The Supreme Court of India together with the other two branches of the government is established under the Constitution and is not only on par with them but independent of them. The Indian Constitution however, does not follow the theory of separation of powers in its totality. The constitutional balance has been maintained by a close link between the three branches of the government. Each is a check upon the other to avoid autocratic functioning of any of the three. Further the government is an organic whole and each organ is relatively dependent upon the other for its proper functioning. Accordingly, there is a close relation between the Supreme Court and the Executive.

In India since there is a parliamentary form of government, therefore, distinction is made between the executive and an executive*. The President of the Union of India is the executive, being the constitutional head of the State and the cabinet is an executive which exercises in point of fact the executive powers of the government. It is proposed to discuss here the relation of the Supreme Court with the Executive (the President and the Cabinet)

Supreme Court and the President:

Though the Supreme Court is an independent judicial tribunal, its judges are appointed by the President¹. In the United States also the judges of the Supreme Court are appointed

*Emphasis is mine.

¹For details please see Chapter II, pp 26-28.
by the President and he usually makes political appointments to the bench. But in India this is not the case. Further it may be pointed out that the President himself, is administered the oath of office by the Chief Justice of India. The Chief Justice also acts as the President of India in situations, when none of the persons in the capacity of President, Vice President or Speaker of the Lok Sabha is there to discharge the functions of the office of the President.

The Supreme Court also acts in an advisory capacity whenever a reference is made to it by the President under Article 143 of the Constitution. The Supreme Court has given quite a few advisory opinions on the references made to it by the President.

Emergency Powers of the President:

The executive is always invested with extraordinary powers during the emergency but the Constitution of India like a few other Constitutions provides against its unworkability under certain circumstances by vesting the President with emergency powers to meet certain situations. Part XIII of the Constitution of

1. This point has been dealt at length in Chapter II, pp.29-30.

2. This was provided in the Constitution in 1968, by an amendment when the President (Dr. Zakir Hussain) expired, the acting President (Vice President V.V.Giri) resigned to contest the election to the office of President and also the Speaker of the Lok Sabha (N. Sanjiva Reddy) resigned to contest for the same office. Till the new President (V.V.Giri) was elected the Chief Justice M.Hidayatullah acted as the President of India.

3. The advisory opinions of the Supreme Court have been discussed in detail in Chapter IV, pp.80-94.

India deals with the emergency provisions. There are three kinds of emergencies which are envisaged under the Constitution, viz., (a) an emergency due to external aggression or internal disturbances; (b) failure of constitutional machinery in a State; and financial emergency.

A perusal of the emergency provisions indicates that the judicial scrutiny of the executive acts, though not categorically denied, has not been envisaged or contemplated under the Constitution. Nonetheless, many cases have come before the Supreme Court since 1962 when emergency was declared by the President, in which the said provisions have been a subject matter of interpretation.

1. Articles 352 to 360.
2. Article 352.
3. Article 356.
4. Article 360.
5. On October 26, 1962 (when the Chinese attacked India), the President having been satisfied that a grave national emergency existed, issued a proclamation declaring the emergency under Article 352 of the Constitution. On the same day, the Parliament not being in session, the President issued an Ordinance - Defence of India Ordinance (IV of 1962). Section 3 of the said Ordinance empowered the Central Government to make rules as appear necessary for securing the defence of India, public safety etc. In exercise of these powers the Central Government promulgated Defence of India Rules 1962, on November 5, 1962.

When the two Houses met, the declaration was placed before them on November 8, 1962 and was approved by the Rajya Sabha on November 13, 1962 and by the Lok Sabha on November 14, 1962.

Before that on November 3, 1962 the President issued another order under Article 359(1), suspending the right to move any Court for the enforcement of rights conferred by Articles 21 and 22 of the Constitution.
The study of the case law however, reveals that the Court has not cared to probe in any depth the questions relating to emergency and it has been criticised for placing much reliance upon the doctrine of 'subjective satisfaction' of the executive in this regard.¹

It was in Mohan Chowdhary v Chief Commissioner, Tripura², that for the first time the validity of the Ordinance issued by the President was challenged before the Supreme Court.

In this case Mohan Chowdhary was detained under Rule 30 of the Defence of India Rules, 1962. The petitioner filed a writ petition for a writ of habeas corpus against his detention. It was contended on his behalf that Article 359 does not authorise the suspension of the exercise of the right guaranteed under Article 32 of the Constitution, and that, in terms, the operation of Article 32 has not been suspended by the President. The Court rejected this contention as wholly unfounded. Chief Justice Sinha who delivered the judgment observed that the Court's power to issue a writ in the nature of habeas corpus has not been touched by the President's Order, but the petitioner's right to move this Court for a writ of that kind has been suspended by the Order of the President passed under Article 359(1), with the result that the petitioner has no locus standi to enforce his right, if any during the emergency.

The Court also ruled out the contention of the petitioner

that it was open to him to contest the validity of the Ordinance. It held that in order that the Court may investigate the validity of a particular ordinance or act of a legislature, the person moving the Court should have a locus standi. If he has not the locus standi to move the Court, the Court will refuse to entertain his petition questioning the vires of the particular legislation. In view of the President's Order passed under the provisions of Article 359(1) of the Constitution, the Court held, the petitioner has lost his locus standi to move this Court during the period of emergency.

In Makhan Singh v State of Punjab, the Supreme Court dealt comprehensively with the emergency provisions of the Constitution. In this case Articles 358 and 359 were elaborated and their points of comparison and contrast were exhaustively explained by Justice Gajendragadkar who delivered the majority judgment. He observed that it would be noticed that as soon as a Proclamation of Emergency has been issued under Article 352 and so long as it lasts, Article 19 is suspended. The suspension of Article 19 removes the fetters created on the legislative and executive powers by Article 19 and if the legislature makes laws or the executive commits acts which are inconsistent with the rights guaranteed by Article 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter. As soon as the proclamation ceases to operate, the legislative enactments passed and the executive actions taken during the course of the said emergency shall be inoperative to the extent to which they conflict with the rights guaranteed under Article 19, because as

soon as the emergency is lifted Article 19 which was suspended during the emergency is automatically revived and begins to operate. Article 358 however, makes it clear that things done or omitted to be done during the emergency can not be challenged even after the emergency is over. In other words, the suspension of Article 19 is complete during the period in question and legislative and executive action which contravenes Article 19 can not be questioned even after the emergency is over.

Article 359, on the other hand, does not purport expressly to suspend any of the fundamental rights. It authorises the President to issue an order declaring that the right to move any Court for the enforcement of such of the rights in Part III as may be mentioned in the order and all proceedings in any court for the enforcement of rights so mentioned shall remain suspended for the period during which proclamation is in force or for such shorter period as may be specified in the order. What the Presidential Order purports to do by virtue of the power conferred on the President by Article 359(1), is to bar the remedy provided to the citizens to move any court for the enforcement of the specified rights. The rights are not expressly suspended, but the citizen is deprived of his right to move any court for their enforcement, that is one important distinction between the provisions of Article 358 and Article 359(1)\(^1\).

It was further pointed out that the Presidential Order can not widen the authority of the legislatures or the executive; it merely suspends the right to move any court to obtain a relief on

\(^1\) A.I.R. 1964, 381 (393).
the ground that the rights conferred by Part III have been contravened if the said rights are specified in the order. The inevitable consequence of such a position is that as soon as the order ceases to be operative, the infringement of the rights made either by the legislative enactment or by executive action can perhaps be challenged by a citizen in a court of law and the same may have to be tried on the merits or the basis that the rights alleged to have been infringed were in operation even during the pendency of the Presidential Order. If at the expiration of the Presidential Order, Parliament passes any legislation to protect executive action taken during the pendency of the Presidential Order and afford indemnity to the executive in that behalf, the validity and the effect of such legislative action the Court pointed out may have to be carefully scrutinised.

Another distinction between the provisions of Article 358 and Article 359(1), the Court observed, is that the suspension of Article 19 for which provision is made under Article 358 applies to the whole of the country, and so, covers all the States. On the other hand, the order issued under Article 359(1) is not so inclusive in its application, it may extend to the whole of India or may be confined to any part of the territory of India.

The Court while elaborating the scope and effect of Article 359(1) repelled the argument of the appellants that the words "any court" in the said Article meant only the Supreme Court. It held that if the intention of the Constitution makers was to confine the operation of Article 359(1) to the right to move only the Supreme Court, nothing could have been easier than to say so expressly instead of using words with wider meaning "the right to
move any court." Consequently it was idle to suggest that the proceedings taken by citizens under Article 226(1) were outside the purview of Article 359(1). "The sweep of Article 359(1) and the Presidential Order issued under it" the Court held, "is thus wide enough to include all claims by citizens in a Court of competent jurisdiction when it is shown that the said claims can not be effectively adjudicated upon without examining the question as to whether the citizen is in substance, seeking to enforce any of the said specified fundamental rights."

Again to the question, whether the proceedings taken under Section 491(1)(b) are of such a distinctly separate character that they can not fall under Article 359(1), the Court answered in the negative. It held that it is clear that the content of the detenu's right to challenge the legality of his detention which was available to him under Section 491(1)(b) prior to the Constitution, has been enlarged by the fundamental rights guaranteed to the citizens by the Constitution, and so, whenever a detenu relies upon his fundamental rights even in support of his petition made under Section 491(1)(b) he is really enforcing the said rights and in that sense, the proceedings inevitably partake of the character of proceedings taken by the detenu for enforcing these rights; that is why the argument that Article 359(1) and the Presidential Order issued under it do not apply to proceedings under Section 491(1)(b) can not be sustained. The prohibition contained in the said Article and the Presidential Order will apply as much to proceedings under Section 491(1)(b) as to those under Article 226(1) and Article 32(1).1

Further it may be pointed out that the theory of 'subjective satisfaction' found favour with the judges in this case. "How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of the emergency" the Court held, "are matters which must inevitably be left to the executive because the executive knows requirements of the situation and the effect of compulsive factors which operate during the periods of grave crisis."

Again the Court rejected the argument that the executive may abuse its power during the operation of the Presidential Order. The Court held that such an argument was essentially political and its impact on the constitutional question was at best indirect. It further observed that "in a democratic state, the effective safeguard against abuse of executive powers whether in peace or in emergency, is ultimately to be found in the existence of enlightened vigilant and vocal public opinion."

A similar observation was made by Justice Subba Rao in Ghulam Sarwar v Union of India¹, who observed that our Constitution seeks to usher in a welfare State, where there is prosperity, equality, liberty and social justice. It accepts three concepts for bringing about such a state: (1) federalism; (2) democracy; (3) rule of law, in which fundamental rights and social justice are inextricably integrated. Under Part XVIII when the emergency is declared the federal government is practically transformed into a unitary form of government. The fundamental rights of the

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people under Article 19 are abrogated and the enforcement of any other fundamental right may be suspended. The executive is also empowered to direct that all or any other provision relating to the distribution of revenue be suspended during that period. Part XVIII appears to bring down the grand edifice of our Constitution at one stroke, but a little reflection discloses that the temporary suspension of the scheme of the Constitution is really intended to preserve its substance. This extraordinary power is unique in our Constitution. It reflects the apprehensions of the makers of the Constitution and their implicit confidence in the parties that may come into power from time to time. The expression 'grave emergency' in Article 352(1) and, the expression 'imminent danger' in Article 352(3) show that the existence of grave emergency or imminent danger is a pre-condition for the declaration of emergency. Doubtless, the question whether there is a grave emergency or whether there is imminent danger as mentioned in the Article is left to the satisfaction of the executive, for it is obviously in the best position to judge the situation. But there is correlative danger of the abuse of such extraordinary power leading to totalitarianism. Indeed the perversion of the ideal democratic Constitution, viz., the Weimer Constitution of Germany, brought about the autocratic rule of Hitler and the consequent disastrous world war. What is the safeguard against such an abuse? The obvious safeguard is the good sense of the Executive but the more effective one is public opinion.

Further in Mohd. Yaqub v State of J. & K the Court ruled

out the scope for inquiry into the question whether the fundamental right the enforcement of which has been suspended under Article 359 has anything to do with the security of India which is threatened by war or external aggression or internal disturbances. The Court held that "whenever such suspension is made it is in the interest of the security of India and no further proof is necessary."\(^1\)

The emergency provisions have been under fire for the reason that they negative the inviolable character of individual liberty and freedom. The Supreme Court has maintained that it is fully conscious of the solemn duty imposed upon it as the custodian and guardian of the fundamental rights enshrined in Part III of the Constitution. But the Constitution itself has made certain provisions in Chapter XVIII with a view to enable the nation to meet grave emergencies and so in dealing with the question about the citizen's right to challenge the validity of any executive order contravening his right or rights, the Court has held, "it will have to give effect to the plain words of Article 359(2) and the Presidential Order issued under it."\(^2\)

The Court has also ruled out that an Order of the President issued under Article 359(1), is a law within the meaning of Article 13(2), for in that case the President can never make a valid order under Article 359(1). "This is reductio ad absurdum"\(^3\). In Mohd. Yaqub v State of J. & K. the Court held that Article 13(2) is

and 359 being parts of the same Constitution "stand on equal foot-
ing and the two provisions have to be read harmoniously in order
that the intention behind Article 359 is carried out and is not
destroyed altogether by Article 13(2). It follows that though an
order under Article 359 may be assumed to be law in its widest
sense, it can not be law within the meaning of Article 13(2) for if
it were so Article 359 would be made nugatory......"

In one case however, the Supreme Court made a liberal inter-
pretation that the order under Article 359(1) which suspended the
enforcement of a fundamental right could be tested under that
particular fundamental right. The Court observed that "There is
a clear distinction between deprivation of fundamental rights by
force of a constitutional provision itself and such deprivation
by an order made by the President in exercise of a power conferred
on him under a Constitution provision. A comparison of the prov-
isions of Article 358 and Article 359 justified this distinction.
Under Article 358, by the force of that Article itself Article 19
is put out of the way Article 359(1) does not operate by its own
force. The President has to make an order declaring that the
right to move a court in respect of a fundamental right or rights
in Part III is suspended. He can only make an order which is
valid. An order making an unjustified discrimination in suspend-
ing the right to move a court under Article 14 itself, will be
void at its inception. It is a still born order. It can not be
said that this involves an argument in a circle...... If the order
does not violate Article 14 it can validly take away the right to
move the Court to enforce Article 14. So viewed the order of the
President must meet the requirements of Article 14.”¹

In the case of Mohd. Yaqub, Chief Justice Wanchoo expressed his doubts to the earlier stand taken by the Court. He observed "if Article 359 is to have any meaning at all and is not to be wiped out from the Constitution an order passed thereunder suspending a fundamental right can not possibly be tested under that very fundamental right which it suspends. If that were permissible no order under Article 359 could really be passed."²

It may be pointed out here that the emergency provisions which were embodied in the Constitution to meet extraordinary situations which may be against the interest of the nation as a whole, or a particular State, have been exercised most irresponsibly. The powers assumed by the executive in the name of emergency were exercised for purposes "far removed" from measures made necessary by the emergency³. It smacks of political immaturity in the country. One can not but agree with what M.C. Setalvad, former Attorney General of India, has to say in this context that the manner in which the emergency provisions were worked out and the Presidential Order by which the citizen’s right to move the Supreme Court for enforcement of his fundamental rights, was deprived, was a "negation" of the rule of law and had cast a slur on the fair name of constitutional and democratic government⁴.

2. A.I.R. 1968 S.C.765
   Hidayatullah J. dissented from the above view.
3. M.C.Setalvad observed in this connection that "arbitrary and extensive powers assumed under the Defence of India Act and the Rules were exercised for the very ordinary purposes, of the government - to prevent hoarding commodities, to put down strikes and for a variety of other normal functions which could and should be dealt with under the powers conferred by the ordinary law of the land." See The Statesman, August 18, 1967.
Supreme Court and the Cabinet:

It has already been pointed out in these pages that the President is the constitutional head of the State. In theory, the text of the Constitution provides that the President shall exercise himself the executive power of the Union either directly or through officers subordinate to him\(^1\), but in reality the executive powers are exercised by the Cabinet. The position of the Cabinet as the real executive has been recognised by the Court. For instance in this context Justice Mukherjea observed: "We have the same system of Parliamentary Executive as in England and the Council of Ministers consisting as it is of the members of the legislature is like the British Cabinet, a hyphen that joins, the buckle that binds the executive and the legislative departments together." About the functions of the Cabinet, he further observed that "the Cabinet enjoying as it does, a majority in the legislature, concentrates itself on the virtual control of both legislative and executive functions and as Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility the most important questions of policy are all formulated by them."\(^2\) Thus it is not incorrect to say that the Cabinet which has no legal authority (except to aid and advise) exercises indeed the supreme control over the executive part of the State.

Delegated Legislation:

It has been already noticed in these pages that the Indian

\(^1\) Article 53 of the Constitution of India.

Constitution does not recognise the doctrine of separation of powers in its absolute rigidity. Consequently, though legislation is the province of the legislature, the executive does exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature.

Delegated legislation is an expression which covers a multitude of confusions. It is an excuse for the legislature, a shield for the executive and a provocation for the constitutional purists. It has been severely criticised on the ground that the power to legislate is not a right of the legislature. It is a function entrusted to it by a constitution, to exercise and not to dispose of at will. Locke was opposed to it in principle when he said: "People can not be bound by any laws but such as are enacted by those, whom they have chosen, and authorised to make laws for them." Even in England where there is no written constitution, delegated legislation has been described as 'New Despotism', though it has been considered inevitable. Delegated legislation has been considered indispensable, inescapable, in this age of technical advancement and for the welfare state. The theoretical force of the arguments opposing the concept of the delegation of power has not prevailed against the actual necessities that have compelled governments to resort to it in many countries. There

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3. Locke, Two Treatises of Government (1690) 1960, II, Sec. 141.
are however acute dangers attendant upon its injudicious exercise and attention has been drawn to it by many writers. This brings in the role of the judiciary. In England judicial control is negligible in view of the supremacy of the Parliament. In the United States, the position is different for the constitutional purists on the bench of the Supreme Court have always used the doctrine of separation of powers as a weapon to attack delegated legislation.

In India the Supreme Court has recognised the need of delegated legislation but has exercised effective control like its counterpart in the United States. The Court has rejected the plea that the legislature has an inherent unlimited power of

1. Justice Fazl Ali observed in a case that delegated legislation "has become a present day necessity, and it has come to stay, it is both inevitable and indispensable. The legislature has now make so many laws that it has no time to devote to all the legislative details, and sometimes the subject on which it has to legislate is of such a technical nature that all it can do is to state the broad principles and leave the details to be worked out by those who are more familiar with the subject. Again when complex schemes of reform are to be the subject of legislation, it is difficult to bring out a self-contained and complete Act straightway, since it is not possible to foresee all the contingencies and envisage all the local environments for which provision is to be made. Thus some degree of flexibility becomes necessary, so as to permit constant adaptation to unknown future conditions without the necessity of having to amend the law again and again. The advantage of such a course is that it enables the delegated authority to consult interests likely to be affected by a particular law, make actual experiments when necessary and utilize the results if its investigations and experiments in the best way possible. There may also arise emergencies and urgent situations requiring prompt action and the entrustment of large powers to authorities who have to deal with various situations as they arise........The complexity of modern administration and the expansion of the functions of the state to the economic and social spheres have rendered it necessary to resort to new forms of legislation and to give wide powers to various authorities on suitable occasions." In re Art. 14-3, Constitution of India, A.I.R. 1951 S.C. 332.
delegation. On the other hand it has consistently maintained that the legislature can not delegate its essential legislative functions, though it is not prohibited from delegating the power of making rules and regulations to the executive to implement an enactment.

It was in 'In re Delhi Laws Act,'¹ that the advisory opinion of the Supreme Court was sought by the President on delegated legislation. No definite principle was laid down in this case since all the judges of the Court delivered their separate opinions. However, they all reached the same conclusion that the legislature can not abdicate its essential legislative functions and that it should not cross the line beyond which delegation may amount to "abdication" or "self-effacement." Chief Justice Kania observed in this context that while a legislature, as a part of its legislative functions can confer powers to make rules and regulations, the power to delegate legislative functions generally is not warranted under the Constitution of India and therefore the contention that the legislative power carries with it a general power to delegate legislative functions so that the legislature may not define its policy at all and may lay down no rule of conduct but that the whole thing may be left either to the executive authority or administrative or other body, is unsound and is not permitted².

The same line of reasoning was pursued by Justice Mukherjea when he observed that the policy may be particularised in as few or as many words as the legislature thinks proper. The Court can

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interfere only if no policy is discernible at all or the delega-
tion is of such an indefinite character as to amount to abdication, 
but as the discretion vests with the legislature in determining 
whether there is necessity for delegation or not, the exercise of 
such discretion is not to be disturbed by the Court except in 
clear cases of abuse.

The Court has consistently held since its opinion to the 
reference made by the President in 1951 that if it appears from 
the relevant provisions of the impugned statute that powers which 
have been delegated include which can legitimately be regarded as 
essentially legislative powers, then the legislation is bad and 
it introduces a serious infirmity in the Act itself. But if the 
legislature lays down its legislative policy in clear and unambig-
-uous terms and leaves it to the delegate to execute that policy 
by means of making appropriate rules, then such delegation however, 
inexpedient, or undesirable politically is constitutionally not 
impermissible1.

1. Justice Subba Rao observed in this context that "The Constitut-
-ion confers a power and imposes a duty on the legislature to 
make laws. The essential legislative function is the deter-
mination of the legislative policy and its formulation as a 
rule of conduct. Obviously it can not abdicate its functions 
in favour of another. But in view of the multifarious act-
-ivities of a welfare State, it can not presumably work out 
all the details to suit the varying aspects of a complex 
situation. It must necessarily delegate the working out of 
details to the executive or any other agency. But there is 
danger inherent in such a process of delegation. An over-
burdened legislature or one controlled by a powerful execut-
-ive may unduly overstep the limits of delegation. It may not 
lay down any policy at all; it may declare its policy in 
vague and general terms; it may not set down any standard for 
the guidance of the executive, it may confer an arbitrary 
power on the executive to change or modify the policy laid 
down by it without reserving for itself any control over sub-
ordinate legislation. The self-effacement of legislative 
power in favour of another agency either in whole or in part

Contd.
But the Court has adhered to this view only theoretically. It is noticeable in the subsequent cases that the Court has gone much beyond the premises set in the Delhi Laws Act. It has upheld the delegated legislation in many cases by vague and liberal interpretation, by trying to read policy in the preamble instead in the Act or other provisions of the impugned enactment. For instance in Harishankar Bagla v State of Madhya Pradesh\(^1\), the Court held that if there was a reasonably clear statement of policy underlying the provisions of the Act or in the preamble, then any part of the Act can not be attacked on the ground that the question of policy has been left to the delegatee. The court went a step further in another case\(^2\) by holding that "it would be legitimate to consider the preamble of the predecessor Act and relevant provisions in it to find out whether the legislature had laid down clearly the policy underlying that Act and has enunciated principles for the guidance of those to whom the authority to implement

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\text{is beyond the permissible limits of delegation. It is for a court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should be carried by the courts to the extent of always trying to discover a document or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of this court to strike down without any hesitation any blanket power conferred on the executive by the legislative."}
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\[\text{*Emphasis is mine.}\]
the Act is delegated."

The Court has also upheld that power delegated to the administration 'to add', 'to amend' or 'to modify' the parent Act, if it lays down a policy. For example the Court upheld Section 27 of the Minimum Wages Act, 1948, which authorised the "appropriate government" to add to the already given list of employments in the schedule attached to the Act, any other employment in regard to which it considered desirable that the minimum rates of wages be fixed¹. The Act was challenged as ultra vires on the ground that such a delegation of power virtually amounts to surrender by the legislature of its essential legislative function and can not be held to be valid. Refuting this contention, the Court held that the legislative policy is apparent on the face of the present enactment. The legislature intended to apply this Act not to all industries but to those industries only where by reason of unorganised labour or want of proper arrangements for effective regulation of wages or for other causes the wages of labourers in a particular industry were very low. It is in view of consideration of these facts that the list of trades has been drawn up in the schedule attached to the Act but the list is not exhaustive and it is the policy of the legislature not to lay down for all time, to which industries the Act should be applied. Conditions of labour vary from State to State and the expediency of including a particular trade or industry within the schedule depends upon a variety of facts which are by no means uniform and which can best be ascertained by the agency responsible for administering the industry in a particular state. It is to carry out effectively the

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purpose of this enactment, the Court held, that power has been given to the appropriate government to decide with reference to local conditions, whether it is desirable that minimum wages should be fixed in regard to a particular trade or industry which is not included in the list. The legislature by enacting such legislation, the Court observed, had not stripped itself of its essential legislative powers or assigned to the administrative authority anything but an accessory or subordinate power which was deemed necessary to carry out the purpose of the Act.

The Court followed its policy of upholding the delegation of power to add, amend, modify or even cancel any of the items in the schedule attached to the parent Act, in Banarasi Das v State of Madhya Pradesh. But it took a different stand in Hamdard Dawakhana v Union of India. In this case Section 5(d) of the Drug and Magic Remedies (Objectionable Advertisements) Act which conferred power on the executive to specify "any other disease or condition" the publication or advertisement of which was to be prohibitory, was challenged as invalid. Upholding the plea of the petitioners the Court held that since Parliament established no criteria, no standard and no principle was prescribed on which a disease or condition was to be specified in the schedule, such a conferment of power was uncanalised, uncontrolled and must therefore be held beyond the permissible boundaries of valid delegation.

The Court has also upheld the delegation of power to extend

Also see Mohmedalli v Union of India, A.I.R. 1964 S.C. 980.
the area of operation or even the life of the Act beyond the period fixed therein. It can not be said, the court has held, that while it may be competent to the legislature to leave it to an outside authority to decide when an enactment might be brought into force, it is not competent to authorise that agency to extend the life of the Act beyond the period fixed therein. On principle, the Court held, it is difficult to see why if the one is competent, the other is not.

At last it may be observed here that whereas in England the judiciary does not possess the power to pronounce on the validity or otherwise a parliamentary enactment and has a remote influence in regard to the delegated legislation, in the United States the Supreme Court exercises rigid control over legislation including delegated legislation. However the Supreme Court of India has struck a middle position between the two courses. In theory it appears that it has control over delegated legislation but from the case law it appears that its attitude in regard to this control is a little soft.

Supreme Court and the Powers of the President and the Governor
Under Articles 72 and 161:

It is the function of the judiciary to give a decision while it is the function of the executive to carry out that decision. The administration of justice by the courts however, does not always seem wise. Besides, they do not take into consideration

1. See Inder Singh v State of Rajasthan, A.I.R. 1957 S.C. 10. In this case the Supreme Court overruled the stand taken by its predecessor (The Federal Court) in Jatindra Nath Gupta v Province of Bihar (1949 F.C.R. 595) where the Court had ruled that such a delegation which empowered the executive to extend the life of the Act beyond the fixed therein was not permissible.
circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments as well as in monarchies, to vest in some other authority than the courts, power to ameliorate or avoid particular criminal judgments. It is a check entrusted in most countries to the executive in special cases. Pardon in fact is one of such prerogatives which have been recognised since ancient times as being vested in the sovereign wherever sovereignty might lie. In England the King exercises the power to pardon as a prerogative, whereas in the United States the Constitution empowers the President to grant reprieves and pardons for offences against the United States except in cases of impeachment. Likewise the Constitution of India confers on the President the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. The Constitution confers this power on the Governor.

2. Article II, Section 2, Clause I.
3. Article 72 of the Constitution of India lays down that:

"(1) The President shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence -

(a) in all cases where the punishment or sentence is by a Court Martial;

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

(c) in all cases where the sentence is a sentence of death.

(2) Nothing in sub-clause (a) of clause (1) shall affect the power conferred by law on any officer of the Armed Forces of the Union to suspend, remit or commute a sentence passed by a Court Martial.

(3) Nothing in sub-clause (c) of clause (1) shall affect the power to suspend, remit or commute a sentence of death exercisable by the Governor of a State under any law for the time being in force."
also under Article 161 with the difference that whereas the power of the President is limited to the offences against any law relating to a matter to which the executive power of the Union extends, the competence of the Governor is limited to offences against any law relating to a matter to which the executive power of the State extends.

The law relating to the pardoning power of the executive did not attract much attention of the constitutionalists till the Nanavati case came before the Supreme Court. In this case the pardon power of the executive was discussed at some length. American and English law was amply quoted both by Chief Justice Sinha and Justice Kapur who delivered the majority and dissenting opinions respectively. The point of law involved in this case was — whether the Governor under Article 161 was competent to suspend the sentence during the period when the matter was sub judice in the Supreme Court. It was argued on behalf of the petitioner that the exercise of the power by the executive under the

1. Article 161 of the Constitution provides that "the Governor of a State shall have the power to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends."

Before the Constitution was framed, the law on the subject was covered by the Criminal Procedure Code (1861), re-enacted in 1898. Section 401 of the re-enacted Code empowered the executive to suspend the execution of the sentence or remit the whole or any part of the punishment without conditions or upon any conditions which the person sentenced accepts. Section 402 further empowered the executive to commute a sentence of death into imprisonment for life, without the consent of the person sentenced. Under the Government of India Act, 1935, Section 295 empowered the executive to suspend, remit or commute a sentence of death. In the Constitution of India the power of the President is the same as it was in Section 295 of the Government of India Act, 1935.

two Articles namely, 72 and 161, was not fettered by the provi-
sions of Articles 142 and 145 of the Constitution which empower
the Supreme Court to "make such order as is necessary for doing
complete justice in any cause or matter pending before it" and
make rules for regulating generally the practice and procedure
of the Court. Consequently, the petitioner submitted that his
sentence having been suspended by the order of the Governor of
the then State of Bombay, the rule made by the Supreme Court as to
surrender which is a condition precedent to the hearing of a petit-
on for leave to appeal against the judgment of the High Court,
was inapplicable to him and that he should be exempted from the
operation of the rule.

The Court by majority opinion held that though the power
under Article 161 is exercised by the executive while the power
under Article 142 is that of the judiciary, there is no doubt that
the two can within certain narrow limits be exercised in the same
field. Since both the Articles 161 and 142, contain no words of
limitation and in the field covered by them they are unfettered,
in a field which is common to both the principle of harmonious
construction will have to be adopted in order to avoid the confl-
ict between the two powers, executive and judicial. "The ambit
of Article 161", the Court held, "is very much wider and it is
only in a very narrow field that the power contained in Article
142, namely, the power of suspension of sentence during the period
when the matter is sub judice in this Court. Therefore, on the
principle of harmonious construction and to avoid a conflict
between the two powers it must be held that Article 161 does not
deal with the suspension of sentence during the time that
Article 142 is in operation and the matter is subjudice in this Court.  

The Court further held that it is open to the Governor to grant full pardon at any time even during the pendency of the case in the Supreme Court in exercise of what is ordinarily called "mercy jurisdiction." This power is essentially vested in the head of the executive because the judiciary has no such "mercy jurisdiction." But the Governor can not exercise his power of suspension of sentence for the period when the Supreme Court is in seizure of the case.

It may, however, be submitted that the principle of harmonious construction was once again wrongly applied in this case. H.M. Seervai has aptly remarked that the majority judgment in fact, created disharmony between the two constitutional provisions where none existed. The dissenting opinion of Justice Kapur is correct that the exercise of power by the executive and the judiciary under Articles 161 and 142 is different in nature and is exercised on different grounds and even may have different effect. Consequently they do not conflict. Justice Kapur observed in his

2. It was misapplied earlier in Shankar Prasad v Union of India (A.I.R. 1951 S.C. 458).

The application of this principle by the Supreme Court has been severely criticised by Blackshield in the following words: "Harmonious construction is most fervently invoked when there is (or has been created by interpretation as a prior step in the argument) a square contradiction. Yet it should be obvious that this is an impossible role to play. If there is really a contradiction between two provisions, the Judge must choose between them; and no amount of harmony can absolve him from the duty of choice." See A.R. Blackshield, Fundamental Rights and Institutional Viability of the Indian Supreme Court, Journal of Indian Law Institute, Vol. 8, 1965, p. 138(241).


*Emphasis is mine.
judgment that the power of pardon which includes reprieve, suspend, 
respite a sentence, is a power of clemency, of mercy, of grace, 
is of the widest amplitude and can be exercised any time after the 
commission of the offence* on principles which are quite different 
from the principles on which the judicial power is exercised.

The majority opinion in the Nanavati case however, is of 
not much significance because in a latter case¹ though the Court 
did not overrule its earlier decision, it upheld the line of 
reasoning adopted by Justice Kapur that the executive power and 
the judicial power over sentences was distinguishable. In England 
and in the United States the executive has the power to suspend 
any sentence given by the Court at any time. This means that the 
political overrides the judicial in this matter. The Supreme 
Court by revising its decision in Sarat Chandra case² has brought 
India in line with England and United States, that in India also 
the President or the Governor can suspend any sentence at any 
time, notwithstanding the fact that the Court is seized of the 
matter.

Enforcement of the Decisions of the Supreme Court - Article 144:

Though the Supreme Court under the Indian Constitution is 
at par with other branches of the government, it is often said 
that the judiciary is the weakest of the three. It has neither 
control on the sword nor on the purse of the nation. It has to rely upon the executive to enforce its decisions. A constitutional

*Emphasis is mine.
obligation has been imposed under Article 14 of the Constitution, upon all authorities, civil and judicial to act in aid of the Supreme Court. But the Article is not mandatory in nature. Consequently, an embarrassing situation may be created for the Court if the executive is uncooperative. The orders, decrees of the Court would be nullified. Rule of law will end if ever such a situation were to arise. In India so far there has not arisen such a situation, but, in the United States there are a few instances of the kind for example Georgia's successful nullification of Supreme Court decisions of 1831-32, relating to the status of Cherokee Indians¹, made possible by President Jackson's unwillingness to back up the Court's findings. It was on this occasion when Jackson is reported to have said "John Marshall has made his decision, now let him enforce it."²

There is no doubt thus that judiciary is the weakest of the three branches of government and the Supreme Court of India is no exception. But if and when the executive decides not to co-operate with it, it shall result in constitutional deadlock if not breakdown because it is as much a duty of the executive as much of the Court to run the constitutional machinery of the State.

**Conclusion:**

It is obvious thus that the principle of separation of powers has been accepted in the Indian Constitution, but not in totality. There is a close relation between the judiciary and the executive -

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1. Cherokee Nation v Georgia 5 Peters I (1831)
   Worcester v Georgia 6 Peter 515 (1832).

both constitutional and real. The President of India appoints the judges of the Court, can seek advisory opinion of the Court on any ticklish question of law and can go to the Supreme Court against his own impeachment also, if the Parliament does not follow the due procedure laid down in the Constitution for that purpose.

The Court on the other hand as a protector of the Constitution and rights of the individual acts as a check on the arbitrary functioning of the executive except when the emergency is in operation where the Court has greatly relied upon the theory of subjective satisfaction of the executive.

Further while the Court has recognised the necessity of delegating legislative power by the legislature to the executive, it maintains that essentially legislative power cannot be delegated.

The Executive in India has also judicial function to exercise in the nature of mercy jurisdiction viz., the power to grant pardon, reprieves, respites or remission of punishment of a person convicted of any offence. In respect of suspension of sentence, the Court has not maintained a consistent line of thinking. Earlier it has held that the Executive could not suspend the sentence when the matter was sub judice in the Court. But lately it has held that the Executive can suspend any sentence at any time notwithstanding the fact that the Court is seized of the matter.

Lastly it may be submitted that the Supreme Court has to depend upon the executive to enforce its decisions. Thus the Court though at par with the executive and is established under the Constitution has inherent institutional weakness.