time in December 1946 and took steps for framing a Constitution. The main problem before the framers of the Indian Constitution was what should be the type and nature of the Government of India. They had before them three alternative forms of democracy - first, the English model of Parliamentary Government, second, the Presidential form of Government as existing in the United States and thirdly, a democracy with plural executive as in Switzerland.
This selection of a particular type of responsible government for India was, as Shri B.N. Rau wrote, 'the most important question in the framing of new Constitution'.

The Constituent Assembly had to find the answer in the context of the past - India's familiarity with cabinet Government - and in the needs of the present and future. The needs were strength and quick effectiveness, for huge strides in industrial, agricultural and social development had to be made and an enormous population well and fairly governed.

During the heated discussion in the Constituent Assembly about the suitability of the form of Government, some members (of the Assembly) spoke against the introduction of the Cabinet system of Government. They were unanimous in their opinion that the British system of democracy would not suit India. They advocated a fixed term executive on the Swiss model, elected by the

3. Ibid.
4. In the Constituent Assembly, Shri Mahboob Ali Beg, Begum Aijaz Rasul, Shri K.S. Karimuddin and Shri Aziz Ahmad Khan spoke against the introduction of the Cabinet system of Government in India.
legislature on a system of proportional representation.

As Shri Mahboob Ali Beg maintained:

"... the British Parliamentary system is not a statutory one ... the parliamentary democracy obtaining in England which is sought to be introduced here is not democratic ... Swiss type (of Government) has got the advantage of being democratic at certain stages. It is possible for all sections of the country to be represented, it will work better and can complete its schemes and in the present circumstances of the country, is the most suitable and there is nothing wrong in introducing this system".5

Opposing the adoption of the British parliamentary system, Shri K.S. Karimuddin also said:

"My submission is that the parliamentary system which is functioning in India under the 1935 Act has miserably failed ... All over India you must have noticed that there have been deadlocks as ... it does not suit the genius of the people ... What we want today is a patriotic Government. What we want today is a strong Government; an impartial and unbending executive, that does not bow before popular whims ...."6

He also said:

"This (India) is a country of different religions. This is a country of different ideologies. This is a country with different cultures. At a critical moment in the history of India when we do not want internal strife,

when we want a formidable government to be a bulwark against all aggression, it is necessary that ... there should be a non-removable executive and non-parliamentary executive. The salvation of Indian people lies in this ...."7

Mr. Aziz Ahmad Khan had also observed:

"... English system of democracy does not suit India. We have witnessed the result of this system of democracy, which has caused disturbances and bloodshed in this country. Had the system of Government been the product of our own genius, most probably such mutual hatred and differences would not have been created or intensified...."8

There was also a move by Prof. K.T. Shah in favour of a Presidential form of Government on the American model.9 But Shri K.M. Munshi, while opposing the motion of Shri K.T. Shah for the adoption of the American President, said:

"We must not forget a very important fact that during the last one hundred years Indian public life has largely drawn upon the traditions of the British Constitutional law. Most of us ... have looked up to the British Model as the best. For the last thirty or forty years some kind of responsibility has been introduced in the governance of this country. Our constitutional traditions have become parliamentary ... After
this experience, why should we go back upon the tradition that has been built for over a hundred years and try a novel experiment ... framed 150 years ago and found wanting even in America".10

Dr. Ambedkar also said that the British system was preferable as it was possible to have a periodic as well as daily assessment of responsibility under the system, whereas under the American system, only periodic assessment of responsibility was possible.11

Shri Alladi Krishnaswamy Ayyar also said:

"An infant democracy cannot afford, under modern conditions, to take the risk of perpetual cleavage, feud, or conflict or threatened conflict between the Legislature and the Executive".12

Moreover, the reports of the Union Constitution Committee and the Provincial Constitution Committee whose Chairman were Pt. Nehru and Sardar Patel, respectively favoured the retention of the British model for India.13

However, after much deliberation the framers of the Constitution adopted the English model of Parliamentary

10. Ibid, pp. 984-5.
Democracy for two reasons, one was the experience gained as a result of the past constitutional development. In fact India was familiar with the British tradition of administration and it was considered better to have a type of government with which the country was familiar. Secondly, continuity of responsibility towards the Legislature and flexibility of the system as a whole.

However, the features of the American model such as the process of election of the President, his impeachment, the Fundamental Rights, the Federalism etc. were also included in our Constitution. This is the reason why Shri P.B. Mukherjee, the former Chief Justice of Calcutta High Court, had stated:

"It is wrong to say that the Indian Constitution is a Presidential form of Government. It is equally wrong to say that it is a Parliamentary Government. It is neither and it is both. India is not only a cultural mixture but also a complex constitutional mixture".14

II. The Constituent Assembly and President of India

Having decided that India would adopt the English system of Parliamentary Democracy, the Constituent Assembly had to find answers to other important questions also. India was to be a Republic and not a Monarchy,\(^\text{15}\) therefore the question arose: who should be the Head of the State? What would be his designation? How was he to be chosen and what should be his powers?

The Nehru Report had advocated that the Head of the State should be a Governor-General with powers similar to those in other Dominions with an executive council operating on the principles of collective responsibility.\(^\text{16}\) The Sapru Report also advocated a constitutional head of the State for India.\(^\text{17}\)

In March 1947, Shri B.N. Rau, the Constitutional adviser, prepared a questionnaire on the Executive which

\(^{15}\) India, throughout her history had been accustomed to Monarchy. Even an opinion was canvassed among the members of the Constituent Assembly in favour of Monarchy. Pt. Nehru argued that though Monarchy was a convenient institution, it was difficult to choose one Monarch from among the 562 Monarchs in India. Cited in B.C. Das, Political Development in India (New Delhi: Ashish Publishing House, 1978), p. 94.


\(^{17}\) Ibid.
he sent to the members of the Central and Provincial Legislatures. In reply to Shri Rau's first question i.e. what should be the designation of the Head of the State, Shri Shyama Prasad Mukherjee suggested the term 'Rashtrapati' probably because the architects of the Indian Constitution were going to construct India as a 'Rastra', a sovereign Democratic Republic. On the other hand, Mr. Panikkar proposed the designation, 'President'. The Union Constitution Committee, however, recommended that the designation of the Head of the Indian Union should be Rashtrapati in English the President. The Constituent Assembly accepted this recommendation of the Union Constitution Committee as final.

Having decided that the designation of the Head of the Indian Union would be 'President' (or Rashtrapati - in Hindi), the discussion on the manner in which the Head

18. B.N. Rau, f.n. 1, p. 16.


20. Ibid.

21. See 'Draft minutes of the meeting of the Union Constitution Committee held on June 6, 1947 at 2.45 p.m. in Council House, New Delhi' in Dr. Rajendra Prasad Papers, File 3-C/47 in National Archives of India Library, New Delhi.
of the State would be elected as well as on other aspects of the Presidency, was started.

During discussion in the Constituent Assembly, Shri K.T. Shah proposed that, "the Chief Executive or the Head of the Union of India ... shall be elected by the votes of all the adult citizens of India."22

Prof. Shibban Lal Saxsena also proposed that the President should be elected directly by the people on the basis of adult franchise.23

Shri S.K. Karimuddin again was of the view that the President should be directly elected by the people. As he said:

"If after every fourth or fifth year the election of the President is held on adult franchise basis, it will educate the masses and momentous economic problems of great magnitude will be brought to the fore front...."24

Shri T. Channiah suggested that the President of India should be elected by rotation either by the North or south of India because that would give a fair representation and satisfaction to the people of India who stood geographically divided into two distinct divisions.25

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On the other hand, Shri Tajamul Husain opposed the proposal that the President should be elected by rotation from North and South of India. As he said:

"This (the proposal to elect President by rotation) is a dangerous principle to adopt. If such a principle is adopted, then every province may claim that in turn the President should be elected from a particular province". 26

Shri Jawahar Lal Nehru opposed the principle of election of the President on North and South basis. He favoured the idea that in the units of the Federation only the Lower Houses should participate in the election of the President. As regards direct election of the President, he felt that, 'it would waste much of our time and that we shall not be in a position to act according to our new Constitution'. 27

Shri B.N. Rau, in his memorandum on the Union Constitution, suggested that, "the President should be elected by the two houses of the Union Parliament at a joint session by secret ballot according to the system of proportional representation by the single transferrable vote". 28

27. Ibid, p. 805.
On 8th June 1947, the Union Constitution Committee accepted the suggestion of Shri N.G. Ayyangar that the President should be elected neither by Parliament nor by direct universal suffrage but by an electoral college comprising of the members of the lower chamber of the Federal Legislature as well as of a fixed percentage of the total population of the Provinces and of the Indian States.  

On 9th June 1947, Shri K.M. Munshi wrote a letter recommending that the President and the Governors should be elected by an electoral college directly elected for the purpose.  

Ultimately, the Union Constitution Committee took the final decision that the President would be indirectly elected through an electoral college consisting of all the elected members of the Legislatures in the country. The Constituent Assembly also accepted that decision of the Union Constitution Committee as final. In this context Shri K.M. Munshi commented:

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29. See 'Draft minutes of the meeting of the Union Constitution Committee, held on June 8, 1947 in the Council House at 3 p.m.' in Dr. Rajendra Prasad's Papers, f.n. 22.


31. Ibid, p. 179.

32. Ibid.
"Ultimately a compromise was arrived at (in the Union Constitution Committee) that the President should not be reduced to the position of a figurehead like the French President, but should have a status and authority equal to the Parliament, by being chosen as the representative of the whole country, though indirectly through an electoral college consisting of all the elected members of the Legislatures in the country". 33

III. The President and his Powers under the Constitution of India

The President of India holds the office for a term of five years from the date on which he enters the office. Under Article 60 of the Constitution of India, he takes an oath in the presence of Chief Justice of India, affirming his devotion to the service and well being of the people of India and protection and defence of the Constitution. As the Head of the state, he is entitled to exercise certain powers. His powers can be broadly classified under five heads: (a) Executive powers (b) Legislative powers (c) Financial powers (d) Judicial powers and (e) Emergency powers.

(a) **Executive Powers**

Under Article 53, the executive power of the Union is vested in the President who can exercise it directly.

33. Ibid.
or through officers subordinate to him in accordance with the Constitution. This Article further provides that the supreme command of the defence forces shall be vested in the President and the exercise of this power shall be regulated by law.

Under Article 78, the President has been given the right to be kept informed by the Prime Minister of all decisions taken by the Council of Ministers and seek such other information regarding the affairs of the Government of India as he may consider necessary. The Article further provides that the Head of the State may also ask the Prime Minister to submit for the consideration of the Council of Ministers any matter on which a decision had been taken by a Minister but which has not been considered by the Council.

All important appointments, including those of the Prime Minister, Council of Ministers (Article 75), Judges of the Supreme Court (Article 124(2)), Judges of the High Courts (Article 217), Attorney General of India (Article 76(1)), Chief Election Commissioner (Article 324(2)), the Chairman and other members of the Union Public Service Commission (Article 316), the Comptroller and Auditor General of India (Article 148) and the Governors of the States (Article 155) are made by the President. He
constitutes the Election Commission (Article 324(2)), the Finance Commission (Article 280) and a number of other Commissions.

As the President is the appointing authority, he also has the power to remove the various dignitaries from office.

Moreover, under Article 263 of the Constitution, the President has the power to set up an inter-state Council charged with the duty of investigating into and advising upon disputes between the States.

(b) Legislative Powers - Even though the President is not a member of any one House of the Union Parliament, he exercises several legislative powers.

The President summons each House of Parliament to meet at such time and place as he thinks fit. But there should not be a gap of more than six months between its last sitting in one session and the date fixed for its first sitting in the next session. The President is empowered to prorogue the Houses or either House and to dissolve the Lok Sabha. The President has also the


35. Ibid.

36. Article 85(2), Ibid.
powers to summon a joint sitting of both Houses of Parliament in case of deadlock between them over a non-money Bill (Article 108(1)). He addresses both Houses of Parliament assembled together at the first session after each general election and at the commencement of the first session of each year and inform Parliament of the causes of its summons (Article 87). He has a right to address either House or their joint sitting at any time. Apart from the right to address, the President has the right to send message to either House of Parliament in regard to any pending Bill or any other matter and the House then must consider the message with all convenient despatch (Article 86(2)). The President has also the right to nominate 12 members to the Rajya Sabha and not more than 2 members to the Lok Sabha.

As regards legislation, the prior recommendation or previous sanction of the President is required for introducing a Money Bill (Article 117(1)) and Bills affecting taxation in which States are interested (Article 274). Recommendation of the President is also required for the consideration of a Bill which, if enacted and brought into operation, would involve expenditure from the consolidated Fund of India. Recommendation of the Head of the State is
also necessary when a Bill is to be introduced under Article 3 for the formation of new states or alteration of boundaries etc.

All bills after having been passed by both the Houses of Parliament must be presented to the President for his assent. Bills become Acts only after receiving the assent of the President (Article 111). Under Article 86(2), the President has the power to issue ordinances, if Parliament is not in session.

(c) Financial Powers

No Money-Bill, as stated above, particularly no Bill imposing or varying any tax or duty in which the states are interested by reason of the whole or any share of it being assigned to them, can be introduced in the Lok Sabha without prior recommendation of the President. The contingency Fund of India is at the disposal of the President. The President causes the budget and supplementary budget to be laid before the Parliament. The President appoints Finance Commission to make recommendations regarding financial relations between the Union and the States.

(d) Judicial Powers

The Head of the State is vested (under Article 72) with power to grant pardons, reprieves, respites or
remissions of punishment or to suspend, remit or commute the sentence of any person convicted of an offence -

(a) in all cases of punishment by a Court Martial;

(b) in all cases where the punishment is for an offence against any law relating to a matter to which the executive power of the Union extends;

(c) in all cases of sentence of death.

(e) **Emergency Powers**

The President has been given very wide powers to meet emergencies. The Constitution envisages three kinds of emergencies, namely, (1) emergency arising out of war or internal disturbances or the threat of the same, (2) emergency arising out of the failure of constitutional machinery in the states and (3) financial emergency.

(i) **Emergency caused by war or internal disturbances**

Article 352 of the Constitution provides that if the President is satisfied that the security of India or any part thereof is threatened by war or external aggression or internal disturbances, he may proclaim an emergency. Proclamation of emergency may also be issued in anticipation of war, external aggression or disturbance.
(ii) **Emergency caused by a Constitutional crisis in a State**

Article 356 provides that if the President on receipt of report from the Governor of a state or otherwise is satisfied that a situation has arisen in which the Government of a state cannot be carried on in accordance with the provisions of the Constitution; or when it has failed to carry out a direction issued to it by the Union Government in respect of the administration of Union matters, he shall issue a proclamation of the failure of constitutional machinery in the state.

(iii) **Financial Emergency**

Article 360 of the Constitution stipulates that if the President is satisfied that a situation has arisen whereby the financial stability or credit of India or of any part thereof is threatened, he may, by a Proclamation, make a declaration to that effect. Such proclamation must be ratified by the Parliament within two months of its declaration.

IV. **Position of the President of India**

In our constitutional system, there are two views about the position of the Indian President which are opposed to each other. The first view is that, since the form of Government contemplated by the Constitution is on
the model of British Parliamentary system, the President is a constitutional head like the British Monarch. The second view is that the President has large and substantial powers which he can exercise in his discretion.

The first view (i.e. the President is always bound by the aid and advice of the Council of Ministers) is shared by prominent authors like Shri M.G. Gupta, Shri K.C. Markandana, Mr. Granville Austin and by legal luminaries like Shri M.C. Setalvad, Justice V.S. Deshpande. This view is also supported by Supreme Court decisions.37

Shri M.G. Gupta in his book wrote:

"The position of the Indian President is more or less similar to that of the British Monarch or that of the Governor-General in a Dominion. The supreme executive power of the Indian Union is vested in him like a constitutional Monarch. He follows the advice of his ministers tendered to him through the Prime Minister. The circumstance that he is elected indirectly for a short term, and the fact ... (that) he can be impeached ... go to establish that the President is constitutionally bound to accept the advice of the Ministers".38


Shri K.C. Markandan also wrote in an article:

"Thus for all practical purposes the President is a constitutional head ... The Constitution lays down specifically either in the matter of performance of a governmental action or appointments to high offices, as to how the President should exercise that function, but where it is silent or where details are not provided for, that function has to be performed by the President in accordance with the advice tendered by the Council of Ministers, or more particularly by the Prime Minister as the spokesman of the Council of Ministers. In the realm of the executive action of the Government of India ... the President is merely a figurehead ...." 39

He supported this view by quoting Dr. Ambedkar,

"there is no case which can arise where the President would be called upon to discharge his functions without the advice of the Prime Minister or his cabinet ...." 40

Mr. Granville Austin, an eminent foreign writer, also held the view that the Indian President was only a constitutional head. As he wrote:

"In April 1948 ... Prasad wrote to B.N. Rau that he did not find a provision 'laying it down in so many terms' that the President of the Union was bound to accept and act upon the advice of his ministers. Prasad was


writing in connection with Article 285(1) of the Draft, which he interpreted to mean that the President, in his discretion, appointed the Chairman of the Public Service Commission, and he asked Rau whether the President was not bound 'at all in any case or that he is bound... in all cases' to accept ministerial advice. That Prasad misinterpreted Article 285(1) in this way showed that he had, willfully or otherwise, misread it and that he had not paid sufficient attention to the debate on the subject in the Assembly."41

He also wrote:

"Not only had he (Dr. Prasad) apparently forgotten that it had been made clear many times in speeches, notes, and memoranda that the President of India was to be, like the British monarch, a constitutional head of state, he had forgotten that A.K. Ayyar had reiterated this point specifically in connection with the appointment of the Chairman of the Union Public Service Commission ...."42

Shri M.C. Setalvad, the former Attorney General of India also stated on October 6, 1950:

"By the Constitution, the President is required to act in all matters with the aid and advice of his Council of Ministers. The moment the President refuses to accept its aid or advice there will be a break-down in the constitutional machinery .... Having regard to the historical setting of our Constitution and its key provisions, the position of the President in our Constitution would appear to be very similar to that of the King in the British constitution ...."43

41. Granville Austin, f.n. 2, p.135.

42. Ibid.

Justice V.S. Deshpande also expressed similar views:

"The office of the President has been created by the Constitution as the Constitutional head of the Executive of the Union. The President does not appear to have any personal capacity or any capacity as a persona designata as distinguished from his sole capacity as the head of the Union Executive. He is invariably advised by the Council of Ministers in all his functions ...."44

This view (i.e. the President has no powers) is also supported by some Supreme Court decisions.

For instance in 1955 in Rai Sahib Ram Jawaya Kapur vs. State of Punjab, the Supreme Court observed:

"Our Constitution though federal in its structure is modelled on the British Parliamentary system where the Executive is deemed to have the primary responsibility for the formulation of Governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the Legislative branch of the State".45

Again in 1970, in the Bank Nationalisation case, the Supreme Court observed:


45. All India Reporter (Nagpur), Vol. 42, 1955, Supreme Court 549 (550).
"The ordinance is promulgated in the name of the President, and in a constitutional sense on his satisfaction; it is in truth promulgated on the advice of his Council of Ministers and on their satisfaction". 46

In 1971, in U.N. Rao v. Mrs. Indira Gandhi case, the continuation of the ministry after the dissolution of Lok Sabha was challenged. It was contended that as the Council of Ministers has to be collectively responsible to the House, the Council could not exist while the House was not existing. It was also argued by the appellant that the executive power of the Union could be exercised by the President directly or through officers subordinate to him in accordance with the Constitution. 47 But justice Sikri observed:

"The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and ministers to aid and advice in the exercise of his functions. As there would be no Council of Ministers' nobody would be responsible to the House of the People. With the aid of


advisers he would be able to rule the Country at least till he is impeached under Article 61."

He also maintained:

"Article 74(1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers".49

In Shamsher Singh Vs. State of Punjab case, Chief Justice A.N. Ray had also observed:

"Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the constitutional or formal head of the Union and he exercises his powers ... on the aid and advice of his Council of Ministers ..."50

According to this first view, the adoption of 42nd and 44th Amendment has ended the ambiguity of the constitutional text concerning the powers of the President in relation to those of the Council of Ministers. The original Article 7451 stipulated that 'There shall be a Council of Ministers with the Prime Minister at the head to aid and

49. Ibid.
50. All India Reporter (Nagpur), Vol. 61, 1974, Supreme Court 2192 (2198).
51. It means the Article before the passing of 42nd Constitution Amendment Act (1976).
advise the President in the exercise of his functions*. The 42nd amendment changed the construction of this sentence to clarify further that 'the President shall, in the exercise of his functions, act in accordance with such advice'.

Thereafter, by the Constitution (Forty-fourth Amendment) Act 1978, the following proviso was added to the revised clause (1) of Article 74:

'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 second view (i.e. the President has large and substantial powers which he can exercise in his discretion) is shared by eminent writers like Shri S.C. Gangal, Shri H.M. Jain, Shri N.S. Gehlot, Shri S. Sahay, Shri Madhu Limaye and eminent jurist like Shri V.R. Krishna Iyer. This view is supported by Supreme Court decisions also in some cases like Jayanthilal Amrit Lal Vs. F.N. Rana, Union of India Vs. Jyoti Prakash etc.

Shri S.C. Gangal, an eminent writer, in an article entitled 'President and the Prime Minister' has observed:

"While constitutionally the President may only
be a formal instrument of expressing or
operationalising the will of the Cabinet, in
practice, an exalted functionary like him
cannot be expected always to remain an
inconsequential or utterly passive agent.
A modern political system, unlike the
written document called the 'Constitution',
is a live and dynamic phenomenon. Hence
the major actors in the system must grow
with it and reflect its dynamism in their
political behaviour and role fulfilment.
In a national crisis - like in the event of
war, grave civil commotion or a national
calamity - the President could not be
expected to remain a mere helpless
spectator, no matter how the Council of
Ministers handles the crisis".  

Shri H.M. Jain has also written in an article:

"It is fallacious to suppose that after the
two amendments of Article 74, the President
will become an automaton, a mere rubber
stamp, or a signing machine. There are two
important areas of his power which remain
unaffected by the said amendment, namely,
(a) the appointment of the Prime Minister
and (b) the dismissal of the Prime Minister.
In the very nature of things, the President
cannot be bound by the Cabinet advice and must
be guided by constitutional propriety and
political imperatives in these matters".

Shri Madhu Limaye also in his book, 'Indian polity
in transition' had maintained that, 'the reserve powers
(of the President) cannot, in the nature of things, be

54. S.C. Gangal, 'President and the Prime Minister'
Ganchi Marq (New Delhi), 9(2), May 1987, p. 69.

55. H.M. Jain, 'Presidential Prerogatives under the Constitution',
Journal of Constitutional and Parliamentary Studies
(New Delhi), 12(2), April-June 1978, p. 177.
exercised on the advice of the Cabinet since they pertain to the formation and dismissal of the Cabinet".  

Shri N.S. Gehlot has also argued:

"The case study of the 1979 constitutional crisis leaves in no doubt that the President of India has a few opportunities of influencing policies, effective decisions and taking actions of his government, and on certain specific occasions, he has to act according to his own discretion to meet a chaotic situation created by the warring groups/parties".  

Shri S. Sahay has also opined:

"The President ought not be a helpless spectator of the arbitrary use of power or its misuse by a Government determined to make hay while the sun shines. Under our Constitution, the President is not exactly a rubber stamp".  

Shri V.R. Krishna Iyer, an eminent jurist, has also expressed the similar views:

"Be it remembered that, when all is said and done, he (President) too is elected by a distinguished electoral college and charged with a vast range of functions and powers and unspelt prerogatives ... And in a narrow area of momentous import it is he who acts without his Cabinet's control or Ken".

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Moreover, there are some cases where the Courts (Supreme Court and High Courts) themselves have recognised the existence of an autonomous sphere of Presidential action.

In 1964 in Jayantilal Amritlal Vs. F.N. Rana, the Supreme Court held that, 'Article 258(1) empowers the President to entrust to the state the functions which are vested in the Union, and which are exercisable by the President on behalf of the Union'. But it went on to say that, 'Article 258 does not authorise the President to entrust any other person or body the powers and functions as are expressly vested in him by the Constitution, such as Articles 356, 309 and do not fall within the ambit of Article 258(1)'.

Thus by making distinction between the executive functions of the Union and that of the President, the Supreme Court recognised an autonomous field of action for the President.

In 1968, the High Court of Punjab and Haryana used similar arguments in Rao Birinder Singh Vs. Union of India case. Shri R.B. Singh, the Chief Minister of Haryana,


61. Ibid.
challenged the validity of the presidential ordinance proclaiming President's rule in Haryana on the ground that the proclamation never specified whether the decision to dismiss his government had been taken on the advice of the Council of Ministers. The High Court rejected his argument and stated that the Jayantilal Amritlal ruling had introduced a distinction between the executive functions of the President and that of the Union; hence it could thereby be deduced that the power of proclaiming President's rule belonged to the category of the personal powers of the President and that consequently, the Ordinance proclaiming President's rule in Haryana, did not have to mention the advice of the Council of the Ministers. 62

In 1971, the Supreme Court in Sardari Lal case observed:

"The power to promulgate Ordinances under Article 123; to suspend the provisions of Articles 268 to 279 during an emergency; to declare failure of the Constitutional machinery in states under Article 356; to declare a financial emergency under Article 360; to make rules regarding the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Article 309 ..."

are not powers of the Union Government; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1).”

Again in Union of India Vs. Jyoti Prakash Mitter, the Supreme Court held that the function entrusted to the President to determine the age of a judge under Article 217(3) was a quasi-judicial function entrusted to the President personally which he must discharge without the advice of the Council of Ministers and in consultation with the Chief Justice but without surrendering his judgement to the Chief Justice.

In Shamsher Singh Vs. State of Punjab, two separate but concurring judgements were delivered by the Court, one by Chief Justice Shri A.N. Ray for himself, Shri Palekar, Shri Mathew, Shri Chandrachud and Shri Alagiriswami and the other by Shri V.R. Krishna Iyer for himself and Shri P.N. Bhagwati. As we have discussed the judgement delivered by Chief Justice A.N. Ray earlier in the first view of the powers of the President of India, the judgement delivered by Shri V.R. Krishna Iyer, which belongs to the second view


64. All India Reporter, Ibid, Supreme Court 1093 (1094).
of the powers of the President, is as follows:

"We declare the law of this branch of our Constitution to be that the President and the Governors ... exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well known exceptional situations ... these situations relate to: (a) the choice of the Prime Minister ... (b) the dismissal of a government which has lost its majority in the House but refuses to quit office; (c) the dissolution of the House ...."\(^{65}\)

Thus, from the above discussion it is clear that there is no unanimity regarding the powers and position of the Indian President among the jurists, legal pundits and academicians.

It would not be out of place if we have a brief historical recount of the working of different Indian Presidents till 1974.

The tenure of Dr. Rajendra Prasad's Presidency was not as comfortable as is generally believed. The President was unable to reconcile himself to certain things. The first real clash between him and Pt. Nehru came towards the end of 1951 over the Hindu Code Bill. With reference to the Bill, Dr. Prasad had clearly expressed the opinion that it should not be passed without its having

65. *All India Reporter*, f.n. 50, Supreme Court 2192(2230).
been circulated for public opinion and being debated by the people as a whole. The reason behind this suggestion was that the Provisional Parliament did not have the mandate from the people to enact social legislation of a revolutionary nature because it had not been elected under the Constitution.

He had also written to Pandit Nehru in 1951 that he would send a message to Parliament expressing his views if the Hindu Code Bill was taken up. It was because of his strong opposition, the Government decided to postpone the consideration of the Bill till the first general elections.

Dr. Prasad had never reconciled to the view that the Indian President was the proto-type of the British Monarch.


67. The Provisional Parliament had not been directly elected under the Constitution; the Constituent Assembly had been redesignated as (Provisional) Parliament which was doing the Legislative and policy work of the Legislature. Cited in Ibid.


69. Ibid; See also Sri Ram Sharma, 'The President of India', Journal of Political Studies (Jullundur), 3(1), February 1970, p. 53.
In his opinion, the Indian President enjoyed much more powers under the Constitution than the British King.

Again in November 1960, he raised a nation-wide controversy on the question of the powers and functions of the President in the Indian Constitution, when in his address at the Indian Law Institute, 70 he called upon the scholars to examine scientifically how far these powers were identical with those of the British Monarch.

Dr. Radhakrishnan, during the tenure of his office had been exceptionally frank in publicly giving expression to his views. In 1962, under the shock of Chinese attack on India, he made no secret of his view that the military disaster was due to the 'credulity and negligence that had marked the India's relations with China and the unpreparedness of the defence forces of the country'. 71

He was also reported to have played a significant role in securing the resignation of the Defence Minister, Shri Krishna Menon, in 1962. 72

70. For details, See Appendix No.I.


72. Cited in N.S. Gehlot, 'The Critical President', Democratic World (New Delhi), 2(38), September 20, 1973, p. 7;
See also C.S. Venkatachar, 'Relations between the Indian President and the Prime Minister', India Quarterly (New Delhi), 27(2), April-June 1971, p. 106.
In 1967 also, in his last Republic Day message, he openly accused the Government for 'widespread incompetence and gross mismanagement of the Country's resources'.

Moreover, when Pt. Nehru died in office in May, 1964, the President did not consult anyone regarding the appointment of the caretaker Prime Minister. He, in fact, recalled an Indian precedent established in West Bengal in 1963 when Dr. B.C. Roy died in office and Mr. P.C. Sen, the senior most Cabinet colleague, was sworn in as the acting Chief Minister. In view of the existence of the above precedent, the President arrived at his own decision and invited Shri Gulzari Lal Nanda for Prime Ministership because he was the senior most cabinet member.

Similar procedure was followed again in January 1966 when Shri Lal Bahadur Shastri died. In doing so and taking the lead, the office of the President came to the fore front. The President of India thereby became the guardian of constitutional continuity in government and administration of the Country.


74. Cited in B.C. Das, The President of India, f.n. 19, p.245.

75. Cited in J.N. Lal, 'Relations between Indian President and Prime Minister', The Modern Review (Calcutta), 128(1), January 1971, p. 49.
Dr. Zakir Hussain always maintained cordial relations with the Prime Minister. He was treated as a patriotic scholar and educationist. He had the chances to intervene specially in Centre-State relations in the presence of the non-Congress Governments in some states. But he chose to play an inactive role even in times of turmoil.

After assuming Presidency, Shri V.V. Giri also played an important role. On various matters, he differed with the Government, namely, the general strike on the Railways, dissolution of Gujrat Assembly etc. He also advocated stringent measures to prevent smuggling, black marketing, adulteration of food-grains etc. The question of pre-mature dissolution of Parliament had also become a live issue in Indian politics for the first time during his tenure.

Thus, from the above discussion, we come to the conclusion that the Constitutional provisions allow the President sufficient scope to exercise certain discretionary powers, which he ought to explore in case he is convinced that the party in power, in pursuit of its narrow political ends, is jeopardizing national interest.

One such constitutional provision is Article 78 under which the President has been given the right to get information from the Executive. This Article is independent of Article 74. To this Article 78 therefore we now turn our attention in the following chapter.