CHAPTER-I

INTRODUCTION:

Temporary Law Making Power by the Executive has been with the Head of Political Sovereign throughout the world, wherever Parliamentary Democracy is found. In India similar powers have been vested in the Executive Head of the Country i.e., the President of India, and since India has adopted federalistic polity the Governors of each State also enjoy similar prerogative legislative powers. The President's law i.e., the Ordinance is applicable to the whole of India or some part of India, as the Ordinance provides for. Whereas the Governor's Law i.e., Ordinance is applicable to the territorial jurisdiction of a State or some part of it, as such ordinance envisages.

The provision, for making the law temporarily by way of Ordinance by the President or the Governor as the Executive Head of the Union or the State respectively, during the recess of the Legislature, that is when it is not in session, and when it becomes urgently

1. Article 123.
2. Article 213.
necessary to make such law is enshrined in the Constitution of India.

In the case of the Union the power is exercisable by the President except, when both the Houses of Parliament are in session. In the case of the States it is exercisable by the Governor except when the Legislature i.e., both Houses, where the Legislature is bi-cameral, is in session.

The Ordinance-making power can be exercised when circumstances exist which make it necessary to take immediate action. An Ordinance promulgated by the President or the Governor has the same force as an Act of Parliament or the State Legislature, as the case may be. By an Ordinance no provision can be made by the President which Parliament would be incompetent to enact or by the Governor which the Legislature of the State would be incompetent to enact.

The origin of the Ordinance-making power of the Chief Executive in India can be traced back to the Indian Councils Act, 1861, which empowered the Governor-General in case of Emergency, to promulgate Ordinances which were to remain in force for not more than six months. The said
provision was continued in subsequent constitutional enactments. The Government of India Act, 1935 also provided for promulgation of Ordinances by the Governor-General in his discretion during the recess of the Legislature. However, the restriction on the period of operation of the ordinances was removed by the India and Burma (Emergency Provisions) Act, 1940. Similarly adoption of Section 42 of the Government of India Act, 1935 by the India (Provisional Constitution) Order, 1947 omitted the existing stipulation, 'that the Ordinance was subject to disallowance by the Crown'. The Ordinance making power as conferred upon the President/Governor is exercised when the President/Governor is satisfied that circumstances exist which render it necessary for them to take immediate action, and may promulgate such Ordinances as the circumstances appear them to require.

Historically, such Ordinance-making power of the President/Governor is traced back to the Indian Councils Act, 1861 and then to Government of India Act, 1919 which empowered the Governor-General and subsequently the President and later the Governor(s) to promulgate, for the peace and

3. By virtue of India and Burma (Emergency Provisions) Act, 1940 the Ordinance became permanent from June 27, 1940 and such permanency continued till April 1st, 1946 i.e., till the enactment of India and Burma (Termination of Emergency) Order, 1946.

good government of the territories, Ordinances which were to remain in force for more than six months. This provision, which was continued in the subsequent constitutional enactments, however, differs from the constitutional scheme in one material aspect namely where the Governor-General could exercise this power both in his discretion or individual judgement as well as on the advice of the Council of Ministers, the President cannot act except in accordance with the aid and advice of the Council of Ministers.

In view of the back-ground of British system of Parliamentary form of Government, India opted out for a like Parliamentary System of Government. The founding fathers of the Constitution of India spent a long time in drafting and adopting the Parliamentary/Assembly system of Government in which President or the Governor(s) are allowed to exercise their respective executive mode of legislative powers on the advice of Council of Ministers through the Prime Minister or the Chief Minister, as the case may be.

The Indian Constitution has vested the executive power of the Union in the President who is required to exercise such executive power either by himself directly or through officers sub-ordinate to him in accordance with
the Constitution. This, otherwise means, that all the executive actions of the Government of India are expressed to be taken in the name of the President. To all outward appearance it may mean, that the President is the real and effective head of the Union and the position of the Indian President may even be analogous to the President of United States of America in exercising the sovereign powers.

Similarly Article 154 of the Constitution of India, 1950 vests exclusive powers on the State Governor(s), which are to be exercised by the Governor either directly or through officers sub-ordinate to him in accordance with the Constitution and all executive action of the State Government is to be expressed in the name of the Governor. The Governor of a State also enjoys certain legislative functions, but none-the-less, he cannot exercise any power without the aid and advise of the Council of Ministers with the Chief Minister as its head.

These fore-going provisions of the Constitution although apparently places the Sovereignty in the President and the Governors, yet the real manifestation of the Sovereign power lies in the hands of the Council of Ministers.

5. Article 53 (1).
6. Article 166.
7. Article 168.
8. Article 163.
representing the Parliament or the State Assembly, as the case may be.

Such an apparent anomaly made the Constitution makers to prefer Parliamentary/Assembly Sovereignty as against Presidential/Governor(s) sovereignty. But the actual sovereignty lies neither in the President/Governor nor in the Parliament/State Legislature but in both, as can be located from the provisions of the Constitution.

Glimpses into the history of Parliamentary system of Democracy will lead one to assess the needs of a future generation of people the basic format of the political and constitutional functioning of a Sovereign, in a proper perspective.

The debate, pertaining to the relative merits and demerits of the Parliamentary and Presidential system of Government, in the Indian context may be traced back to the proceedings of the Constituent Assembly. Notwithstanding the overwhelming majority view in favour of the parliamentary system, K.T. Shah introduced an amendment on December 10, 1948 arguing that the stability of the Presidential system and the strength of the Government

9. Explicit provisions in Art. 74 & Art. 75 make the President a mere constitutional head and similarly Art. 163 read with Art. 355 and Art. 356 makes the Governor a component in the apparatus of Governance at the State level and for carrying out the directives of the Centre.
that flowed from it could not be obtained under the Parliamentary system. But the vast majority in the Constituent Assembly opted for the Parliamentary system, and argued that frequent deadlocks between Executive and the Legislature prevalent in the American model of Presidential system would make progressive legislation to raise the living standards of the people rather difficult. Further, with the support of the majority of legislators, the Cabinet, in the Parliamentary system, could be as stable and strong as the President, in the Presidential system. The decision of the Constituent Assembly to opt for the Parliamentary form of Government was taken after full deliberation by a body of men whose vision, knowledge and statesmanship could seldom be surpassed by subsequent Parliaments.

Therefore preference was made in favour of Parliamentary system of Government as against Presidential system of Sovereignty. Yet there may be second view that the Parliamentary system of Government guarantees that all interests and regions will share in the decision making.

process and there will be no feeling in any region that its interests are being ignored. A third view expressed by K.S.Rao may also be possible, that the Indian people had become used to the Parliamentary system since 1935, when the British Crown instituted legislatures at the Centre and the Provinces.

The Constitution of a country is not only a legal parchment but also a social and political character reflecting the hopes and aspirations of its people. Quite often it is seen that the present constitutional system fails to cater the contemporary needs of society. There has been a growing disenchantment with the present Parliamentary form of Government and there has been a persistent demand to either restructure it or replace it. According


to them, the present day ills like the political instability of the Party Government in the States, coalitional politics, toppling games of on-going Governments, factionalism within the ruling parties and inevitable mid-term polls, and many others could be minimised by adopting the Central Presidential Executive form of Government. Further, it is to be admitted that there has been a certain measure of decline in the power, authority, sagacity and prestige of the nation's highest law-making body. Unlike its British counterpart, the Indian Parliament is not a fully sovereign law-making body, as it has to function within the ambit of a written constitution and its competence is limited both by the federal system of Government and the Supreme Court's power of judicial review. There has been an unmistakable slide down in its authority and prestige. There has been, for example, a growing tendency on the part of the Executive to withhold vital information, which is sufficiently indicative of

14. From recent past, some of the outstanding examples: in 1984 Mrs. Gandhi did not disclose how the file relating to the KVO oil deal was misplaced in her office. Similarly, the Fifth Five Year Plan was finalised before it was even debated in the Parliament. The terms and conditions of I.M.F. Loan were not disclosed. Massive arms deal under the Janata Regime and Mirage 2000s under Mrs. Gandhi's Government - the deal was struck and the Parliament was not allowed to scrutinise it. Prime Minister Mr. Rajiv Gandhi refused to lay down before the Parliament Mr. M.P. Thakkar, J.'s Report on Mrs. Gandhi's assassination, equally so on the Bofors deal.
Parliament's declining prestige. The *reductio ad absurdum* of the shrinking legislative sessions - particularly in case of State Assemblies, is noticed as, in most cases, they are convened only to fulfil a constitutional obligation, since the session would not even last for more than a week.

One of the important factors impeding the growth of Parliamentary form of democracy is the virtual monopoly of political power, by the party in power. The weakness of the Indian political party system is reflected in its opportunistic alliances and manoeuvrings, total lack of ideological base, disregard for party discipline and even indifference to party programmes and mandates. It is therefore not surprising to find members cutting across party lines for achieving sectional or personal interests.

Similarly a remarkable degree of non-performance of the State Legislative Assemblies has exposed the whole system to all kinds of corrupt and perverse influences. The duality of Westminister model; at the Union and the State level, has also led to unrestricted and unprincipled participation of political parties. The members of the Legislative Assemblies instead of confining their activities to their legitimate duties, have made unwarranted interventions in administrative matters.

Dissatisfaction with the working of the Parliamentary form of Government has been noticeable in India at least
since the Fourth General Elections of 1967. That year in several States, no party could secure a majority in the legislature, and coalition ministries were characterised by infighting and instability.

The outcome of the 1989 Lok Sabha election had baffled, shocked and dismayed the divergent political forces in the country. No party was in a position to form a government at the Centre on its own. The election results had thrown-up a difficult problem in the President's lap to take a decision that would be fair to all sides and the nation. A similar situation was created in Great Britain in 1929 when the general elections produced a hung Parliament. Madhu Limaye, a former member of Parliament said, 'the President should not ignore such precedent, nor disregard the clear popular verdict'.

Strictly speaking, the President does not really have a discretion. He must act according to principles. His task is to interpret and not pronounce upon the mandate of the people. In discharging his constitutional obligation the President has to function independently and without pulls and pressures that may be generated in the

15. The Hindustan Times, 29 Nov., 1989 (New Delhi)
political field. His solemn duty is to act according to dictates of his conscience and his constitutional oath which obliges him to 'preserve, protect and defend the Constitution'. Soli J. Sorabjee, a Senior Advocate of the Supreme Court says that, 'the President in order to preserve democracy should act as the custodian of the Constitution'.

This prompted ultimately to ask for a switch over to the Presidential system on the ground that if the present trend continued the country would face both at the Centre and in most of the States a totally fluid situation in which a host of parties would constantly manoeuvre for power in a series of everchanging coalitions, defections and floor-crossings. In such a situation, the authority of the Government and Parliament would be so debased that the nation would sink into anarchy or cease to exist as a United India.

In October 1980 the Congress-I for the first time initiated a national debate by the All-India Conference of Lawyers on the need for a change-over to Presidential system. A similar International Conference was also held in the P.G. Department of Law, Utkal University, Vani Vihar in 1987 where

eminent Jurists, Lawyers, Legislators and Academicans participated, but the said conferences ended in a virtual anti-climax, when in both the Conferences, the delegates did not favour a switch-over.

The noted constitutional lawyer N.A. Palkhivala says that if India chooses to have a Presidential form of government it must be one which is in total conformity with the philosophy of freedom and liberation underlying the Constitution. There are four advantages of having the Presidential system Palkhivala said;

First, it enables the President to have a Cabinet of outstanding competence and integrity since the device is not restricted to Parliament. A wise President can substitute excellence for the deadwood which passes for Government today.

Secondly, since the Cabinet Ministers are not elected, they are not motivated to adopt cheap populist measures, which are so costly to the country in the long run.

Thirdly, the Presidential system permits the Cabinet Ministers to be absorbed in the job of governing the country, instead of wasting their time and potential in endless politicking.

Fourthly, it would stop defections and desertions on the part of the legislators, which are in most cases motivated purely by a thirst for power and hunger for office.

In early December 1980 Kamalapati Tripathy, Bhagawat Jha Azad and Antulay used the AICC Session to rekindle the debate in the presence of Mrs. Gandhi, the then Prime Minister. Professor K.Gupteswar of Andhra University says that the President is not the Principal Executive to run the Government, nor the Principal Executive i.e., the Prime Minister is not the President to acquire sovereignty in him. It is rather the camouflage of the powers vested in them decide the government.

Quite often suggestions for the adoption of Presidential form of Government in India are made with an objective to make the decision-making powers of the government a bit strong and to take such measures which the Country needs immediately. Such an argument, of course ignores a basic postulate of democracy. Even assuming that the theory of check and balances adopted by the Constitution of United States of America is adopted in the Constitution of India and Presidential form is accepted in the sense, the danger of trusting an

18. Id.
19. Id.
individual in the Country's administration can not be ignored, although the decision-making power will be expediated. This particular fact was taken into consideration by the Founding Fathers who over-ruled to adopt a form of government on the pattern of the United States of America.

Therefore a question arises as to whether or not any coherent strategy for the radical transformation of Indian society into a purposeful polity has been formulate. Is it possible to ensure free functioning of Parliamentar Democracy true to the spirit of the ideals enshrined in the Constitution? And what means can be adopted for bringing a social transformation in the progressive constitutional legislation?

The protagonists for a switch over to Presidential form of government in India have harped on the factors of stability in government and good and efficient administration. But the controversy pertaining to the switching over to a variety of Presidential System that is either in favor of American, French or Srilankans did not yield any solution to such protagonist. Critics have argued that a switch over to the Presidential model, will result in the loss of the representative character of government. The President
will be sole repository of all the Executive Power of the Union Government and will not share that power with his cabinet colleagues. A directly elected President, without sufficient checks, is likely to exercise dictatorial powers, as the experience of many third world countries amply demonstrates.

Presidential system will aggravate divisive tendencies. A group of States, say Hindi-speaking ones or the Southern ones, may try to dominate through the one person in power. Such States may sponsor or support a candidate for the Presidency. This may be regarded by the non-sponsoring States as foisting a candidate on the whole Country.

If the monarchical tradition of India is to be respected through the office of the President, India should not have better retained the princely states after 1947. If a referendum were taken then, probably, the subjects of most of these states would have voted against their merger with Indian Union. But the national leaders thought and acted differently.

It is true that the Indian masses have a feudal streak in their psyche. They feel a sense of security in monarchy and its concomitant principle of the nearest
relations to the legislatures. This has been evident in some constituencies. Under the Presidential system the whole country becomes a one single Constituency. The highest post itself will be subjected to hereditary succession. But is it desirable that while trying to find models of democracy in the modern era, one should look back to feudal India of hundreds of years of bygone days.

The Prime Minister have always had a docile party, a docile Parliament, a docile cabinet and to a great extent obliging President. They have always dutifully approved the Prime Minister's proposals, be there is imposition of emergency, dissolution of State Assemblies, supression of Supreme Court Judges or even constitutional amendments. So to say that the Prime Minister has no powers is a travesty of facts and also of truth.

Which American Presidents have foisted and removed the Chief Ministers, and also transferred the Governors and compelled them to resign as the Indian Prime Ministers have done all these years? All this was done some times in utter and blatant disregard of the wishes of the people and legislators of the States. Does this go to show that the Prime Minister has less power?

The demand for a system change over symbolises the expression of exasperation against constitutional checks
and balances. The Parliament has become irksome to the rulers. So are the institutions of President, Judiciary and free press. The Presidential system is a cloak for doing away with accountability. Even in the Presidential system some checks and balances between executive, judiciary and legislature will be there. So why complain against them of the present system?

Presidential form of government is a non-issue and none in the opposition had asked for it. In this system, the Ministers and officials will not be answerable to Parliament. The people will be robbed of even the limited protection, Parliament now gives them. The States will lose whatever autonomy they now have. The judiciary will be crippled. The Governors will become the aggressive instruments of authoritarian personal power.

The principle of "unity in diversity" will be outraged. National integrity will be in jeopardy. Evils of the national life are due to the policies of the government, not to the form of government.

Introduction of the Presidential system will not do away with Parliament and State Legislatures, nor with political parties and politicians; unless the President is intended to be a dictator permitting only his own party to exist as is the case in some African, Asian and Latin American Countries.
Inspite of the fact that the Parliamentary system has not worked well, it would be unwise to give the Presidential form a trial for two reasons: (i) an elected body like the Parliament is the only political expedient by which any degree of self-government can be organised in a modern nation State. It must not be forgotten that Great States can exist without Parliaments, but without them, their peoples cannot govern themselves; (b) the change from a Parliamentary to a Presidential system is relatively easy, but a change back is virtually impossible. Concentrated power, exercised and enjoyed for a period of years, can only be diffused, shared and decentralised after a long struggle, may be a violent one. Justice V.R.Krishna Iyer cautioned that in a large and diverse country with a majority of illiterate people the Presidential form of government has the potential for subversion of democracy.

None of the defects in the present system will be cured by the Presidential System. The President will also need the support of the legislature. So he will have to manipulate the legislators to gain such support. The defector who extracts a price now will not be any more virtuous in the new system.

20. Id.
In regard to the French Presidential model, it is pointed out that "the Head of State, dictates the conduct of anybody anywhere and in any circumstance. The business of French National Assembly is carried out on the basis of decisions made outside its walls. The system of electing the Head of State by universal suffrage introduced by De Gaulle has turned Presidents into autocrats. All power is concentrated in the President with very few checks and balances. Political dissent is equated with treason. It is said that monarchy had been restored in France in a stronger and a more absolute form than it had ever been under many regins. Le Monde, lamented in December 1980: "France is not a democracy anymore". Jean Bredin, Professor of Law Sorbonne University hit the bull's eye when he said: ("B)y consecrating Presidents, universal suffrage inexorably turns them into kings and all that is left is to hope for good kings.

Moreover, these models operate in a socio-cultural politico-economic milieu peculiar to these countries which is not necessarily existent in India. Constitutional adviser Sir B.N. Rau advocated rightly that, "The English Parliamentary system of Government
has become almost second nature to us. One of the most characteristic and admirable features of the system is that it not merely tolerates an opposition, but welcomes for it".

From the above enumeration, it is clear that both the systems have their plus and minus points. Yet nothing has happened that could be attributed to the shortcomings of the Parliamentary system, or which can be remedied by the Presidential system. Moreover, the advocates of the Presidential system, have never presented a well defined clear cut blue print of proposals. Instead they have been talking in general vague conceptual terms. And there are varieties and varieties of 'Presidents' in the world. The Founding Fathers had carefully weighed the merits and demerits and opted for the present system with free, frank and forthright exchange of views. It has worked with reasonable success. Here the democracy has, at least till now, not crumbled, as it has in many third world countries. The familiarity factor, with the system has been further reinforced in these past years. Finding faults with the system is like a worker finding faults with his tools.

The debate for adoption of a particular form of

22. Vide, Munshi K.M., Pilgrimage to Freedom, p. 27 (Bom.).
government in India assumed many dimensions. Social and economic justice which is the key note is to be delivered to the people who through legal fiction have 'adopted, enacted and given' the Constitution to themselves. These ideals can be pursued by resorting to different means and methods. Still it is the bounden duty of the political system contemplated by the Constitution to achieve them without jeopardizing the basic human values, which include the feeling of a citizen to share the political power of his country. The Parliamentary form of government is only a means to realize this goal and the citizen feels that he is safe and his interests are safe as he is able to reserve the decision through voting.

With the back-drop of Parliamentary system of Government, it became quite necessary to examine the real executive made legislative power conferred on the President and the Governor(s) through the Constitution. The President and the Governor(s) enjoyed certain legislative powers in the formulation of 'Laws' in the Nation. In the process of making the legal coil of the Union/States, both the President and the Governor(s) enjoyed simultaneous powers in their respective spheres in forming the Government by appointing Prime Minister/
Chief Minister, summoning, proroguing, dissolving the Lok Sabha/State Legislative Assembly, addressing the House(s), assenting Bills for becoming Acts, passing Orders, Regulations and Notifications, and at the time of urgent necessity promulgating Ordinances for the peace and good governance of the people of India. Apart from these legislative powers the President has also been empowered to proclaim emergency in a State on the satisfaction of a situation of constitutional crisis in that State. In such an event a State Governor has also been empowered to exercise certain inherent discretionary powers in order to restore constitutional normalcy in a State.

In retrospect the historical background has been traced in Chapter II to the exercise of political power by the East India Company and by the gradual substitution of the prevailing pattern of administration by the British system, since 1698. Later from 1915 the Committee form of Government in the shape of Collegiate role, which germinated the seed for Parliamentary System of Government was discussed. In certain eventualities, the overriding powers of the Governor-General over the Council of Ministers were conferred on the pretext of safety, tranquility or interests, of the British possessions in India. Specific
legislative powers vested in the Governor-General, on his own authority and on his own responsibility to suspend and reject the measures proposed by the Council of Ministers, are analysed in extenso in Chapter II.

In the third Chapter the Constituent Assembly Debates were analysed in order to focus whether in a given situation, the President or the Governor could decline the advice tendered by the Council of Ministers or as it is currently practised, the President or the Governor (s) being the constitutional Head of the Union and State(s) respectively, are normally required to act in all matters including the promulgation of an Ordinance on the advice of Council of Ministers. In reality, an Ordinance is promulgated, when the House(s) are not in session, by the President or the Governor, in the name of President or the Governor as the case may be, and in a constitutional sense on their own satisfaction with a view to meet extra-ordinary situations demanding immediate enactment of laws. Equations have been drawn by jurists that the constitutional satisfaction to certain extent, does not imply objective facts basing upon which the Council of Ministers advise.

The Union Constitution Committee took the decision in June, 1947 adopting Parliamentary system of Government
with President as Head of the State, but it did not approve the recommendation of B.N. Rau, the Constitution Advisor as regards exercising the President's discretionary legislative power. M.M. Panikkar, an eminent Parliamentarian and Member of the Constituent Assembly, quoting Laski, stated that, the term 'President' is fundamentally an American Institution and therefore he should not merely be treated as 'Figure-Head' otherwise the Indian President would be like the President of 4th French Republic. Subsequently, of course Panikkar allied with Shyama Prasad, Alladi, Gopalswamy and others in advocating for Parliamentary system of Government without any discretionary powers. But G.S. Gupte strongly pleaded for allowing certain discretionary powers to resolve a situation arising out of constitutional crisis.

Using Ayyanger's and Aiyar's Joint Memorandum and B.N. Rau's proposal, the Draft Committee vested the President with powers to refer Bills back to Parliament for reconsideration as the only discretionary legislative power to be exercised by him in his own individual judgement. In all other aspects the President should be bound by the advice of the Council of Ministers. But there were

23. Vide, Munshi, K.M., Pilgrimage to Freedom, p. 27(Bom)
24. Papers in the President's Secretariat, G.S. Gupte's reply to the Questionaire made by B.N. Rau.
heated discussions in the Constituent Assembly regarding the position and status of the President on the issue that he should have been empowered to safeguard the Constitution to effectively maintain the machinery of the Government in a crisis, which might be created in the absence of a single majority party in power, or when such party-in-power acts unconstitutionally, or when the Country is exposed to external dangers.

Considering the vast legal powers that have been conferred on the President, it cannot be stated that he is intended to stand substantially in relation to the Union administration in the same manner as the British Queen stands. In Chapter IV it has been highlighted that the Indian President is a component part of the Parliament, whereas the British Queen has no say in respect of British Parliamentary Affairs. The Indian President is constitutionally bound to summon the Parliament within six months from the last sitting of the former session, whether or not, the Council of Ministers, through the Prime Minister, desires so. The President is conferred a power under the Constitution to resolve the deadlock in case there is a deadlock between the two Houses of the Parliament. He has the power to address the House(s) either jointly or separately in order to lay
the legislative policies of the Government and even at the time of necessity, may send messages to either House of the Parliament.

He has the power to assent the Bills or withhold assent, except in cases of Money Bills, or may return the Bills for re-consideration with his suggestions or to amend or modify the contents of the Bills, or otherwise. In certain cases, the President's prior approval of introducing a Bill in the Parliament or the State Legislature is necessary. The President, as a sentinel of the Union of India is required to exercise certain coercive powers to ensure that each state is carrying on its government in accordance with the provisions of the Constitution; and proclaim emergencies either to safeguard against the failure of the constitutional machinery in a State or to repair the effects of a breakdown and accordingly make laws relating to that State. Similarly, unless a State Law has been reserved for the consideration of the President and has received Presidential assent, no exemptions can be granted to certain categories of acquisitional laws by virtue of Articles 14, 19 and 31.

In England, royal assent is accorded as a matter of course, since all legislations initiated and piloted by the Cabinet are to be assented to by the Crown without developing any executive veto over the Bills, whereas, in
United States of America, the President enjoys 'qualified veto' and 'pocket veto' in respect of Bills. Under the qualified veto system the President's second assent is not required if the Bill is adopted again by two-third majority of the members present, but if the President prevents a Bill till the ten-day limit and if by that date the Congress has adjourned, the Bill cannot become Law, which is known as 'pocket veto'.

The President and the Governors, under the Indian Constitution mutatis and mutandis, enjoy competitive jurisdiction in exercising executive-made-legislative power to promulgate Ordinances with potent authority to frame regulations for peace, progress and good government of the Union/the States, upon a satisfaction as to the necessity in view of compelling circumstances, for an immediate action, to embody certain fundamental rules and regulations during the recess of the House(s).

It may be interesting to note that the Courts are precluded to question the emergent situations or the sufficiency of reasons led the President or the Governor(s) to promulgate the Ordinance. Even the actions of the President or the Governor in Parliament or State Legislature, as the case may be, simply for the purpose of.

promulgating an Ordinance cannot be challenged. Nor the Courts have power to question either the occasion or purpose or the subject matter of an Ordinance, even if the Ordinance is not made in good faith. But if the Ordinance is based on an un-justiciable ground of exceeding the legislative powers conferred on the Union by the Constitution, the Courts can intervene.

The President may issue an Ordinance to enforce the provision of a Bill pending before a House, or to enforce the provisions of a Bill already passed by one House but not passed by the other House, or on an entirely

28. In 1954, while the Press (Objectionable Matter) Amendment Bill, 1953 being introduced in Lok Sabha was pending at the termination of the Fifth Session of First Lok Sabha, the President promulgated the Press (Objectionable Matter) Amendment Ordinance, 1954 on January 29, to give effect to the provisions of the Bill pending its passage in Parliament.
29. The Travancore-Cochin Appropriation (Vote on Account) Bill, 1956 passed by Lok Sabha on March 29 was awaiting passage in Rajya Sabha when it was not in Session. The President promulgated the Travancore-Cochin Appropriation (Vote on Account) Ordinance, 1956 on March 31, 1956 to give effect to the provisions of the Bill as passed by Lok Sabha. The Bill was transmitted to Rajya Sabha on April 16, 1956, when Rajya Sabha re-assembled.
new matter to be placed subsequently by a Bill to be brought before the Houses, or for a purpose not requiring permanent legislation.

The Ordinance making power of the Governor-General under the Government of India Act, 1935 had been the subject matter of great criticism in the country. Similarly, there has been a great deal of controversy regarding the Ordinances making power of the President since the introduction of the Constitution. At a frequent point of discussion in Lok Sabha the Speaker has held repeatedly that promulgation of an Ordinance is the discretion of the President and such discretion cannot be controlled by the House. A suggestion was made by some Members of Lok Sabha to set up a Parliamentary Committee which might be consulted prior to the promulgation of an Ordinance or which might review an Ordinance already issued. In fact, the Constitution has given complete power of supervision to Parliament.

30. The Banaras Hindu University (Amendment) Ordinance 1958, and the Banking Companies (Amendment) Ordinance 1961 and the like were replaced subsequently by Bills.


either to approve or to disapprove the action of the President and to censure the Government in this regard. The President may act in public interest and if he did not, public interest would suffer. Accordingly, there is no harm if a Parliamentary Committee was kept informed of the details of every situation but it is not really possible to generalise such situations. The Constitution contained the checks and balances and any Ordinance could be referred to a Court of Law for deciding its validity. The suggestion for the setting up of a Parliamentary Committee was considered by the Rules Committee of Lok Sabha but the question of appointment of the Committee was subsequently postponed, though prior approval of an Ordinance by a Parliamentary Committee would have made its subsequent passage easier and formal. That could have facilitated double consideration and removal of doubts about its judicial validity in case of its challenge in a Court of Law which is no longer possible after the 38th Constitution Amendment, 1975.

33. The Rules Committee of Lok Sabha in its sitting held on December 17, 1953 considered the suggestion for setting up a Parliamentary Committee on Ordinance but the question of appointment was subsequently deferred by the Rules Committee on September 21, 1954.
If the Government wanted to continue the provisions of an Ordinance for a longer period or to make it permanent, a Bill has to be introduced to replace the Ordinance with an accompanying statement explaining the circumstances which necessitated immediate legislation by Ordinance. A Convention has grown, though unjustified, to promulgate an Ordinance taking the plea of shortage of time for initiation of legislation in a regular way. This type of legislation by an ordinance might also be faulty and inconvenient. In 1956, the President nationalized the Life Insurance Corporation of India by promulgating an Ordinance four weeks before the reassembly of Parliament. On July 19, 1969, Vice-President V.V. Giri while acting as President, promulgated the Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969 nationalizing fourteen major Indian Scheduled Banks with deposits exceeding fifty crores each, just forty hours prior to the assembly of the Parliament.

It is still more surprising that the Punjab Governor passed the entire State Budget in 1968 through the promulgation of an Ordinance under Art. 213 of the Constitution.

34. Speech of Speaker Mavalankar at the Presiding Officer's Conference, 1947.
35. The Ordinance was promulgated on July 19, and the validity of the Ordinance was challenged in the Supreme Court on July 21, 1969.
thus establishing a precedent that Ordinance can also be promulgated even for the Annual Financial Statement. But such a state of affairs is not conducive to the development of the best Parliamentary traditions. Promulgation of an Ordinance, as such is undemocratic but its justification lies in emergency or extreme urgency or compulsion of exigencies. Parliamentary procedure, indeed, is sufficient to give the fullest opportunity for consideration and debate and to check errors and mistakes creeping in a piece of legislation. But all this involves considerable delay and an important legislation is held up. Hence the need to resort to promulgation of an Ordinance.

On July 19, 1969 fourteen major Indian Banks were nationalized on a unanimous decision of the Central Cabinet giving the Centre control over "the commanding heights of the economy in order to serve better the needs of development of the economy in conformity with national priorities and objectives". The Banking Companies (Acquisition and Transfer of Undertakings) Ordinance, 1969 (No. 8 of 1969) was later given permanent life having been repealed by Parliament by enacting the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1969 (Act. 22 of 1969) which the Supreme Court struck down on writ petitions
challenging the enactment on the ground that it made
hostile discrimination against the Banks and violated
certain Fundamental Rights guaranteed in the Constitution.
All measures taken under the Act were held invalid by the
Supreme Court. Again, on February 14, 1970 the President
Mr. V.V. Giri, re-nationalized the said fourteen Banks
whose take-over had been invalidated by the Supreme Court
by removing the lacunae in the Act 22 of 1969 and providing
for higher compensation in cash or securities or both and
part payment, immediately, by promulgating the Banking
Companies (Acquisition and Transfer of Undertakings)
Ordinance, 1970 (No. 3 of 1970). The Supreme Court had
delivered the judgement on February 10 and the Ordinance
was promulgated on February 14, 1970; not haste! The
Government, in the fitness of things, should have given
itself sufficient time to consider the ways and means of

The Preamble to the Banking Companies (Acquisition
and Transfer of Undertakings) Ordinance, 1970 (No. 3 of 1970) runs as follows:

"An Ordinance to provide for the acquisition
and transfer of the undertakings of certain
Banking Companies in order to serve better the
needs of development of the economy in confir-
mity with national policy and objectives and
for matters connected therewith or incidental
thereto.

Whereas Parliament is not in session and the
President is satisfied that circumstances exist
which render it necessary for him to take
immediate action".
overcoming the objections that were raised by the Supreme Court and should have brought forward a Bill, to which Parliament could have given priority.

An Ordinance is a provisional legislation promulgated for a short period in an emergent situation and awaits approval of the Legislature. Drawal of neat boundaries between the Executive and the Legislature is impracticable in a political system, but this thesis aims to aggrandise a viable system of checks and balances that might help elimination of abuse of power.
CHAPTER II