
CHAPTER IV

THE PRESIDENT AND THE COUNCIL OF MINISTERS

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In this chapter an attempt is made to go through the relations established by the Constitution in regard to the President and the Council of Ministers. There are various Articles in the Constitution of India which can be explored in this chapter.

Clause (1) of Article 74 of the Constitution of India provides, " There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions ". Clause (2) of this Article says that the question whether any, and if so what, advice was tendered by Ministers to the President shall not be enquired into in any Court. It is provided then in Clause (3) of the Article 75 that the Council of Ministers shall be collectively responsible to the House of the People.

Article 74 corresponds to Article 61 of the Draft Constitution amendment¹ moved by K.T.Shah had proposed, as follows:

" The Prime Minister at the Head" should be deleted.
In support of the amendment, it was argued that

1. Amendment No.1295; Constituent Assembly Debates,
Vol.VII, p.1144.

there was no question of ending the institution of the Prime Minister and the objective was only to withhold the constitutional recognition of any person as head of the Council of Ministers. Further, the institution, if necessary, could better be evolved by conventions rather than established by letter of law. Those opposing the amendment had emphasized that the only sanction through which collective responsibility could be ensured was through the Prime Minister, and that his collective responsibility could be enforced through two basic principles, One, that no person shall be nominated as a member of the Cabinet, and second, that no person shall be nominated as a member of the Cabinet and second, that no person shall be retained as a member of the Cabinet of the Prime Minister has lost confidence in him. When put to vote, the amendment was negatived².

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2. In the United Kingdom, the office of the Prime Minister was statutory unknown until 1937, when the Ministers of the Crown Act 1937, was passed and a constitutional status was accorded to the occupant of this office by fixing his specified salary in practice, the office has gained recognition since the time of P.M. Walpole who was designated by King George I, to preside over a Cabinet meetings, though, according to John Prophet, the " person to find himself in a position bearing a comparable resemblance to a modern P.M." was Robert Peel, who was Prime Minister from 1841 to 1846. Refer John Prophet: The Structure of Government: London, Longmans Green, 1967, p.97.

Article 74 (1) of the Constitution has thus conferred a constitutional right on the Prime Minister to preside over the Cabinet meetings. He has to be, in constitutional terms, " at the head " of the Council of Ministers. It is he who is appointed first in time, the other Ministers being appointed afterwards only on his advice. Article 74, however, does not use the word " Cabinet ". The term is equally unknown to English law. There is no constitutional term as "Cabinet" in the American Constitution also. "The Cabinet" according to Maitland; is a selection out of a larger body of Ministers, while the Ministry consists of those holders of office under the Crown, who according to constitutional usage are to be members of one or other House of Parliament. 'A Ministry ', he says, "Consists of forty to fifty men of whom fifteen to seventeen form the Cabinet"³.

NO EXECUTIVE POWERS IN THE COUNCIL:

In relation to the Union executive, the words, "Council of Ministers""Prime Minister" and "Ministers" have occurred only in four articles viz. Article 74, 75, 77 and 78, including in Chapter V titled "THE EXECUTIVE". In the whole of

 3. F.W.Maitland: 'The Constitutional History of England', Cambridge University Press, 1961, pp.402-403.

that Chapter, it is however, provided that executive powers, or part thereof, would be vested in the Council of Ministers. In terms of Article 53, the executive power of the Union is vested in the President, and is vested in no one else anywhere in the Constitution and this power is to be exercised by him either directly or through officers subordinate to him. From this it can be stated that the Minister can at any rate be said to be officers subordinate to the President of India.

Article 75 (1) states that the Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister. The power of the President to make appointments to the Council of Ministers sounds resonantly as a dominant power when it is particularly specified under Clause (2) of the Article that the Ministers shall hold office during the pleasure of the President. However, Clause (3) of the same Article proceeds to make a clarification that the Council of Ministers shall be collectively responsible to the House of People, an amplication anomalous but inevitable that the Council of Ministers is accountable not to the President but to the House of the People. In other words, the Council of Ministers occupies its position during the pleasure, and so long as it retains the confidence; of the House of the People. During pleasure of the House and until loss of its

confidence may not analytically connote one and the same thing; since a confidence of the House being betrayed, it is no longer the liberty of the House to retain the same Council of Ministers and the President must dismiss the one and reconstitute another. It is here that the pleasure of the House cannot by any stretch of polemic be identified with the pleasure of the President. Hence Article 79 has undoubtedly made the President an indispensable constituent of the Parliament. Article 59 forbids him to be a member of any house. This harmony of Constitution requires that the President must exercise his pleasure, in accordance with the sense of the House.

The principle of collective responsibility has been understood by Ramsay Muir as "the concentration of responsibility,"⁴ Willoughby states that Parliamentary Government is governed by the Cabinet.⁵ But to Ramsay Muir Parliamentary Government not only includes but is wholly the Cabinet Government. "The Cabinet is the steering wheel of the ship of the State"; he says, and "indeed Parliament has become a registering body".

4. Ramsay Muir: How Britain is Governed, London, Constable 1930, p.21.

5. K.C.Wheare: Modern Constitutions, London, Oxford University Press, 1951, p.37.

Under the existing provisions of the Indian Constitution; the character of the Indian Presidency may probably vary with the character of the President. K.Santhanam, who himself had been an active member of the Constituent Assembly, wonders as to, "What would have happened if Jawaharlal Nehru had become the President and Dr.Rajendra Prasad, the Prime Minister.⁶ The probability of fluctuation or the proclivity to fluctuation of powers from President to President must have been the quintessence of K.Shanthanam,'s wonder. Article 53 (1) vests executive power off in the President, but it has to be exercised in accordance to the Constitution. In actual practice, the order and instruments made or executed in the name of the President are authenticated by the Secretaries. The Constitution now provides that execution vested in the President shall be exercised through a Minister or Ministers. Article 74 (1) does not contain any such words.

Article 258 (2) similarly empowers the Parliament, when a law made by it applies in any State, to confer powers and impose duties, or authorises the conferring of power and the imposition of duties, upon the State or officers and authorities thereof, notwithstanding that it relates to a matter with respect to which the legislature

6. K.Santhanam: The President of India, Journal of Constitutional and Parliamentary Studies, July-Sept. 1969, p.2.

of a State has no power to make laws, and this the Parliament can do without the consent of the concerned State. But the powers and duties validated under Article 258 (2) will only be such as are created under a particular law made by Parliament. The powers and duties so created can only be such as are necessary in order to implement the scheme and policy determined or formulated by or under that law. It has nothing to do with the Constitutional powers or duties of the President which he exercises as head of the executive. Under Article 53 (3) or under Article 258 (2), the Indian Parliament cannot confer its powers or function, to anyone. If it so happens, the executive powers of the Indian President is limited only by the Constitution. In this context Dr.B.R. Ambedkar pointed that the Parliament was not competent to transfer the powers of the President either.⁷

The President is required under Article 77 (1) to frame rules for a more convenient transaction of the business of the Government. This is the constitutional mandate on the President and a refusal on his part would be violation of the Constitution. It is within the frame-work of these rules that the Council of Ministers become a body busy with the functions of the President and emerges under

7. Constituent Assembly Debate: Vol.VII, p.1138.

Article 74 (1) as a Constitutional authority to aid and advise the President in the exercise of his functions. On a true interpretation of the expression in the context of the relevant provisions of the Constitution, it never becomes " abundantly clear " as the Supreme Court in Ram Jowaya Kapur's⁸ case has held but remains fairly obscure whether the function of the Council of Ministers is merely " giving advice " or " they can take decisions which must take effect". Opposing for amendment, K.Santhanam, inter-alia observed⁹:

" That does not mean that normally the function of the Prime Minister is to aid and advise the President in the exercise of his functions. In fact, the position is altogether opposite, or the reverse, it is the Prime Minister's business with the support of the Council of Ministers to rule the country and the President may be permitted now and then for aid and advise the Council of Ministers".

The debate on this amendment was summed-up by Dr.B.R. Ambedkar in the following terms¹⁰.

" There is no case which can arise where the President would be called upon to discharge his functions without the

8. A.I.R.1955, S.C.549.

9. Constituent Assembly Debates, Vol.VII, p.1155.

10. Ibid., p.1158.

advise of the Prime Minister on his Cabinet... Mr.Tahir has failed or realise that all that the President will have under the new Constitution will be certain prerogatives but not functions and that there is a vast deal of difference between prerogatives and functions as such."

" Under a parliamentary system of Government, there are only two prerogatives, which the King or the Head of the State may exercise. One is the appointment of the Prime Minister and the other is the dissolution of Parliament. With regard to the Prime Minister, it is not possible to avoid vesting the discretion in the President."

Dr.Rajendra Prasad, the first occupant of the office of President and who was also the President of Constituent Assembly, had felt 'intrigued' by the provision of draft article 61, as he expressed in his letter of April 9, 1948 to Sir B.N.Rau, as doubted whether it would bind the President, because it never said that the President would be bound to accept advice of his Council of Ministers. He expressed the same view in Constituent Assembly. Dr.Frasad argued that in such a case there would be no possibility even to impeach the President because he would not be acting in violation of the Constitution; if there was no mandatory provision.¹¹ He unsuccessfully tried to get a new Schedule III-A

11. Constituent Assembly Debates, Vol.VII, pp.215-16.

added after the Third Schedule, titled as 'Instructions to the President', containing the details of the mode in which the President was to receive guidance in the exercise of his powers. This schedule was ultimately abandoned and Article 61 of the Draft Constitution was adopted to form part of the Constitution and has come down as the existing Article 74 with its inherently blurred impression prevailing up to the day that the President was bound to accept and not to disregard, the advice tendered by the Council of Ministers which virtually meant the advice of the Prime Minister.

'Aid and advice' it is said, " is a technical expression which has since acquired a definite meaning in Constitutional law and whether that expression was used, what was intended was that the 'aid and advice' shall be followed by the dignitary to whom that ' aid and advice' was given.¹²

H.M.Seervai¹³ states that two views had been expressed about the position which the President occupied under the Constitution; one that his position was correspondingly

12. K.C.Markandan: "The Office of the President of the Indian Union - A Probe into the intentions of the Founding Fathers", - Journal of Constitutional and Parliamantary Studies, July-September, 1969, p.68.

13. H.M.Seervai, Op.cit., pp.744-45.

similar to that of the British Monarch; and second that he swears to defend and is charged with the duty of defending the Constitution which enables him to hold the unity of the nation by enjoying certain powers to override the Council of Ministers. In this connection Seervai refers to the works of Sir Benegal Rama Rau¹⁴ and Granville Austin¹⁵ as supporting the first view, and to that of K.M.Munshi¹⁶, who himself was a members of the Constituent Assembly and a supporter of the second view.

There prevails also a third view being the natural outcome of a compromise between the two extremes. It is observed by M.M.Sankhadher¹⁷ that in times to come there is possibility of "a political pattern to crystallise which would bring out the latent authority of the President into open". The powers of the President, according to him were specified as well as implied and made him act both as head of the State and head of the Government. He says:

"If Nehru's charismatic personality and the vast majority in his support kept the Presidency eclipsed,

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14. Sir Benegal Ram Rau: Indian Constitution in the making, 2nd Ed., pp.202-13.
 15. Granville Austin: The Indian Constitution: Cornerstone of a Nation, Oxford, Clarendon Press, 1966, pp.136-43.
 16. K.M.Munshi: The President Under the Indian Constitution, Bombay, Bharatiya Vidya Bhawan, 1963, pp.33-35.
 17. M.M.Sankhdher: Office of the President', Journal of Constitution & Parliamentary Studies, July-Sept.1969, pp.87-88.

there is no reason to believe that the office will remain dormant for all time. With a weak Prime Minister and with a lean majority behind him; the roles may be reserved. No Constitutional impropriety would, however, be involved if the Presidency comes into its own".

Seervai's own estimate approximates to the third view, He States that the existence of the Council of Ministers responsible for the House of the people and therefore, removable by it, makes it impossible for the President "ordinarily to override the Government", but in the very "unlikely event" of a Council of Ministers being bent upon subverting the Constitution, " the President has certain reserve powers and is obliged by his oath to exercise them". It need not be disputed, he says, that the President can dissolve the House of the People and press an appeal to the electorate, " but unless the electorate supports him, he must give way, or face an impeachment¹⁸ .

Views of the Constituent Assembly on the term
Aid and Advice:

During discussion on the mode of election of the President; Nehru had advised the Constituent Assembly to drop the idea of direct suffrage in the Presidential

18. H.M.Seervai, op.cit.p.775.

election - on the apparent reasoning that the President elected on adult franchise but without having any real powers would make his position anomalous. The question was raised again by H.V.Kamath; in reply to which Dr.Ambedkar stated:

" No Constitutional Government can function in any country unless any particular constitutional authority remembers the fact that its authority is limited by the Constitution and that if there is any authority created by the Constitution which has to decide between that particular authority and any other authority, then the decision of that authority shall be binding upon any other organ. That is the sanction which this constitution gives in order to see that the President shall follow the advice of his Ministers, that the executive shall not exceed in its executive authority the law made by Parliament and that the executive shall not give its own interpretation of the law which is in conflict with the interpretation of the judicial organ created by the Constitution"¹⁹.

Further Alladi Krishnaswami Ayyar, supported this contention of Dr.Ambedkar and said:

" We have provided in Article 61 (3) that the Council of Ministers shall be collectively responsible to the

19. Constituent Assembly Debates, Vol.X, p.269.

House of the People. If the President stands in the way of the Council of Ministers discharging that responsibility to the House, he will be guilty of violation of the Constitution and he will be even liable to impeachment. Therefore, it is merely a suphemistic way of saying that the President shall be guided by the advice of the Ministers in the exercise of the functions"²⁰

T.T.Krishnamachari further stated in the Assembly on November 25, 1949:

"So far as the relationship of the President with the Cabinet is concern, I must say that we have so to say completely copied the system of ned, responsible government that is functioning in Britain today, we have made no deviation from that and the deviations that we have made are only such as are necessary because our constitution is federal in structure... All the powers that are left to him are perhaps those in which there will be marginal use of discretion, perhaps, when there happens to be a question of dissolution of the Parliament, that

20. Ibid., pp.270-71.

is, the dissolution of the House of the People,
 The question of calling up on any particular person
 to form the Ministry and the question of dismissing
 the Ministry... In all these points, conventions
 that have grown round the powers of the King of
 England in so far as his relationship with his
 Cabinet is concerned today are sufficiently strong
 for us to rest content with and there will be no
 misuse of those marginal powers by the President²¹.

This makes it clear that it was expected by the
 framers of the Constitution that the President had to be
 on certain counts considered to be the same as that of
 Englands Crown.

If the advice of the Council of Ministers were to be
 binding on the President, there is hardly any occasion
 left for the President to 'stand in the way' because any
 executive action could automatically be expressed under
Article 77 to have been taken in the name of the President,
 without even a revelation whether the President agreed to
 or disagreed from any particular advice. Further an order
 or instrument to be made or executed in respect of any such

 21. Ibid., Vol. XI, pp. 956-57.

action could be authenticated in accordance with the rules already in hands of the Ministers, there being no court to question that it was not an order or instrument made or executed by the President.

The position on the ~~contrary~~ is that it is most likely for the Council of Ministers to stand in the way of the President discharging some executive functions, when it would be the duty of the President to see that in giving a particular advice to him; the Council of Ministers has not acted arbitrarily but has properly discharged its responsibility to the House. It is the President who ensures the collective responsibility of the Ministry to the House. The moment the Ministry ceases to bear that responsibility, it renders itself liable to dismissal. There is, hence, no room for any abrupt conclusion that as soon as the President had refused to abide by the advice of the Council of Ministers. " he will be guilty of violation of the Constitution and liable to impeachment"²².

The President will be guilty of violation of the Constitution not because he has refused to abide by the advice of the Council of Ministers, but because he has

22. Dr.Ambedkar in the Constituent Assembly Debates,
Vol.X, p.269.

followed the advice of the Council of the Ministers which does not represent the views of the House of the People. It is the two Houses of Parliament and not the Council of Ministers, which can impeach a President. The President is individually responsible to both the Houses of Parliament whereas the Council of Ministers is collectively responsible to the House, namely, the House of the People. A simple majority in the House of the People alone is sufficient to dislodge the Council of Ministers whereas a President cannot be ousted from the office without a two-thirds majority of the total membership of either House of Parliament at the first as at the second stage of impeachment.

Aid not Binding:

The Council of Ministers in charge with a dual responsibility, i.e. to render aid and tender advice to the President in the exercise of his functions. There is virtually no point in an aid being binding. Aid is just assistance, be it of a political, personal or intellectual nature, and a thing which is characteristically assistance cannot be regarded as an admonition. At the same time it is not so superfluous as to amount merely to an adulation. The purpose it serves is just to be supple with advertence for the President. This is auxiliary and not obstructive in the exercise of Presidents' functions.

Under Article 78, the President invariably receives information from the Prime Minister regarding all decisions taken by the Cabinet, all proposals for legislation, and all matters pertaining to administration of the Country. It follows from the very scheme of this article that the Ministers are to collect up-to-date information for, and supply all relevant data to, the President. The President can on his own ask for any information in addition to that already placed for his perusal. Since the data material or information, is collected by the Ministers, they alone are in the best position to know its source and the mode of its presentation. They alone also know the repercussion likely to entitle if a certain decision were effectuated or a proposal followed on that basis. They alone are, therefore, made responsible to advice the President on all these points. If the data material or information be ill advised, it is a constitutional complacence to hold some body responsible for things expressed to be done in the name of the President, and the body to stand vicariously responsible to the President is the Council of Ministers who must be prepared to remove ambiguities, if any, and to clarify the position to the President as also before Parliament when so required.

Advice Not Binding:a) Interpretation of Text:

The advice by the Council of Ministers to the President is not legally binding on the latter, because the text of Article 74 (1) does not elevate the essential of advice to the status of mandates. They are simple regulative provisions. On many an occasion, the Supreme Court of India had to examine the distinction between obligatory and regulatory provisions of a statute. In Bhikraj Jaiphria V. Union of India;²³, the Court held:

"Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non compliance, the question whether, the

23. A.I.R. 1962 S.C. 113 (119). The Supreme Courts ruling compares well with the observations of Lord Campbell in Liverpool Borough Bank V. Turner. Lord Campbell said:

" No Universal rule can be laid down as to whether mantory enactment shall be considered directory or obligatory only with an implied nullification disobedience. It is duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed"

(1860) 30 L.J.Ch.379.

provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the Statute".

b) Absence of Strict Compliance or Prohibition.

What is mandatory under Article 74 (1) is the issuance of an advice from the Council of Ministers for the guidance and advertence of the President in the exercise of his functions. Once the President has had the benefit of an advice tendered by the Council of Ministers, there is substantial compliance with the provisions of Article 74 (1). There is no express or implied prohibition either under Article 74 (1) or elsewhere in the constitution against the President doing any thing in disregard, defiance or supersession of that advice. Once they have given an advice, the Council of Ministers are rid of their responsibility and there is no political or judicial authority to compel the President not to do otherwise than in accordance with such advice.

c) Provisions Articles 103 and 74:

The provisions of Article 74 (1) may be compared with those of Article 103 (2) where under the President; while deciding a reference whether a member of Parliament has become subject to any disqualifications, is required to act according to the opinion of the Election Commission to

be necessarily obtained by him. There is lack of any such words in Article 74 (1). This establishes that in cases where any opinion or advice is meant to be binding on the President, it has been in so many words provided for in the constitution.

d) Ejusdem Generis Construction:

This conclusion would claim support also from accepted canons of construction. No rule of construction can be formulated as would lend to the accompanying word a meaning broader than the word which has preceded. The term advice is preceded by the term 'aid' and the word 'and' is conjunctive of the two. In order of their juxtaposition in the text, 'advice' as a term is to be taken as general of aid has to fulfil a purpose as done by aid. The advice must be of an assisting rather than obstructing nature.

e) Provision for Other Advisory Bodies:

There are several other bodies under the constitution which the President is required to or may at times, consult in order to be better informed of the implications of any particular situation. If the advice of the Council of Ministers were binding on the President, the Council of Ministers could even vitiate the constitutional obligation or right of the President to refer some matters for advice

to the other advisory institutions created under the constitution.

There is possibility of a serious deadlock in case the advice of the Council of Ministers was adverse or contrary to the opinion given by the Election Commission in a particular case. It is also not unlikely that the Council of Ministers might even advise the President to refrain from obtaining any opinion at all. The very purpose of Article 103 would be frustrated if the advice of the Council of Ministers were binding on the President.

The President acting under Article 124 (2) may consult certain judges of the Supreme Court in the matter of appointment of Judges to that Court. Article 217 (1) provides for consultation by the President with the Chief Justice of India and the Governor of the State in the matter of appointment of Judges to the State High Courts. Article 324 (4) provides for consultation by the President with the Election Commission in the matter of appointment and removal of Regional Commissioners. All these are bodies other than the Council of Ministers - which the constitution binds the President to take advice from. All acts contemplated under these articles are certainly the functions of the President, yet he has to take guidance in their exercise not from the Council of Ministers but from entirely different bodies.

The advice or opinion of these special advisory institutions must, therefore, supersede the general advice of the Council of Ministers. Further it can be also examined from the various Articles provided in the Indian Constitution that the implications of them are varied and various.

A) Implications of Article 361 (1):

In terms of Article 361 (1), the President shall not be answerable to any Court for the exercise and performance of the powers and duties of his office for any act done or purporting to be done by him in the exercise and performance of those powers and duties. It is argued that the provision of Article 361 (1) has incorporated in substance the British principle that 'the king can do no wrong'. Since the President would never act on his own but always on the advice of the Council of Ministers, it follows that he can commit no wrong; and hence the provision that he shall not be answerable to any Court for the exercise and performance of the powers and duties of his office.

B) Implication of Article 74 (2):

It is contended on the basis of Article 74 (2) that since no Court would ever come in for inquiry whether any, and if so what, advice was tendered by Ministers to the President; the latter must accept that advice whether he likes it or not, and in a case of conflict, the matter

has to be settled between the President and the Ministers alone. In the case the deed of the President would have automatically reflected the advice of Ministers, that is the things done by the President and the things advised by the Ministers would have been identical. In such a case, an inquiry to differentiate between actions of President and advice of Ministers would simply be sterile. The enactment of the astute provisions under Clause (2) has not only presupposed the possibility of a difference between acts of President and advice of Ministers but has also provided that the President's view shall override those of the Ministers.

In the event of the provision under Article 74 (2) not being enacted, it could be open to any party to question the propriety of Presidential acts by showing that it was not in consonance with the advice of the Ministers. The Clause in fact is not meant to deter the President from having his own way, it is virtually a check upon the Council of Ministers against an attempt to thrust an advice on an unwilling President.

C) Implication of Article 78:

Article 78 makes it the unfailing duty of the Prime Minister to communicate to the President all the decisions of the Council of Ministers relating of the administration

of the affairs to the Union and proposals for legislation and to furnish such information relating thereto as the President may call for, and if the President so desires, also to submit for consideration of the whole Council any matter on which a decision has been taken by a Minister but which has not been considered by the Council. Since the President can also ask for any details, information or material with regard to such decisions or proposals, it implies that the President is required to give them his own deliberation and then approve or disapprove of any decision or proposal, and unless he could do so, there was no point in collecting any further information.

ADVICE NOT BINDING EVEN ON POLITICAL
CONSIDERATIONS:

a) Threat of Impeachment:

It is argued, rather in an enchantingly political spirit; that in case of President does not follow the advice of the Council of Ministers, he immediately becomes liable to impeachment. What Dr. Ambedkar once said to this effect was in the heat of debate at the spur of the moment without any broad analysis of interaction of one constitutional provision with another.

"One should not make a myth of the impeachment proceeding but rather try to know what impeachment is and what it must mean. There is an impeachment for violation of the Constitution, whether it comes about by overriding the ministerial advice or otherwise, does not matter. There is, however, no impeachment for violation of the Minister's advice which has every tendency to be wrongful in itself"²⁴.

b) Chances of an Unconstitutional Advice:

The Council of Ministers consisting as it does of infallible human beings may itself build up an advice in violation of the Constitution. Is there then no way for the President except either to yield to an unconstitutional advice or suffer impeachment for the plain that he sticks to his oath to uphold the Constitution ?

A reasonable answer to such a situation would be that the President would be liable to impeachment not because he has failed to abide by the advice of the Ministers but because he has allowed himself to suffer such advice. The President alone is the best judge to determine whether particular advice is legally and constitutionally right or is in utter violation of the constitution.

c) Chances of Parliament Acting Unconstitutionally:

Under a parliamentary system of Government, the Ministry usually represents only the majority party and the

24. Constituent Assembly Debates, Vol. X, p. 269.

advice given by it may not necessarily reflect the views of the whole House. The commitments of the Council of Ministers may themselves run counter to the Constitution, The Constitution and the Government are not the monopoly of anyone party in majority.

If the whole House were ill-advised and sticking to the views, which in the President's opinion would lead to violation of the Constitution, the President may summon a joint sitting of both House of Parliament and may require the two Houses to examine the validity of any particular advice. If even both Houses of Parliament were ill-informed or incapable of appreciating a particular issue in its correct perspective, it is in the final analysis the President's own wisdom whether his acting in accordance with any advice would amount to violation of the constitution. He would dissolve the House of the People and insist on the electorate to judge the issue and return their representatives still more informed to examine the matter in a new perspective. A President bound to follow a wrong advice but not going to this extent in the expediency of a situation would be failing in his obligation to preserve, protect and defend the constitution.

d) Use of Article 143:

The President can also reduce in to writing the proposed line of his action in the form of a reference to the Supreme

Court for its opinion under Article 143 in regard to a question of law or fact. In constructing a reference of this nature, the President need not disclose whether any and if so what advice was given to him by the Ministers, nor need he disclose his inclination or disinclination to abide by that advice. It is the existence and content of any particular advice which is precluded from enquiry by Courts. A particular line of action adopted or proposed to be adopted by the President in a given case does constitute a matter of definite public importance fit for reference under Article 143.

As a matter of course, the Courts are ready to examine the propriety, vires or validity of an Ordinance or part of it proclaimed by the President under Article 123. The power to promulgate an Ordinance is a plenary power. It is unlike those usual functions in which the President would wait for an advice. The power can be exercised the moment the President is satisfied of the existence of circumstances which render it necessary for him to take immediate action. Yet, in all wisdom, he should have liked his Ministers to counsel him in this respect also. But the nature and content of such counsel, if any, need not come, and never comes, into picture when a court is to judicially examine the vires or validity of a particular ordinance.

Take in particular Article 76 (1) and 148 (1) where-
under the President appoints respectively the Attorney-
General and the Comptroller and Auditor General of India.
Those are not such powers as he may or may not exercise,
these are functions he must necessarily discharge. Since
these are functions, the President does seek the counsel
of his Ministers prior to accomplishment of these functions.
Whether he has acted on; or disregarded, the advice is
another matter; but the element of advice is necessarily
there and despite this underlying advice, no court is
precluded from sitting in inquiry to examine the legality
or validity of these appointments.

Actions of the President, whether they arise out of
discharge of functions or of exercise of powers, are not
closed to judicial scrutiny. The only restrictions or
reservations are that in terms of Article 361, the President
shall not be made to be personally answerable for anything
done or purported to be done under the colour of his powers
or duties; and that in terms of article 74 (2), the question
whether any, and if so what, advice was given by the Ministers
to the President in the exercise of a particular function
shall not be inquired into any Court. If a function dissociated
of its underlying advice can be examined in a Court, a
function proposed to be discharged by the President can likewise
be made subject of reference to the Supreme Court, provided

it is dissociated from the Ministerial advice preceding or underlying it. The opinion obtained from the Supreme Court may serve to dispel the clouds of doubt in the President's mind touching the propriety of his actions involving any matter of public importance and he may use the Court's opinion as his working hypothesis, or employ it as an authority to convince his Council of Ministers or the Houses of Parliament with a view to effecting his own notions in matters where he thought the advice of the Council of Ministers was unconstitutional or otherwise improper or not well founded.

With the sanctity of a judicial opinion on his side, the President can make his views prevail upon the Parliament, and if the Parliament is still recalcitrant or obdurate, there is no option with him but to dissolve the House of the People and ask the electorate to intervene. The electorate would respond to it in fresh elections and, if necessary, the new Parliament would determine the issue. Thus purely on political considerations also the advice of the Council of Ministers is not binding on the President.