SHAMSHER SINGH & ANR.

AND

STATE OF PUNJAB

August 23, 1974

[A. N. RAY, C.J., D. G. PALEKAR, K. K. MATHEW, Y. V. CHANDRACHUD, A. ALAGIRISWAMI, P. N. BHAGWATI AND V. R. KRISHNA IYER, JJ.]

President and Governors—Whether formal heads—Whether bound to act on aid and advice of Council of Ministers—Articles 166(3), 154(1), 53(1) *of constitution of India.*

Constitution of India—Article 311—*termination of service by innocuously worded order whether hit by article* 311.

Civil service probationer whether can be deemed to be confirmed on the expiry of probation period.

Punjab Civil Service (Judicial Branch) Rules 1951 *rr.* 7, 9.

Constitution of India Article 235—*High Court whether can depute an executive authority to inquire into allegations made against subordinate judiciary.*

Constitution of India, Article 234—*Appointment and determination of services of subordinate judges if to be made by Governor personally.*

The appellant Shamsher Singh was a Subordinate Judge on probation. His services were terminated by the Government of Punjab in the name of Governor of Punjab by an order which did not give any reasons for the termination.

Likewise, the services of Ishwar Chand Agarwal were also terminated by the Government of Punjab in the name of Governor on the recommendation of the High Court. The appellants contended that the Governor as the constitutional or the formal head of the State can exercise powers and functions of appointment and removal of members of the subordinate judicial service only personally. The appellants placed reliance on the decision of this Court in *Sardari Lal's* case where it is held that the satisfaction for making an order under Article 311 is the personal satisfaction of the President or the Governor. The State, on the other hand, contended that the Governor exercises powers of appointment and removal conferred on him by or under the Constitution like executive powers of the State Government only on the aid and advice of his council of Ministers and not personally. The Governor is by and under the Constitution required to act in his discretion in several matters. Articles where the expression "acts in his discretion" is used in relation to the powers and functions of the Governor are those which speak of special responsibilities of the Governor. Our constitution embodies generally the parliamentary or cabinet system of Government of the Biritish model. Under this system the President is the constitutional or formal head of the Union and exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his council of Ministers. Under the cabinet system of Government, the Governor is the constitutional or formal head of the State and exercises all his powers and functions conferred on him by or under the Constitution on the aid and advice of his council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. These appeals have been placed before a larger bench to consider whether the decision in *Sardari Lal's* case correctly lays down the law.

It was further contended that since the probationer continued in service after the expiry of the maximum period of probation he became confirmed that the termination was by way of punishment and was in violation of article 311; and that the High Court failed to act in terms of the provisions of art. 235 of the Constitution and abdicated the control over subordinate judiciary by asking the government to enquire through the vigilance department.

A (Per A. N. Ray C.J., Palekar, Mathew, Chandrachud, Alagiriswami, JJ).

HELD :—The decision in *Sardari Lal's* case that the President has to be satisfied personally in exercise of executive power or function and that the functions of the President cannot be delegated is not the correct statement of law, and is against the established and uniform view of this Court as embodied in several decisions. The President as well as the Governor is the constitutional head or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. [833C-F]

B

Sardari Lal's case overruled.

HELD FURTHER : The President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. The present appeals concern the appointment of persons other than District Judges to the Judicial Service of the State which is to be made by the Governor as contemplated in Article 234 of the constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution. [836B-D]

C

HELD FURTHER : No abstract proposition can be laid down that where the services of probationer are terminated without saying anything more in the order of termination that it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution. [837 F]

D

HELD FURTHER : In the absence of any rules governing a probationer the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged, the same does not involve any punishment. The authority may in some cases be of the view that the conduct of the petitioner may result in dismissal or removal on enquiry but in those cases the authority may not hold an enquiry and may simply discharge the petitioner with a view to giving him a chance to make good in other walks of life without a stigma. The fact of holding an enquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then the petitioner is entitled to attract Article 311. Where the departmental enquiry is contemplated and if any enquiry is not in fact proceeded with, Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct. [837 G-A; 838 C; F&G]

E

F

HELD FURTHER : Rule7(1) of the Punjab Civil Service (Judicial Branch) Rules 1951 provides that every Subordinate Judge in the first instance would be appointed on probation for 2 years but the said period might be extended from time to time expressly or impliedly so that the total period of probation including extension if any does not exceed 3 years. The explanation to rule 7(1) provides that the probation shall be deemed to have been extended if a Subordinate Judge is not confirmed on the expiry of his probation. Any confirmation by implication is negatived in the present case because before the completion of 3 years the High Court found prima facie that the conduct as well as the work of the appellant was unsatisfactory and a notice was given to the appellant to show cause as to why his services should not be terminated. Explanation to rule 7(1) shows that the period of probation shall be deemed to have been extended impliedly if a subordinate Judge is not confirmed on the expiry of probation. Therefore, no confirmation by implication can arise in the present case. [839B; E-G]

G

H

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HELD FURTHER : The High Court for the reasons which are not stated decided to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the judiciary asked the Government to hold an enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to hold an enquiry through the Director of Vigilance was an act of self abnegation. The High Court should have conducted the enquiry preferably through District Judges. The members of the Subordinate judiciary look up to High Court not only for discipline but also for dignity. The enquiry officer nominated by the Director of Vigilance recorded the statements of witnesses behind the back of the appellant. The enquiry was to ascertain the truth of allegations of misconduct. Neither the report nor the statements recorded by the Enquiry Officer reached the appellant. The Enquiry Officer gave his findings on allegations of misconduct. The High Court accepted the report of Enquiry Officer and wrote to the Government that in the light of the report, the appellant was not a suitable person to be retained in service. [841C-F]

The order of termination of the services of Ishwar Chand Agarwal is clearly by way of punishment in the facts and circumstances of the case. The High Court not only denied Ishwar Chand merely the protection under Article 311 but also denied itself the dignified control over the subordinate judiciary. The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provisions of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. The order of termination is illegal and must be set aside. [841 G-H]

In case of Shamsher Singh the orders of termination of the services are set aside. The appellant Shamsher Singh succeeds by setting aside the order of termination. In view of the fact that Shamsher Singh is already employed in the Ministry of Law, no relief accepting salary and other monetary benefits which accrued to him upto the time he obtained employment in the Ministry of Law is given.

(Per Krishna Iyer J. for himself and Bhagwati, J. concurring)

(i) The argument about the oath of office of President to defend the Constitution is sometimes put forward by anti-ministerialist advocates. The President defends the Constitution not by denying its spiritual essence of Cabinet responsibility—indeed he subverts it that way—but by accepting as his Constitutional function what his 'responsible' ministers have decided. Can a Judge, in fulfilment of the oath of his office, ignore all binding precedents and decide according to the *ad hoc* dictates of his uninformed conscience ? *Tribhovandas's* case answers the point in the negative. If every functionary who takes the oath by the Constitution interprets it accordng to his lights, this solemn document would be the source of chaos and collusion and the first casualty would be the rule of law. Such mischief cannot merit juristic acceptance. [856H; 857A-B]

It is clear from article 74(1) that it is the function of the Council of Ministers to advise the President over the whole of the Central field. Nothing is left to his discretion or excepted from that field by this article. By way of contract see Article 163 which is the corresponding provision for Governors and which expressly excepts certain matters in which the Governor is, by or under the constitution, required to act in his discretion. There is no such exception in the case of the President. [858FG]

However, Article 75(3) makes the Council of Ministers responsible to the House of the People. If, therefore, the President acted contrary to advice, the ministers would either resign or, since the advice tendered reflected the view of the House of the People, they would be thrown out of office by the House of the People. For the same reason, no one else

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A would then be able to form a government. The President would, therefore, be compelled to dissolve the House. Apart from the technical difficulty of carrying out the many details of a general election in such a situation the President might have to dismiss the Ministry and instal a 'caretaker' government to co-operate with him in ordering a general election—the consequences of the election might be most serious. If the electorate should return the same government to power, the President might be accused of having sided with Opposition and thrown the country into the turmoil and expense B of a general election in a vain attempt to get rid of a Ministry that had the support of Parliament and the People. This would gravely impair the position of the President. [858G-H; 859A-B]

If we hold that in a conflict between the Ministry and the President, the President's voice should prevail in the last resort, either generally or even in a particular class of cases, this would mean the elimination to that extent of the authority of a Ministry which is continuously subject to control or criticism by the House of the People in favour of the C authority of a President who is not so subject. It would thus result in a reduction of the sphere of 'responsible government'. So important a subtraction must be justified by some express provisions in our constitution. [859C-D]

If the President, in a particular case where his own views differ from those of his Ministers, ultimately accepts their advice in defence to a well-understood convention, then even if the act should result in a breach of some 'fundamental right' or 'directive principle' enunciated in the constitu- D tion, the responsibility will be that of the ministers and not of the President. [859D-E]

The President under the Indian Constitution is not a mere figure head. Like the King in England he will still have the right to be consulted, to encourage and to warn. Acting on ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any purposed course of action and ask his E Ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he must accept their final advice. [859F-G]

The President in India is not at all a glorified cipher. He represents the majesty of the State, is at the apex, though only symbolically, and has rapport with the people and parties being above politics. His vigilant presence makes for good government if only he uses, what Bagehot described as, 'the right to be consulted, to warn and encourage.' Indeed, Article 78 wisely used, keeps the President in close touch with the Prime Minister F on matters of national importance and policy significance, and there is no doubt that the imprint of his personality may chasten and correct the political government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors, *i.e.*, the Prime Minister and his colleagues. In short, the President, like the King, has not merely been constitutionally romanticised but actually vested with a persuasive role. Political theorists are quite conversant with the dynamic role of the Crown which keeps away from politics and power and G yet influences both. While he plays such a role he is not a rival centre of power in any sense and must abide by and act on the advice tendered by his Ministers except in a narrow territory which is sometimes slippery. Of course, there is some qualitative difference between the position of the President and the Governor. The former, under Art. 74 has no discretionary powers; the latter too has none, save in the tiny strips covered by Arts. 163(2), 371A(1)(b) and (d), 371A(2)(b) and (f); VI Schedule para 9(2) (and VI Schedule para 18(3), until omitted recently with effect from 21-1-1972). These discretionary powers exist only where expressly spelt out H and even these are not left to the sweet will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament for those actions. Again, a minimal area centering round reports to be despatched under Art. 356 may not, in the nature of things, be amenable to ministerial advice. [867F-H; 868A-C]

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If only we expand the ratio of *Sardarilal* and *Jayantilal* to every function which the Article of the Constitution confer on the President or the Gonvernor, Parliamentary democracy will become a dope and national elections a numerical exercise in expensive futility. We will be compelled to hold that there are two parallel authorities exercising powers of governance of the country, as in the dyarchy days, except that Whitehall is substituted by Rashtrapati Bhavan and Raj Bhawan. The cabinet will shrink at Union and State levels in political and administrative authority and, having solemn regard to the gamut of his powers and responsibilities, the Head of State will be reincarnation of Her Majesty's Secretary of State for India, untroubled by even the British Parliament—a little taller in power than the American President. Such a distortion, by interpretation, it appears to us, would virtually amount to a subversion of the structure, substance and vitality of our Republic, particularly when we remember that Governors are but appointed functionaries and the President himself is elected on a limited indirect basis. [869G-H; 870A-B]

HELD FURTHER :

The President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion, satisfaction or decision. The independence of the judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant Article making consultation with the Chief Justice of India obligatory. In all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decided the issue. [873A-C]

HELD FURTHER :

Nor is *Sardarilal* of such antiquity and moment that a reversal would upset the sanctity of *stare decisis*. Some rulings, even of the highest Court, when running against the current of case and the clear stream of Constitutional thought, may have to fall 'into the same class as restricted railroad ticket, good for the day and train only,' to adopt the language of Justice Roberts (*Smith* v. *Alleright*, 321 U.S. 649, 665). [875E-F]

In short the law of this branch of our constitution is that the President and Governor, Custodians of all executive and other powers under various Articles shall, by virtue of these provisions, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well-known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the constitutional proprieties in these predicaments except to utter the caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. [875F-H]

(ii) So far as the appeals are concerned, the effect is that there is no infirmity in the impugned orders on the score that the Governor has not himself perused the papers or passed the orders. [876C-D]

A The orders of terminations are liable to be quashed and set aside on the facts set out in the judgment of the learned Chief Justice.

Arguments on behalf of the appellant :

Article 234 of the Constitution confers on the Governor the power first to frame rules in consultation with the High Court and the Public Service Commission and then requires him to appoint persons to judicial service of a State in accordance with the Rules so made. The power to appoint includes the power to dismiss or terminate according to section 16 of the general B Clauses Act read with Article 367 of the Constitution.

The power of the Governor under Article 234 as regulated by the rules framed thereunder is not the executive power of the State as contemplated under Article 154 and under Article 162 of the Constitution and is, therefore, not exercisable under Article 154 through subordinate officers, which, includes Ministers but must, on the language, the purpose and the setting of the Article, be exercised by the Governor as a power exercisable by himself. Even Rule 7 framed in consultation with the High Court and the Public C Service Commission of the Punjab Civil Service (Judicial Branch Rules) confers the power of termination on the Governor alone and being bound by those rules he cannot leave exercise thereof to a subordinate officer. Since the impugned order of termination dated 15th December, 1969 was passed admittedly without even placing the papers before the Governor the same is in contravention of and is not authorised by Article 234 and the rules framed thereunder.

Under Article 163 of the Constitution the Governor is to act on the aid and advice of his Council of Ministers in the exercise of his functions D except in so far as he is by or under the Constitution required to exercise his functions in his discretion. The power of termination conferred by Rule 7 is a power conferred by and under the Constitution and since Rule 7 requires the Governor in his own discretion to decide whether or not to terminate the services of a probationer judicial officer the function could be exercised by the Governor even without the aid and advice of his Council of Ministers. Article 163(2) further strengthens this submission in as much as it confers on the Governors the power even to decide whether a matter E is or is not one in his discretion.

Alternatively and assuming that the function under Article 234 read with Rule 7 was not within the Governor's discretion in terms of Article 163, the power conferred by Article 234 and said Rule 7 was not exercisable through subordinates under Article 154 although it may be exercisable by the Governor on the aid and advice of his Council of Ministers since the power is not the executive power of the State but a law making cum executive power of the Governor himself.

F Under Article 235 of the Constitution it is the High Court alone which is vested with the control over the subordinate judiciary in all matters including the initiating and holding of enquiries against judicial officers. Since the dismissal or termination of the appellant's services is based on the Superintendent of Police, Vigilance Department's findings of guilt the order is in breach of Article 235 of the Constitution.

The appellant having completed his maximum period of three years probation, a legal right to be confirmed in favour of the appellant. Thereafter he ceased G to be a probationer. Since the appellant had acquired a right to be confirmed his services could not have been terminated without compliance with the provisions of Article 311 of the Constitution.

The impugned order of termination though innocuous in form, is really an order by way of punishment removing the appellant from service on the basis of charges of gross misconduct found established by an ex-parte enquiry conducted by the S.P. Vigilance Department with the only object of ascertaining the truth of the alleged misconduct and for the purpose of dismissing or removing the petitioner if the charges were found established. It was ultimately on the basis H of specific findings recorded by S.P. Vigilance that the appellant's services were terminated. The enquiry was clearly in breach of Article 311 of the Constitution as also in breach of rules of Natural Justice. The enquiry by S.P. Vigilance was essentially and in character and object different from the infor-

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mal enquiry into the suitability of the appellant held by the two District Judges (Ferozpur and Bhatinda) towards the end of the maximum period of probation.

The report of the Vigilance Department which formed the very basis of the termination is therefore, based on an entirely uncommunicated material.

Even the adverse reports referred to by the Respondent Government were not made the subject matter of the show cause notice proposing termination so that in terms of Rule 9 the petitioner never had the opportunity to show cause against them. Although the said reports related to a pre-show cause notice period they were not made the subject matter of the show cause notice so that the impugned order of termination, which, is admittedly based on these adverse reports also is in breach of Rule 9.

The appellant's service have thus been terminated on the basis of grounds entirely extraneous to the show cause notice and since the appellant was not apprised of these new grounds and allegations and was not given an opportunity to submit an explanation with regard to the same, the order of termination dated 15th December, 1969 has clearly been made in breach of mandatory provisions of rule 9 and is liable to be quashed.

Arguments on behalf of the Respondent

It is a fundamental principle of English Constitutional law that there must be no conflict between the King and his people, and consequently no conflict between the King and the House of Commons which represents the people. It is this principle which is responsible for three settled rules of English Constitutional Law : (i) That for every public act of the King, his Ministers must accept responsibility; (ii) That the Sovereign must never act on his own responsibility that is, he must always have advisers who will bear responsibility for his acts; and (iii) The power of the Sovereign to differ from or dismiss his Ministers is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action and those advisers must have the confidence of the house of Commons. This rule of English Constitutional Law is incorporated in the Constitution of India. See Articles 74(1), 75(3) and 361(1) and second proviso which clearly point to the conclusion that the Indian Constitution envisages a Parliamentary or "responsible" form of Government and not a Presidential form of Government. The powers of the Governor as constitutional head are no different—See Article 163(1), 164(2) and 361(1) and second proviso.

The Supreme Court of India has consistently taken the view that the powers of the President and the powers of the Governor under the Indian Constitution are akin to the powers of the Crown under the British Parliamentary system. *See Ramajawara Kapur* v. *State of Punjab* [1955] 2 SCR *at* 236-237 *(Mukherjea, C.J.), A. Sanjeevi Naidu* v. *State of Madras* [1970] 3 SCR 505 *at* 511 *(Hegde J.); U. N. Rao* v. *Indira Gandhi* [1971] Supp. SCR *p.* 46 *(Sikri, C.J.)*. In the last case this Court held that Article 74(1) was mandatory and therefore the President could not exercise the executive power without the aid and advice of Council of Ministers; but the principle of the decision is not restricted to the exercise of executive power alone. A similar view with regard to the powers of the President and the Governor under our Constitution is expressed by Constitutional lawyers. (*See, for instance, Jennings Constitutional Laws of the Commonwealth* 1952 *p.* 365 where the author characterises the description of the Indian Constitution as a Sovereign Democratic Republic as "wholly accurate" but that "it might also be described as a constitutional monarchy without a monarch".

The Governor is at the apex of the Executive and the executive power of the State is vested in the Governor [*Article* 154(1)]. The Governor is also at the apex of the State Legislature (*Article* 169).

In both these capacities the Governor has several functions to perform. The word 'functions' includes powers and duties—The nature of these functions and the capacity in which he examines them is set out in the Explanatory Note appended to this written argument.

The power to terminate the engagement of a member of a State Public Service Commission—such as a Sub-Judge—is part of the executive power of

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A the State. (*Art.* 162 *read with Entry* 41 *of List II*). It can be allocated to a Minister under Art. 166(3). It can be exercised by subordinate officials if this is in accordance with the rules of allocation.

In any case the executive power of the State extends to, but is not limited to, matters in respect of which legislature has power to make laws. Neither the appointment nor the termination of the services of a District Judge (*Article* 233) nor the appointment or termination of service of a member of the Subordinate Judicial Service (*Article* 234) is a matter with respect to which the Governor is B *required* to act in his discretion. The argument (on behalf of the Interveners) that the "Governor" in Articles 233 and 234 mean the Governor personally and not acting through any other agency is contrary to the plain language of articles 154(1), 162(1) and 166. It is also contrary to the concept "responsible" Government. That the actions of "responsible" Ministers should be scrutinised by a nominated Governor, who is responsible to no one, is a strange argument; the confidence in the personal opinion of a nominated individual may or may not be justified; but it is not warranted in a Parliamentary system of democracy. There is nothing in the form of the oath taken by the Governor to militate against the C State's submissions. If the Governor is true to his oath he cannot ignore or refuse to follow a rule of constitutional Law—which is that he must act as a constitutional head of a State having a Council of Ministers responsible to the State Legislature. In fact such a contention runs counter to the theory of Cabinet responsibility on which our Constitution is based.

The argument founded on article 167 does not advance the case of the petitioners. The Governor has no right to refuse to act on the advice of the Council of Ministers. Such a position is antithetical to the concept of "responsible" Gov- D ernment. Article 167 was inserted for the limited purpose of enabling him to obtain information so that he could discharge the constitutional functions of a Governor. It was not intended to give the Governor power to interfere in the administration and as such a result does not flow from the language used in article 167.

A person appointed to a permanent post in Government service on probation has no right to continue to hold that post any more than a servant employed on probation by a private employer is entitled to do. Termination of the service of E the probationer during or at the end of the period or probation will not ordinarily and by itself be a punishment attracting the provisions of article 311. If termination of service of a probationer is founded on a right flowing from the contract or the service rules, then *prima facie* it is not a punishment and article 311 is not attracted. The test is : Is termination sought to be brought about otherwise than by way of punishment ? If yes, article 311 will not apply. This is *ordinarily* to be ascertained by reference to the order terminating the service.

Though termination of the service of a probationer during or at the end of F the period of probation will not ordinarily and by itself be a punishment—the circumstances attending the termination would be relevant to determine whether or not the termination was by way of punishment. An important circumstance would be the fact that disciplinary action was contemplated and taken. The form of the order is not by itself conclusive.

An order of termination of service in unexceptionable form preceded by an inquiry launched by the superior authority—whether under specific rules or otherwise for the purpose of ascertaining whether the public servant should be re- G tained in service does not attract the operation of article 311.

Even where a departmental inquiry is initiated and a charge sheet submitted followed by an explanation from the probationer the provisions of article 311 would not be attracted if the inquiry was not proceeded with and there was a termination of service *simpliciter*.

But where the inquiry is held under rules giving the public servant on probation an opportunity of showing cause why the probationer's appointment should not be terminated and such a show cause notice is given and an inquiry held H under the relevant rule, the order of discharge of the probationer if unexceptionable in form, will not amount to "dismissal".

In the present case Rule 9 was invoked and was applied. The confidential reports themselves disclose an unsatisfactory record implying unsuitability for

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further service. This itself is sufficient to dispose of the petitioner's contentions on merits. The confidential reports were available with the Government as they were forwarded by the High Court. The explanation of the petitioner was considered by the High Court both prior to the issue of a show cause notice by the Chief Secretary and after, and the explanation of the petitioners was also considered by the High Court. The record does not show that the view of the High Court was in any way perverse. On the contrary, it is clearly warranted by the facts on record. The contention that the show cause notice should have been under the specific directions of the Chief Minister is not warranted either by the Allocation Rules of 1966 nor is it justified on a true construction of Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules, 1952.

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 2289 of 1970 and 632 of 1971.

From the Judgment and Order dated 28-4-70 of the appeal by Special Leave from the Judgment and order dated 8-10-70 of the Punjab & Haryana High Court in Civil Regular First Appeal No. 446/69 and L.P.A. No. 656 of 1970 respectively.

Appellant appeared *in person* (In CA No. 2289/70).

G. L. Sanghi, S. P. Agarwala, A. T. M. Sampath, A. K. Sanghi and *E. C. Agarwala;* for the Appellant (In C.A. No. 632/71).

F.S. Nariman, Addl. Sol. Gen. of India, H. R. Khanna and *O. P. Sharma; for Respondent No.* 1 (In CA. No. 2289/70).

V. M. Tarkunde, S. K. Mehta and *O. P. Sharma* for the Respondent (In CA. 632/71).

Niren De, Att. Gen., P. P. Rao and *S. P. Nayar;* for the Attorney General of India.

B. R. L. Iyengar and *Bishamber Lal for* the Intervener (Mr. B. L. Gupta).

Anand Swarup, A. K. Sen and *Harbans Singh Marwaha* for Intervener (Punjab & Haryana).

The Judgment of A. N. Ray, C.J., D. G. Palekar, K. K. Mathew, Y. V. Chandrachud and A. Alagiriswami, JJ. was delivered by Ray, C.J., V. H. Krishna Iyer, J. gave a separate Opinion on behalf of P. N. Bhagwati J. and himself.

RAY C. J. These two appeals are from the judgment of the Punjab and Haryana High Court.

The Appellants joined the Punjab Civil Service (Judicial Branch). They were both on probation.

By an order dated 27th April, 1967 the services of the appellant Shamsher Singh were terminated. The order was as follows :

> "The Governor of Punjab is pleased to terminate the services of Shri Shamsher Singh, Subordinate Judge, on probation, under Rule 9 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952 with immediate effect. It is requested that these orders may be conveyed to the officer concerned under intimation to the Government."

By an order dated 15 December, 1969 the services of the appellant Ishwar Chand Aggarwal were terminated. The order was as follows:—

> "On the recommendation of the High Court of Punjab and Haryana, the Governor of Punjab is pleased to dispense with

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A the services of Shri Ishwar Chand Agarwal, P.C.S. (Judicial Branch), with immediate effect, under Rule 7(3) in Part 'D' of the Punjab Civil Services (Judicial Branch) Rules, 1951, as amended from time to time".

The appellants contend that the Governor as the Constitutional or the formal head of the State can exercise powers and functions of B appointment and removal of members of the Subordinate Judicial Service only personally. The State contends that the Governor exercises powers of appointment and removal conferred on him by or under the Constitution like execute powers of the State Government only on the aid and advice of his Council of Ministers and not personally.

The appellants rely on the decision of this Court in *Sardari Lal* C v. *Union of India & Ors.* (1971)3 S.C.R. 461 where it has been held that where the President or the Governor, as the case may be, if satisfied, makes an order under Article 311(2) proviso(c) that in the interest of the security of the State it is not expedient to hold an enquiry for dismissal or removal or reduction in rank of an officer, the satisfaction of the President or the Governor is his personal satisfaction. The appellants on the authority of this ruling contend that D under Article 234 of the Constitution the appointment as well as the termination of services of subordinate Judges is to be made by the Governor personally.

These two appeals were placed before a larger Bench to consider whether the decision in *Sardari Lal's* case (supra) correctly lays down the law that where the President or the Governor is to be satis- E fied it is his personal satisfaction.

The appellants contend that the power of the Governor under Article 234 of the Constitution is to be exercised by him personally for these reasons.

First there are several constitutional functions, powers and duties F of the Governor. These are conferred on him *eo nomine* the Governor. The Governor, is, by and under the Constitution, required to act in his discretion in several matters. These constitutional functions and powers of the Governor *eo nomine* as well as these in the discretion of the Governor are not executive powers of the State within the meaning of Article 154 read with Article 162.

G Second, the Governor under Article 163 of the Constitution can take aid and advice of his Council of Ministers when he is exercising executive power of the State. The Governor can exercise powers and functions without the aid and advice of his Council of Ministers when he is required by or under the Constitution to act in his discretion, where he is required to exercise his Constitutional functions conferred on him *eo nomine* as the Governor.

H Third, the aid and advice of the Council of Ministers under Article 163 is different from the allocation of business of the Government of the State by the Governor to the Council of Ministers under Article

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166(3) of the constitution. The allocation of business of Govt. under Article 166(3) is an instance of exercise of executive power by the Governor through his council by allocating or delegating his functions. The aid and advice is a constitutional restriction on the exercise of executive powers of the State by the Governor. The Governor will not be constitutionally competent to exercise these executive powers of the State without the aid and advice of the Council of Ministers.

Fourth, the executive powers of the State are vested in the Governor under Article 154(1). The powers of appointment and removal of Subordinate Judge under Article 234 have not been allocated to the Ministers under the Rules of Business of the State of Punjab. Rule 18 of the Rules of Business States that except as otherwise provided by any other rule cases shall ordinarily be disposed of by or under the authority of the Minister-in-Charge who may, by means of Standing orders, give such directions as he thinks fit for the disposal of cases in his department. Rule 7(2) in Part D of the Punjab Civil Service Rules which states that the Governor of Punjab may on the recommendation of the High Court remove from service without assigning any cause any subordinate Judge or revert him to his substantive post during the period of probation is incapable of allocation to a Minister. Rule 18 of the Rules of Business is subject to exceptions and rule 7(2) of the Service Rules is such an exception. Therefore, the appellants contend that the power of the Governor to remove Subordinate Judges under Article 234 read with the aforesaid Rule 7(2) of the Service Rules cannot be allocated to a Minister.

The Attorney General for the Union, the Additional Solicitor General for the State of Punjab and Counsel for the State of Haryana contended that the President is the constitutional head of the Union and the Governor is the constitutional head of the State and the President as well as the Governor exercises all powers and functions conferred on them by or under the Constitution on the aid and advice of the Council of Ministers.

In all the Articles which speak of powers and functions of the President, the expressions used in relation thereto are 'is satisfied', 'is of opinion', 'as he thinks fit' and 'if it appears to'. In the case of Governor, the expressions used in respect of his powers and functions are 'is satisfied', 'if of opinion' and 'as he thinks fit'.

Article 163(1) states that there shall be a Council of Ministers with the Chief Minister at the head to aid and advice the Governor in the exercise of his functions, except in so far as he is by or under this Constitution, required to exercise his functions or any of them in his discretion. Article 163(2) states that if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. Extracting the words "in his discretion" in relation to exercise of functions, the appellants contend that the Council of Ministers may aid and advise the

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A Governor in Executive functions but the Governor individually and personally in his discretion will exercise the constitutional functions of appointment and removal of officers in State Judicial Service and other State Services.

It is noticeable that though in Article 74 it is stated that 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, there is no provision in Article 74 comparable to Article 163 that the aid and advice is except in so far as he is required to exercise his functions or any of them in his discretion.

It is necessary to find out as to why the words 'in his discretion' are used in relation to some powers of the Governor and not in the case of the President.

C Article 143 in the Draft Constitution became Article 163 in the Constitution. The draft constitution in Article 144(6) said that the functions of the Governor under Article with respect to the appointment and dismissal of Ministers shall be exercised by him in his discretion. Draft Article 144(6) was totally omitted when Article 144 became Article 164 in the Constitution. Again Draft Article 153(3) said that the functions of the Governor under clauses (a) and (c) of D clause (2) of the Article shall be exercised by him in his discretion. Draft Article 153(3) was totally omitted when it became Article 174 of our Constitution. Draft Article 175(proviso) said that the Governor "may in his dircretion return the Bill together with a message requesting that the House will reconsider the Bill". Those words that "the Governor may in his discretion" were omitted when it became Article 200. The Governor under Article 200 may return the Bill together E with a message requesting that the House will reconsider the Bill. Draft Article 188 dealt with provisions in case of grave emergencies. clauses (1) and (4) in Draft Article 188 used to words "in his discretion in relation to exercise of power by the Governor. Draft Article 188 was totally omitted. Draft Article 285(1) and (2) dealing with composition and staff of Public Service Commission used the expression "in his discretion" in relation to exercise of power by the Gover- F nor in regard to appointment of the Chairman and Members and making of regulation. The words "in his discretion" in relation to exercise of power by the Governor were omitted when it became Article 316. In Paragraph 15(3) of the Sixth Schedule dealing with annulment or suspension of acts or suspension of acts and resolutions of District and Regional Councils it was said that the functions of the Governor under G the Paragraph shall be exercised by him in his discretion. Sub-paragraph 3 of Paragraph 15 of the Sixth Schedule was omitted at the time of enactment of the Constitution.

It is, therefore, understood in the background of these illustrative draft articles as to why Article 143 in the Draft Constitution which became Article 163 in our Constitution used the expression "in his discretion" in regard to some powers of the Governor.

H Articles where the expression "acts in his discretion" is used in relation to the powers and functions of the Governor are those which speak of Special responsibilities of the Governor. These Articles are 371A(1)(b), 371A(1)(d), 371A(2)(b) and 371A(2)(f). There

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are two Paragraphs in the Sixth Schedule, namely, 9(2) and 18(3) where the words "in his discretion" are used in relation to certain powers of the Governor. Paragraph 9(2) is in relation to determination of amount of royalties payable by licensees or lessees prospecting for, or extracting minerals to the District Council. Paragraph 18(3) has been omitted with effect from 21 January, 1972.

The provisions contained in Article 371A(1)(b) speak of the Special responsibility of the Governor of Nagaland with respect to law and order in the State of Nagaland and exercise of his individual judgment as to the action to be taken. The proviso states that the decision of the Governor in his discretion shall be final and it shall not be called in question.

Article 371A(1)(d) states that the Governor shall in his discretion make rules providing for the composition of the regional council for the Tuensang District.

Article 371A(2)(b) states that for periods mentioned there the Governor shall in his discretion arrange for an equitable allocation of certain funds, between the Tuensang District and the rest of the State.

Aricle 371A(2)(f) states that the final decision on all matters relating to the Tuensang District shall be made by the Governor in his discretion.

The executive power of the Union is vested in the President under Article 53(1). The executive power of the State is vested in the Governor under Article 154(1). The expression "Union" and "State" occur in Articles 53(1) and 154(1) respectively to bring about the federal principles embodied in the Constitution. Any action taken in the exercise of the executive power of the Union vested in the President under Article 53(1) is taken by the Government of India in the name of the President as will appear in Article 77(1). Similarly, any action taken in the exercise of the executive power of the State vested in the Governor under Article 154(1) is taken by the Government of the State in the name of the Governor as will appear in Article 166(1).

There are two significant features in regard to the executive action taken in the name of the President or in the name of the Governor. Neither the President nor the Governor may sue or be sued for any executive action of the State. First, Article 300 States that the Government of India may sue or be sued in the name of the Union and the Governor may sue or be sued in the name of the State. Second, Article 361 states that proceedings may be brought against the Government of India and the Government of the State but not against the President or the Governor. Articles 300 and 361 indicate that neither the President nor the Governor can be sued for executive actions of the Government. The reason is that neither the president nor the Governor exercises the executive functions individually or personally. Executive action taken in the name of the President is the action of the Union. Executive action taken in the name of the Governor is the executive action of the State.

A Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British model both for the Union and the States. Under this system the President is the Constitutional or formal head of the Union and he exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers Article 103 is an exception to the aid and advice of the Council of Ministers because it specifically provides B that the President acts only according to the opinion of the Election Commission. This is when any question arises as to whether a member of either House of Parliament has become subject to any of the disqualifications mentioned in clause (1) of Article 102.

Under the Cabinet system of Government as embodied in our Constitution the Governor is the constitutional or formal head of the State and he exercises all his powers and functions conferred on him by or C under the Constitution on the aid and advice of his Council of Ministers save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion.

The executive power is generally described as the residue which does not fall within the legislative or judicial power. But executive power may also partake of legislative or judicial actions. All powers and functions of the President except his legislative powers as for D example in Article 123, viz., ordinance making power and all powers and functions of the Governor except his legislative power as for example in Article 213 being ordinance making powers are executive powers of the Union vested in the President under Article 53(1) in one case and are executive powers of the State vested in the Governor under Article 154(1) in the other case. Clause (2) or Clause (3) of Article 77 is not limited in its operation to the executive action of the Govern- E ment of India under clause (1) of Article 77. Similarly, clause (2) or clause (3) of Article 166 is not limited in its operation to the executive action of the Government of the State under clause (1) of Article 166. The expression "Business of the Government of India" in clause (3) of Article 77, and the expression "Business of the Government of the State" in clause (3) of Article 166 includes all executive business.

F In all cases in which the President or the Governor exercises his functions conferred on him by or under the Constitution with the aid and advice of his Council of Ministers he does so by making rules for convenient transaction of the business of the Government of India or the Government of the State respectively or by allocation among his Ministers of the said business, in accordance with Article 77(3) and 166(3) respectively. Wherever the Constitution requires the satis- G faction of President or the Governor for the exercise of any power or function by the President or the Governor, as the case may be, as for example in Articles 123, 213, 311(2) proviso (c), 317, 352(1), 356 and 360 the satisfaction required by the Constitution is not the personal satisfaction of the President or of the Governor but is the satisfaction of the President or of the Governor in the Constitutional sense under the Cabinet system of Government. The reasons are these. It H is the satisfaction of the Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Both Articles 77(3) and 166(3) provide

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that the President under Article 77(3) and the Governor under Article 166(3) shall make rules for the more convenient transactions of the business of the Government and the allocation of business among the ministers of the said business. The rules of business and the allocation among the Ministers of the said business all indicate that the decision of any Minister or officer under the rules of business make under these two Articles viz., Article 77(3) in the case of the President and Article 166(3) in the case of the Governor of the State is the decision of the President or the Governor respectively.

Further the rules of business and allocation of business among the Ministers are relatable to the provisions contained in Article 53 in the case of the President and Article 154 in the case of the Governor, that the executive power shall be exercised by the President or the Governor directly or through the officers subordinate. The provisions contained in Article 74 in the case of the President and Article 163 in the case of the Governor that there shall be a Council of Ministers to aid and advise the President or the Governor as the case may be, are sources of the rules of business. These provisions are for the discharge of the executive powers and functions of the Government in the name of the President or the Governor. Where functions entrusted to a Minister are performed by an official employed in the Minister's Department there is in law no delegation because constitutionally the act or decision of the official is that of the Minister. The official is merely the machinery for the discharge of the functions entrusted to a Minister (See Halsubry's laws of England 4th Ed. Vol. I paragraph 748 at p. 170 and *Carltona Ltd.* v. *Works Commissioners* (1943) 2 All. (E.R. 560)

It is a fundamental principle of English Constitutional law that Ministers must accept responsibility for every executive act. In England, the sovereign never acts on his own responsibility. The power of the sovereign is conditioned by the practical rule that the Crown must find advisers to bear responsibility for his action. Those advisers must have the confidence of the House of Commons. This rule of English constitutional law is incorporated in our Constitution. The Indian Constitution envisages a parliamentary and responsible form of Government at the Centre and in the States and not a Presidential form of Government. The powers of the Governor as the Constitutional head are not different.

This Court has consistently taken the view that the powers of the President and the powers of the Governor are similar to the powers of the Crown under the British Parliamentary system. (See *Ram Jawaya Kapur* v. *State of Punjab* (1952) 2 S. C. R. 225 at 236-237, *A. Sanjeevi Naidu* v. *State of Madras* (1970) 3 S. C. R. 505 at 511. *U. N. Rao* v. *Indira Gandhi* (1971) Supp. S. C. R. 46. In *Ram Jawaya Kapur's* case (supra) Mukherjea, C. J. speaking for the Court stated the legal position as follows. The executive has the primary responsibility for the formulation of governmental policy and its transmission into law. The condition precedent to the exercise of this responsibility is that the executive retains the confidence of the legislative branch of the State. The initiation of legislation, the maintenance of order, the promotion of Social and economic welfare, the

A direction of foreign policy, the carrying on the general administration of the State are all executive functions. The executive is to act subject to the control of the legislature. The executive power of the Union is vested in the President. The President is the formal or constitutional head of the executive. The real executive powers are vested in the Ministers of the Cabinet. There is a Council of Ministers with the Prime Minister as the head to aid and advise the President B in the exercise of his functions.

The functions of the Governor under rules of business of Madras Government in regard to a scheme for nationalisation of certain bus routes were considered by this Court in *Sanjeevi Naidu's* case (supra). The validity of the scheme was challenged on the ground that it was not formed by the State Government but by the Secretary C to the Government pursuant to powers conferred on him under Rule 23-A of the Madras Government Business Rules.

The Scheme was upheld for these reasons. The Governor makes rules under Article 166(3) for the more convenient transaction of business of the Government of the State. The Governor can not only allocate the various subjects amongst the Ministers but may go D further and designate a particular official to discharge any particular function. But that could be done on the advice of the Council of Ministers. The essence of Cabinet System of Government responsible to the Legislature is that an individual Minister is responsible for every action taken or omitted to be taken in his Ministry. In every administration, decisions are taken by the civil servants. The Minister E lays down the policies. The Council of Ministers settle the major policies. When a Civil Servant takes a decision, he does not do it as a delegate of his Minister. He does it on behalf of the Government. The officers are the limbs of the Government and not its delegates. Where functions are entrusted to a Minister and these are performed by an official employed in the Ministry's department, there is in law no delegation because constitutionally the act or decision of the official F is that of the Minister.

In *Rao's* case (supra) this Court had to consider whether House of People being dissolved by the President on 27 December, 1970, the Prime Minister ceased to hold office thereafter. Our Constitution is modelled on the British Parliamentary system. The executive has the primary responsibility for the formation of Government policy. G The executive is to act subject to control by the Legislature. The President acts on the aid and advice of the Council of Ministers with the Prime Minister at the head. The Cabinet enjoying as it does a majority in the Legislature concentrates in itself the virtual control of both legislative and executive functions. Article 74(1) which states that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the legislative functions is H mandatory. The contention in that case that on the President dissolving the House, there will be no Prime Minister was not accepted because it would change the entire content of the executive Government.

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If there will be no Council of Ministers, the President will not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there will be no Council of Ministers, nobody will be responsible to the House of the People. Article 75 states that the Prime Minister will be appointed by the President and the other Ministers shall be appointed on the advice of the Prime Minister. Article 75(3) states that the Council of Ministers is collectively responsible to the Government. This is the basis of responsible Government. Article 75(3) by itself may not apply when the House of People is dissolved or prorogued. But the harmonious reading of the mandatory character of Article 75(1) along with Articles 75(2) and 75(3) is that the President cannot exercise executive powers without the aid and advice of the Council of Ministers with the Prime Minister at the head. In that context, Articles 77(3) and 78 have full operation for duties of the Prime Minister and allocation of business among Ministers.

These decisions of this Court are based on the root authority in *King Emperor* v. *Sibnath Banerji & Ors.* 72 I. A. 241. Section 59(3) of the Government of India Act, 1935 referred to as the 1935 Act contained provisions similar to Article 166(3) of our Constitution. The question arose there as to whether the satisfaction of the Governor meant the personal satisfaction as to matters set out in the rule 26 of the Defence of India Rules. It was held that these matters could be dealt with by him in the normal manner in which the executive business of the Provincial Government is carried on and in particular under Section 49 of the 1935 Act and the provisions of the Rules of Business made under the aforesaid Section 59 of the 1935 Act. The orders of detention were held to be regular and appropriate. A presumption of constitutionality was also to be implied under the Rules of Business. The presumption of course could be rebutted.

The Judicial Committee observed that the executive authority in its broad sense included both a decision as to action and the carrying out of such decision. The Judicial Committee said that such matters as those which fell to be dealt with by the Governor under Rule 26 of the Defence of India Rules would be dealt with by him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of the Act of 1935 and in particular under Rules of Business.

This Court in *Bejoy Lakshmi Cotton Mills Ltd.* v. *State of West Bengal and ors.* reported in (1967) 2 S.C.R. 406 considered the validity of a notification signed by the Assistant Secretary in the Land and Revenue Department of the State Government. It was contended that the executive power of the State is vested in the Governor under Article 154(1) of the Constitution, and, therefore, the satisfaction of the Governor was contemplated under Sections 4 and 6 of the Land Development and Planning Act under which the notification would be made. Under the Rules of Business made by the Governor under Article 166(3), the Governor allocated to the Minister certain matters. The Minister-in-charge issued a Standing Order specifying the matters which were required to be referred to him.

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A The Rules of Business in the *Bejoy Lakshmi Cotton Mills* case (supra) indicated that the business of the Government was to be transacted in various departments specified in the Schedules. Land and Land Revenue was allocated as the business of the Department of the Minister with that portfolio. The Minister-in-charge had power to make standing Order regarding disposal of cases. This Court held that B the decision of any Minister or officer under Rules of Business is a decision of the President or the Governor respectively. The Governor means, the Governor aided and advised by the Ministers. Neither Article 77(3) nor Article 166(3) provides for any delegation of power. Although the executive power of the State is vested in the Governor actually it is carried on by Ministers under Rules of Business made under Article 166(3). The allocation of business of the Government C is the decision of the President or the Governor on the aid and advice of Ministers.

This Court in *Jayantilal Amritlal Shodhan* v. *F. N. Rana & Ors.* [1964] 5 S. C. R. 294 considered the validity of a notification issued by the President under Article 258(1) of the Constitution entrusting with the consent of the Government of Bombay to the Commissioners of Divisions in the State of Bombay the functions of the Central Govern- D ment under the Land Acquisition Act in relation to the acquisition of land for the purposes of the Union within the territorial jurisdiction of the Commissioners. The notification issued by the President was dated 24 July, 1959. The Commissioner of Baroda Division, State of Gujarat by notification published on 1 September, 1960, exercising functions under the notification issued by the President notified under E Section 4(1) of the Land Acquisition Act that certain land belonging to the appellant was needed for a public purpose. On 1 May, 1960 under the Bombay Reorganisation Act, 1960 two States were carved out, viz., Maharashtra and Gujarat. The appellant contended that the notification issued by the President under Article 258(1) was ineffective without the consent of the Government of the newly formed State of Gujarat.

F This Court in *Jayantilal Amritlal Shodhan's* case (supra) held that Article 258 enables the President to do by notification what the Legislature could do by legislation, namely, to entrust functions relating to matters to which executive power of the Union extends to officers named in the notification. The notification issued by the President was held to have the force of law. This Court held that Article 258(1) empowers the President to entrust to the State the functions G which are vested in the Union, and which are exercisable by the President on behalf of the Union and further went on to say that Article 258 does not authorise the President to entrust such power as are expressly vested in the President by the Constitution and do not fall within the ambit of Article 258(1). This Court illustrated that observation by stating that the power of the President to promulgate Ordinances under Articles 268 to 279 during an emergency, to declare H failure of constitutional machinery in States under Article 356, to declare a financial emergency under Article 360; to make rules regulating the recruitment and conditions of service of persons appointed

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to posts and services in connection with the affairs of the Union under Article 309, are not powers of the Union Government but are vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority under Article 258(1). A

The ratio in *Jayantilal Amritlal Shodhan's* case (supra) is confined to the powers of the President which can be conferred on States under Article 258. The effect of Article 258 is to make a blanket provision enabling the President to exercise the power which the Legislature could exercise by legislation, to entrust functions to the Officers to be specified in that behalf by the President and subject to the conditions prescribed thereby. The result of the notification by the President under Article 258 is that wherever the expression "appropriate Government" occurs in the Act in relation to provisions for acquisition of land for the purposes of the Union, the words "Appropriate Government or the Commissioner of the Division having territorial jurisdiction over the area in which the land is situate" were deemed to be substituted. B C

The distinction made by this Court between the executive functions of the Union and the executive functions of the President does not lead to any conclusion that the President is not the constitutional head of Government. Article 74(1) provides for the Council of Ministers to aid and advise the President in the exercise of his functions. Article 163(1) makes similar provision for a Council of Ministers to aid and advise the Governor. Therefore, whether the functions exercised by the President are functions of the Union or the functions of the President they have equally to be exercised with the aid and advice of the Council of Ministers, and the same is true of the functions of the Governor except those which he has to exercise in his discretion. D E

In *Sardari Lal's* case (supra) an order was made by the President under sub-clause (c) to clause (2) of Article 311 of the Constitution. The order was : "The President is satisfied that you are unfit to be retained in the public service and ought to be dismissed from service. The President is further satisfied under sub-clause (c) of proviso to clause (2) of Article 311 of the Constitution that in the interest of the security of the State it is not expedient to hold an inquiry". The order was challenged on the ground that the order was signed by the Joint Secretary and was an order in the name of the President of India and that the Joint Secretary could not exercise the authority on behalf of the President. F G

This Court in *Sardari Lal's* case (supra) relied on two decisions of this Court. One is *Moti Ram Deka etc.* v. *General Manager N.E.F. Railway, Maligaon, Pandu* [1964] 5 SCR 683 and the other is *Jayantilal Amritlal Shodhan's* case (supra). *Moti Ram Deka's* case (Supra) was relied on in support of the proposition that the power to dismiss a Government servant at pleasure is outside the scope of Article 53 and 154 of the Constitution and cannot be delegated by the President or the Governor to a subordinate officer and can be exercised only by the President or the Governor in the H

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manner prescribed by the Constitution. Clause (c) of the proviso to Article 311(2) was held by this Court in *Sardari Lal's* case (supra) to mean that the functions of the President under that provision cannot be delegated to anyone else in the case of a civil servant of the Union and the President has to be satisfied personally that in the interest of the security of the State it is not expedient to hold an inquiry prescribed by Article 311(2). In support of this view this Court relied on the observation in *Jayantilal Amrit Lal Shodhan's* case (supra) that the powers of the President under Article 311(2) cannot be delegated. This Court also stated in *Sardari Lal's* case (supra) that the general consensus of the decisions is that the executive functions of the nature entrusted by certain Articles in which the President has to be satisfied himself about the existence of certain facts or state of affairs cannot be delegated by him to anyone else.

The decision in *Sardari Lal's* case that the President has to be satisfied personally in exercise of executive power or function and that the functions of the President cannot be delegated is with respect not the correct statement of law and is against the established and uniform view of this Court as embodied in several decisions to which reference has already been made. These decisions are from the year 1955 upto the years 1971. The decisions are *Rai Saheb Ram jawaya Kapur* v. *State of Punjab* [1955] 2 S.C.R. 225, *A. Sanjeevi Naidu* v. *State of Madras* [1970] 3 S.C.R. 505 and *U. N. R. Rao* v. *Smt. Indira Gandhi* [1971] Suppl. S.C.R. 46. These decisions neither referred to nor considered in *Sardari Lal's* case (supra).

The President as well as the Governor is the Constitutional or formal head. The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion. Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function, the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the Constitutional sense in the Cabinet system of Government, that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercise all his powers and functions. The decision of any Minister or officer under rules of business made under any of these two Articles 77(3) and 166(3) is the decision of the President or the Governor respectively. These articles did not provide for any delegation. Therefore, the decision of Minister or officer under the rules of business is the decision of the President or the Governor.

In *Moti Ram Deka's* case (supra) the question for decision was whether Rules 148(3) and 149(3) which provided for termination of the service of a permanent Government servant by a stipulated notice violated Article 311. The Majority opinion in *Moti Ram Deka's* case (supra) was that Rules 148(3) and 149(3) were invalid inasmuch as they are inconsistent with the provisions of Article 311(2).

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The decision in *Moti Ram Deka's* case supra is not an authority for the proposition that the power to dismiss a servant at pleasure is outside the scope of Article 154 and cannot be delegated by the Governor to a subordinate officer.

This Court in *State of Uttar Pradesh & Ors.* v. *Babu Ram Upadhya* [1961] 2 S.C.R. 679 held that the power of the Governor to dismiss at pleasure, subject to the provisions of Article 311, is not an executive power under Article 154 but a Constitutional power and is not capable of being delegated to officers subordinate to him. The effect of the judgment in *Babu Ram Upadhya's* case (supra) was that the Governor could not delegate his pleasure to any officer nor could any law provide for the exercise of that pleasure by an officer with the result that statutory rules governing dismissal are binding on every officer though they were subject to the overriding pleasure of the Governor. This would mean that the officer was bound by the Rules but the Governor was not.

In *Babu Ram Upadhya's* case (supra) the majority view stated seven propositions at p. 701 of the report. Proposition No. 2 is that the power to dismiss a public servant at pleasure is outside the scope of Article 154 and therefore cannot be delegated by the Governor to a subordinate officer and can be exercised by him only in the manner prescribed by the Constitution. Propositions No. 3 and 4 are these. The tenure of a public servant is subject to the limitations or qualifications mentioned in Article 311 of the Constitution. The Parliament or the Legislatures of States cannot make a law abrogating or modifying this tenure so as to impinge upon the overriding power conferred upon the President or the Governor under Article 310 as qualified by Article 311. Proposition No. 5 is that the Parliament or the Legislatures of States can make a law regulating the conditions of service of such a member which includes proceedings by way of disciplinary action, without affecting the powers of the President or the Governor under Article 310 of the Constitution read with Article 311. Propoistion No. 6 is that the Parliament and the Legislatures also can make a law laying down and regulating the scope and content of the doctrine of "reasonable opportunity" embodied in Article 311, but the said law would be subject to judicial review.

All these propositions were reviewed by the majority opinion of this Court in *Moti Ram Deka's* case (supra) and this Court restated that proposition No. 2 must be read along with the subsequent propositions specified as propositions No. 3, 4, 5 and 6. The ruling in *Moti Ram Deka's* case (supra) is that a law can be framed prescribing the procedure by which and the authority by whom the said pleasure can be exercised. The pleasure of the President or the Governor to dismiss can therefore not only be delegated but is also subject to Article 311. The true position as laid down in *Moti Ram Deka's* case (supra) is that Articles 310 and 311 must no doubt be read together but once the true scope and effect of Article 311 is determined the scope of Article 310(1) must be limited in the sense

A that in regard to cases falling under Article 311(2) the pleasure mentioned in Article 310(2) must be exercised in accordance with the requirements of Article 311.

The majority view in *Babu Ram Upadhya's* case (supra) is no longer good law after the decision in *Moti Ram Deka's* case (supra). The theory that only the President or the Governor is B personally to exercise pleasure of dismissing or removing a public servant is repelled by express words in Article 311 that no person who is a member of the Civil service or holds a civil post under the Union or a State shall be dismissed or removed by authority subordinate to that by which he was appointed. The words "dismissed or removed by an authority subordinate to that by which he was appointed" indicate that the pleasure of the President or the Governor is exercised by C such officers on whom the President or the Governor confers or delegates power.

The provisions of the Constitution which expressly require the Governor to exercise his powers in his discretion are contained in Articles to which reference has been made. To illustrate, Article 239(2) states that where a Governor is appointed an Administrator D of an adjoining Union Territory he shall exercise his functions as such administrator independently of his Council of Ministers. The other Articles which speak of the discretion of the Governor are paragraphs 9(2) and 18(3) of the Sixth Schedule and Articles 371(1)(b), 371A(1)(d) and 371A(2)(b) and 371A(2)(f). The discretion conferred on the Governor means that as the constitutional or formal head of the State the power is vested in him. In this connection, E reference may be made to Article 356 which states that the Governor can send a report to the President that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution. Again Article 200 requires the Governor to reserve for consideration any Bill which in his opinion if it became law, would so derogate from the powers of the High Court as to endanger the position which the High Court is designed to fill F under the Constitution.

In making a report under Article 356 the Governor will be justified in exercising his discretion even against the aid and advice of his Council of Ministers. The reason is that the failure of the Constitutional machinery may be because of the conduct of the Council of Ministers. This discretionary power is given to the Governor to en- G able him to report to the President who, however, must act on the advice of his Council of Ministers in all matters. In this context Article 163(2) is explicable that the decision of the Governor in his discretion shall be final and the validity shall not be called in question. The action taken by the President on such a report is a different matter. The President acts on the advice of his Council of Ministers. In all other matters where the Governor acts in his discretion he will H act in harmony with his Council of Ministers. The Constitution does not aim at providing a parallel administration within the State by allowing the Governor to go against the advice of the Council of Ministers.

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Similarly Article 200 indicates another instance where the Governor may act irrespective of any advice from the Council of Ministers. In such matters where the Governor is to exercise his discretion he must discharge his duties to the best of his judgment. The Governor is required to pursue such courses which are not detrimental to the State.

For the foregoing reasons we hold that the President or the Governor acts on the aid and advice of the Council of Ministers with the Prime Minister at the head in the case of the Union and the Chief Minister at the head in the case of State in all matters which vests in the executive whether those functions are executive or legislative in character. Neither the President nor the Governor is to exercise the executive functions personally. The present appeals concern the appointment of persons other than District Judges to the Judicial Service of the State which is to be made by the Governor as contemplated in Article 234 of the Constitution after consultation with the State Public Service Commission and the High Court. Appointment or dismissal or removal of persons belonging to the Judicial Service of the State is not a personal function but is an executive function of the Governor exercised in accordance with the rules in that behalf under the Constitution.

In the present appeals the two rules which deal with termination of services of probationers in the Punjab Civil Service (Judicial Branch) are Rule 9 of the Punjab Civil Service (Punishment and Appeal) Rules, 1952 and Rule 7(3) in Part D of the Punjab Civil Service (Judicial Branch) Rules 1951 hereinafter referred to as Rule 9 and Rule 7. The services of the appellant Samsher Singh were terminated under Rule 9. The services of Ishwar Chand Agarwal were terminated under Rule 7(3).

Rule 9 provides that where it is proposed to terminate the employment of a probationer, whether during or at the end of the period of probation, for any specific fault or on account of the unsatisfactory record or unfavourable reports implying the unsuitability for the service, the probationer shall be apprised of the grounds of such proposal, and given an opportunity to show cause against it, before orders are passed by the authority competent to terminate the appointment.

Rule 7(3) aforesaid provides that on the completion of the period of probation of any member of the service, the Governor may, on the recommendation of the High Court, confirm him in his appointment if he is working against a permanent vacancy or, if his work or conduct is reported by the High Court to be unsatisfactory, dispense with his services or revert him to his former substantive post, if any, or extend his period of probation and thereafter pass such orders as he could have passed on the expiry of the first period of probation.

Rule 9 of the punishment and appeal Rules contemplates an inquiry into grounds of proposal of termination of the employment of

A the probationer. Rule 7 on the other hand confers power on the Governor on the recommendation of the High Court to confirm or to dispense with the services or to revert him or to extend his period of probation.

The position of a probationer was considered by this Court in *Purshottam Lal Dhingra* v. *Union of India* [1958] S.C.R. 828 Das, B C.J., speaking for the Court said that where a person is appointed to a permanent post in Government service on probation the termination of his service during or at the end of the period of probation will not ordinarily and by itself be a punishment because the Government servant so appointed has no right to continue to hold such a post any more than a servant employed on probation by a private employer is entitled to do so. Such a termination does not operate as a forfeiture C of any right of a servant to hold the post, for he has no such right. Obviously such a termination cannot be a dismissal, removal or reduction in rank by way of punishment. There are, however, two important observations of Das, C.J., in *Dhingra's* case (supra). One is that if a right exists under a contract or service Rules to terminate the service the motive operating on the mind of the Government is wholly irrelevant. The other is that if the termination of service is D sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and violates Article 311 of the Constitution. The reasoning why motive is said to be irrelevant is that it inheres in the state of mind which is not discernible. On the other hand, if termination is founded on misconduct it is objective and is manifest.

E

No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting F a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any G Rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved, in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not H hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand,

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the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. In *Gopi Kishore Prasad* v. *Union of India* A.I.R. 1960 S.C. 689 it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and imcompetent officer.

The fact of holding an inquiry is not always conclusive. What is decisive is whether the order is really by way of punishment. (See *State of Orissa* v. *Ramnarain Das* [1961] 1 S.C.R. 606). If there is an enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance. (See *Madan Gopal* v. *State of Punjab* [1963] 3 S.C.R. 716). In *R. C. Lacy* v. *State of Bihar & Ors.* (Civil Appeal No. 590 of 1962 decided on 23 October, 1963) it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2). (See *R. C. Banerjee* v. *Union of India* [1964] 2 S.C.R. 135.) A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to attract Article 311 (See *Champaklal G. Shah* v. *Union of India* [1964] 5 S.C.R. 190). On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (See *Jagdish Mitter* v. *Union of India* A.I.R. 1964 S.C. 449).

If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive. (See *K. H. Phadnis* v. *State of Maharashtra* [1971] Supp. S.C.R. 118).

An order terminating the services of a temporary servant or probationer under the Rules of Employment and without anything more will not attract Article 311. Where a departmental enquiry is contemplated and if an enquiry is not in fact proceeded with Article 311 will not be attracted unless it can be shown that the order though unexceptionable in form is made following a report based on misconduct. (See *State of Bihar* v. *Shiva Bhikshik* [1971] 2 S.C.R. 191).

The appellant Ishwar Chand Agarwal contended that he completed his initial period of two years' probation on 11 November, 1967 and the maximum period of three years' probation on 11 November, 1968 and by reason of the fact that he continued in service after the expiry

A of the maximum period of probation he became confirmed. The appellant also contended that he had a right to be confirmed and there was a permanent vacancy in the cadre of the service on 17 September, 1969 and the same should have been allotted to him.

Rule 7(1) states that every Subordinate Judge, in the first instance, be appointed on probation for two years but this period may be extend-
B ed from time to time expressly or impliedly so that the total period of probation including extension, if any, does not exceed three years. The explanation to Rule 7(1) is that the period of probation shall be deemed to have been extended if a Subordinate Judge is not confirmed on the expiry of his period of probation.

Counsel for the appellant relied on the decision of this Court in
C *State of Punjab* v. *Dharam Singh* [1968] 3 S.C.R. 1 where this Court drew an inference that an employee allowed to continue in the post on completion of the maximum period of probation is confirmed in the post by implication. In *Dharam Singh's* case (supra) the relevant rule stated that the probation in the first instance is for one year with the proviso that the total period of probation including extension shall not exceed three years. In *Dharam Singh's* case
D (supra) he was allowed to continue without an order of confirmation and therefore the only possible view in the absence of anything to the contrary in the Service Rules was that by necessary implication he must be regarded as having been confirmed.

Any confirmation by implication is negatived in the present case because before the completion of three years the High Court found
E *prima facie* that the work as well as the conduct of the appellant was unsatisfactory and a notice was given to the appellant on 4 October, 1968 to show cause as to why his services should not be terminated. Furthermore, Rule 9 shows that the employment of a probationer can be proposed to be terminated whether during or at the end of the period of probation. This indicates that where the notice is given
F at the end of the probation the period of probation gets extended till the inquiry proceedings commenced by the notice under Rule 9 come to an end. In this background the explanation to rule 7(1) shows that the period of probation shall be deemed to have been extended impliedly if a Subordinate Judge is not confirmed on the expiry of this period of probation. This implied extension where a Subordinate Judge is not confirmed on the expiry of the period of probation is not
G found in *Dharam Singh's* case (supra). This explanation in the present case does not mean that the implied extension of the probationary period is only between two and three years. The explanation on the contrary means that the provision regarding the maximum period of probation for three years is directly and not mandatory unlike in *Dharam Singh's* case (supra) and that a probationer is not in fact confirmed till an order of confirmation is made.

H In this context reference may be made to the proviso to Rule 7(3). The proviso to the Rule states that the completion of the maximum period of three years' probation would not confer on him the right to

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be confirmed till there is a permanent vacancy in the cadre. Rule 7(3) states that an express order of confirmation is necessary. The proviso to Rule 7(3) is in the negative form that the completion of the maximum period of three years would not confer a right of confirmation till there is a permanent vacancy in the cadre. The period of probation is therefore extended by implication until the proceedings commenced against a probationer like the appellant are concluded to enable the Government to decide whether a probationer should be confirmed or his services should be terminated. No confirmation by implication can arise in the present case in the facts and circumstances as also by the meaning and operation of Rules 7(1) and 7(3) as aforesaid.

It is necessary at this stage to refer to the second proviso to Rule 7(3) which came into existence on 19 November, 1970. That proviso of course does not apply to the facts of the present case. That proviso states that if the report of the High Court regarding the unsatisfactory work or conduct of the probationer is made to the Governor before the expiry of the maximum period of probation, further proceedings in the matter may be taken and orders passed by the Governor of Punjab dispensing with his services or reverting him to his substantive post even after the expiry of the maximum period of probation. The second proviso makes explicit which is implicit in Rule 7(1) and Rule 7(3) that the period of probation gets extended till the proceedings commenced by the notice come to an end either by confirmation or discharge of the probationer.

In the present case, no confirmation by implication can arise by reason of the notice to show cause given on 4 October, 1968, the enquiry by the Director of Vigilance to enquire into allegations and the operation of Rule 7 of the Service Rules that the probation shall be extended impliedly if a Subordinate Judge is not confirmed before the expiry of the period of probation. Inasmuch as Ishwar Chand Agarwal was not confirmed at the end of the period of probation confirmation by implication is nullified.

The second contention on behalf of Ishwar Chand Agarwal was that the termination is by way of punishment. It was said to be an order removing the appellant from service on the basis of charges of gross misconduct by ex-parte enquiry conducted by the Vigilance Department. The enquiry was said to be in breach of Article 311 as also in violation of rules of natural justice. The appellant relied on Rule 9 to show that he was not only entitled to know the grounds but also to an opportunity to represent as a condition precedent to any such termination. The appellant put in the forefront that the termination of his services was based on the findings of the Vigilance Department which went into 15 allegations of misconduct contained in about 8 complaints and these were never communicated to him.

The High Court under Article 235 is vested with the control of subordinate judiciary. The High Court according to the appellant failed to act in terms of the provisions of the Constitution and abdicated the control by not having an inquiry through Judicial Officers

A subordinate to the Control of the High Court but asking the Government to enquire through the Vigilance Department.

It was submitted on behalf of the State that the enquiry suggested by the High Court through the Director of Vigilance was not to satisfy itself about the unsuitability of the appellant but to satisfy the Government that the recommendation which had already been made by the High Court for the termination of the service of Ishwar Chand Agarwal should be accepted.

The High Court for reasons which are not stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse The Governor will act on the recommendation of the High Court. That is the broad basis of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Articles 235 by asking the Government to enquire through the Director of Vigilance.

The enquiry officer nominated by the Director of Vigilance recorded the statements of the witnesses behind the back of the appellant. The enquiry was to ascertain the truth of allegations of misconduct. Neither the report nor the statements recorded by the Enquiry Officer reached the appellant. The Enquiry Officer gave his findings on allegations of misconduct. The High Court accepted the report of the Enquiry Officer and wrote to the Government on 25 June, 1969 that in the light of the report the appellant was not a suitable person to be retained in service. The order of termination was because of the recommendations in the report.

The order of termination of the services of Ishwar Chand Agarwal is clearly by way of punishment in the facts and circumstances of the case. The High Court not only denied Ishwar Chand Agarwal the protection under Article 311 but also denied itself the dignified control over the subordinate judiciary. The form of the order is not decisive as to whether the order is by way of punishment. Even an innocuously worded order terminating the service may in the facts and circumstances of the case establish that an enquiry into allegations of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Article 311. In such a case the simplicity of the form of the order will not give any sanctity. That is exactly

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what has happened in the case of Ishwar Chand Agarwal. The Order of termination is illegal and must be set aside. A

The appellant Samsher Singh was appointed on 1 May, 1964 as Subordinate Judge. He was on probation. On 22 March, 1967 the Chief Secretary issued a notice to him substantially repeating the same charges which had been communicated by the Registrar on 15 December, 1966 and asked the appellant to show cause as to why his B services should not be terminated as he was found unsuitable for the job. The appellant gave an answer. On 29 April, 1967 the services of the appellant were terminated.

The appellant Shamsher Singh in the context of the Rules of Business contended that the removal of a Subordinate Judge from Service is a personal power of the Governor and is incapable of being dele- C gated or dealt with under the Rules of Business. We have already held that the Governor can allocate the business of the Government to the Ministers and such allocation is no delegation and it is an exercise of executive power by the Governor through the Council or Officers under the Rules of Business. The contention of the appellant that the order was passed by the Chief Minister without the formal approval of the Governor is, therefore, untenable. The order is the order of the D Governor.

The appellant was asked to show cause as to why his services should not be terminated. There were four grounds. One was that the appellant's behaviour towards the Bar and the litigant public was highly objectionable, derogatory, non-cooperative and unbecoming of a judicial officer. The second was that the appellant would leave his E office early. The third was the complaint of Om Prakash, Agriculture Inspector that the appellant abused his position by proclaiming that he would get Om Prakash involved in a case if he did not cooperate with Mangal Singh, a friend of the appellant and Block Development Officer, Sultanpur. The fourth was the complaint of Prem Sagar that the appellant did not give full opportunity to Prem Sagar to lead evidence. Prem Sagar also complained that the decree-holder made an applica- F tion for execution of the decree against Prem Sagar and the appellant without obtaining office report incorporated some additions in the original judgment and warrant of possession.

The appellant showed cause. The appellant said that he was not provided with an opportunity to work under the same superior officer for at least six months so that independent opinion could be formed G about his knowledge, work and conduct. On 29 April, 1967 the appellant received a letter from the Deputy Secretary to the Government addressed to the Registrar, Punjab and Haryana High Court that the services of the appellant had been terminated.

It appears that a mountain has been made out of a mole hill. The allegation against the appellant is that he helped the opponent of Prem H Sagar. The case against Prem Sagar was heard on 17 April, 1965. Judgment was pronounced the same day. The application for execution of the decree was entertained on the same day by the appellant.

A In the warrant the appellant wrote with his own hands the words "Trees, well, crops and other rights attached to the land". This correction was made by the appellant in order that the warrant might be in conformity with the plaint and the decree. There is nothing wrong in correcting the warrant to make it consistent with the decree. It appears that with regard to the complaint of leaving office early and the complaint of Om Prakash, Agriculture Inspector the appellant was B in fact punished and a punishment of warning was inflicted on him.

The appellant claimed protection of Rule 9. Rule 9 makes it incumbent on the authority that the services of a probationer can be terminated on specific fault or on account of unsatisfactory record implying unsuitability. In the facts and circumstances of this case it is clear that the order of termination of the appellant Samsher Singh was C one of punishment. The authorities were to find out the suitability of the appellant. They however concerned themselves with matters which were really trifle. The appellant rightly corrected the records in the case of Prem Sagar. The appellant did so with his own hand. The order of termination is in infraction of Rule 9. The order of termination is therefore set aside.

D The appellant Shamsher Singh is now employed in the Ministry of law. No useful purpose will be served by asking for reconsideration as to the suitability of the appellant Samsher Singh for confirmation. If the authorities had at the proper time been a little more careful and cautious perhaps the appellant might not have left the subordinate Judicial Service and sought employment elsewhere.

For the foregoing reasons we hold that the President as well as the E Governor acts on the aid and advice of the Council of Ministers in executive action and is not required by the Constitution to act personally without the aid and advice of the Council of Ministers or against the aid and advice of the Council of Ministers. Where the Governor has any discretion the Governor acts on his own judgment. The Governor exercises his discretion in harmony with his Council of Ministers. The appointment as well as removal of the members of the Subordinate Judi- F cial Service is an executive action of the Governor to be exercised on the aid and advice of the Council of Ministers in accordance with the provisions of the Constitution. Appointments and removals of persons are made by the President and the Governor as the constitutional head of the executive on the aid and advice of the Council of Ministers. That is why any action by any servant of the Union or the State in regard to appointment dismissal is brought against the Union or the G State and not against the President or the Governor.

The orders of termination of the services of the appellants are set aside. The appellant Ishwar Chand Agarwal is declared to be a member of the Punjab Civil Service (Judicial Branch). The appellant Samsher Singh succeeds in so far as the order of termination is set aside. In view of the fact that Samsher Singh is already employed in the Ministry of Law no relief excepting salary or other monetary benefits H which accrued to him upto the time he obtained employment in the Ministry of Law is given.

The State of Punjab will pay costs to the appellants.

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KRISHNA IYER, J—These two appeals, by a couple of small judicial officers whose probation has been terminated by orders of concerned Ministers in conformity with the recommedations of the High Court, have projected constitutional issues whose profound import and broad impact, if accepted, may shake up or re-shape the parliamentary corner-stone of our nation. Great deference and complete concurrence would have otherwise left us merely to say 'we agree', to what has fallen from the learned Chief Justice just now, but when basic principles are assailed with textual support, academic backing and judicial dicta, speech, not silence, is our option.

Putting aside for the noncesome subsidiary, though salient, questions argued before us, we may focus on a problem of great moment which has been canvassed at length by the learned counsel for the parties. It is this problem which has necessitated the hearing of this case by a Bench of seven Judges. The question is : does our legal-political system approximate to the Westminster-style Cabinet Government or contemplate the President and Governor, unlike the British Crown, being *real* repositories of and *actually* exercising power in its comprehensive constitutional signification? Phrased metaphorically, is the Rashtrapati Bhavan—or Raj Bhavan—an Indian Buckingham Palace or a half way house between it and the White House? This issue lays bare the basics.

This Court has a solemn duty, as a high sentinel authorised by Art. 141, to declare what our law of the Constitution *is*, how our suprema lex has designed a project of power. The major instrumentalities must work in comity and avoid a collision course, ensuring the ultimate authority and continuous control of 'We, the People of India' through the House of elected members. In essaying this task we must keep away from ideological slants and imaginary apprehensions and should not import personal predilections but inform ourselves of the grand design of our Constitution and the great models inspiring it.

May be, our founding fathers were not political prophets who could foresee glaring abuses or perverted develcpments. In a passage which is classic, Mill told the lovers of liberty :

> "Of what avail is the most broadly popular representative system, if the electors do not care to choose the best member of parliament, but choose him who will spend most money to be elected ? How can a representative assembly work for good, if its members can be bought, or if their excitability of temperament uncorrected by public discipline or private self-control, makes them incapable of calm deliberation, and they resort to manual violence on the floor of the House, or shoot at one another with rifles?"(1)

We are not unmindful of the agitational siege of parliamentary institutions and of the anti-parliamentary build-up under way and the rashes of frustration showing up against the unsavoury politics

(1) The President and the Governors in the Indian Constitution—by Justice M. M. Ismail—Orient Longman.

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A of power. But the limited task assigned to us is to interpret the Constitution as it is, not to venture starry-eyed proposals for reform. Even so, our activism in interpretation must not be bogged down by logomachy or blinkered by legalism, but be aglow with the insightful observations of Marshall, C J. :

> "We must never forget that it is a constitution which we are
> B expounding, a constitution intended to endure for ages, and consequently to be adapted to the various crises of human affairs. Nor did they imagine that it was to be so strictly interpreted that amendments and radical revisions would be constantly required to keep Government functioning smoothly."

Not the terminological facade of euphemisms, but the underlying
C reality of government by the people, must be our lodstar, as we search for the true semantics of terms of art used in the Great Charter.

It is surprising that extreme views have been propounded by responsible jurists on the law of our Constitution in the strategic sector of the President *vis-a-vis* his Cabinet and dangerous portents must therefore be forestalled by an authoritative statement of the constitutional position by the apex court. If, in that process, earlier ruling
D of this Court have to be over-ruled, we may not hesitate to do so. For, it is truer to our tryst to be ultimately right, than to be consistently wrong, where the constitutional destiny of a developing nation is at stake. In the words of Learned Hand, the judiciary's 'proper representative character as a complementary organ of the social will' cannot be overlooked.

E A skeletal projection of the facts on the forensic screen, sufficient to follow the problems raised in these appeals, may now be made. F Two freshers in the State judiciary, the appellants, were undergoing their prescribed probation. Before the full term set by the rules had run out, the High Court discovered unsavoury conduct in these officers and, as controlling authority, considered the need to terminate their services on grounds of unsuitability. The ups and downs of the
F follow-up action vary in the two cases. In one, during the President's rule, the Governor, instead of acting on the High Court's advice, indicated that the charges were vague and a fresh enquiry be held. Thereupon, the High Court requested the Director of Vigilance to make some investigations which were actually carried out by his subordinate, the Superintendent of Police. The Administrative Full Court, however held, on the materials available, but without a formal
G or full-blooded enquiry, that on the proved charges the officer's probation deserved to be terminated for 'unsuitability'. By then the Council of Ministers had come into being and, on a consideration of the High Court's report, the Chief Minister acted on it and ended the probation of the officer, although the Governor's personal satisfaction about this step was neither sought nor secured. Also, by
H that time, the maximum probation period of three years, under the relevant rules, had expired and a permanent vacancy had also arisen. (This bears on another argument about the import of the service Rules.) In the other case also, the High Court held the officer unfit

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to be confirmed without any elaborate enquiry and this view was accepted by the Chief Minister without reference to the Governor.

The orders terminating probation have been challenged on a few grounds. Primarily, the power of appointment being with the Governor (or the President, in the case of Central Services) the removal must be by him alone, the argument runs. Wherever the Constitution vests a function in the Governor or President, as such, it has to be discharged by him, applying his mind to the materials. He can neither surrender to his ministers, nor delegate to his officers, what the Constitution has enjoined shall be executed by him personally. Admittedly, in the present case, the ultimate order was made, without reference to the Governor, by the Chief Minister who virtually accepted the recommendation of the High Court. The learned Attorney General and the Additional Solicitor General, have refuted the whole basis of this argument. We have, in the President and Governor, a replica of a constitutional monarch and a Cabinet answerable to Parliament, substantially embodying the conventions of the British Constitution—not a turn-key project imported from Britain, but an edifice made in India with the know-how of British Constitutionalism. If this theory be sound, Government is carried on by the Ministers according to the rules of allocation of business and, the Governor, no more than the Queen, need know or approve orders issued in his name. The core of the Westminster system is that the Queen resigns, but the Ministers rule, except in a few special, though blurred, areas, one of which certainly is not the appointment and dismissal of civil servants. The second major contention of Shri Sanghi, for the appellant, is that the High Court and Government have, in substance, dismissed the probationers and, in doing so, violated the constitutional mandate of Art. 311 and the canons of natural justice. Even on the footing that the impugned orders are innocuous terminations of probation, the rules which embody procedural fairness have been flouted the consequence being invalidation. In the course of the submissions, some criticism was levelled at the High Court requesting the Director of Vigilance—a police officer—to investigate into the veracity of charges against judicial officers. Thirdly, has the High Court the last word regarding termination of service of judicial personnel, Government being a formal agency to implement it? This was challenged at the bar, although we do not finally deal with it, for the reasons to be mentioned later. Other lesser illegalities were relied on, but they have been dealt with in the judgment of the learned Chief Justice, with which we wholly agree. We confine ourselves to the dual principal pleas whose impact will far exceed the nullification of orders by Ministers removing judicial probationers from service and deserve careful study.

The first broad proposition of the appellants is that the President—and the Governor—are not just constitutional cousins of the British Queen, but real wielders of power, bestowed on them expressly by the terms of the text, almost next of kin to their American counterparts with similar designations. The issue is so fundamental that its resolution is necessary to know not only who can declare a probationer's fitness but who can declare a war in national defence or proclaim

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A a breakdown of the State constitutional machinery or assent to a bill passed by Parliament. For, if under Art. 311 the President must be personally satisfied for certain small steps, he must surely be individually convinced regarding the far more momentous spectrum of functions he is called upon to discharge under a big bunch of other provisions. And this reasoning regarding disposal of gubernatorial business or discharge of official responsibilities will equally apply to Governors.

A sort of constitutional mini-crisis has been sparked off by the decision in *Sardarilal's* Case(1) which regarded the President's personal satisfaction for dispensing with an enquiry, for reasons of security of the State under clause (c) of the proviso to Art. 311(2) of the Constitution, as necessary and non-delegable. We will presently project, with reference to the Articles, the rainbow of administrative, quasi-judicial and legislative tasks specifically directed by the Constitution to be performed by the Head of the State in contradistinction to his Council of Ministers, if the appellant's proposition were sound, thus bringing dyarchy by a side wind, as it were, and emasculating the plenary authority of Parliament to whom the President is not but the Council of Ministers is responsible. The peril to the Westminster model of government is self-evident and serious if vital business of government is to be transacted *de facto* and *de jure* by the head of the State, and the Ministers, who are responsible to the House consisting of the elected representative of the people, are to be relegated to carrying on of the administration only, subject to the over-riding presence, pleasure and powers of their uncrown republican King.

This dilemma of democracy, created by a spreadout of the rationale of Sardarilal(1), can be resolved only by a study in depth of the political perspective and philosophy and of the conspectus of provisions, as well as an understanding of the models which influenced the Constitution framers. What are the basic fabric, the animating spirit, and juridical ideas of our constitutional structure and dynamics?

The law of our Constitution, any student of Indian political history and of comparative constitutional systems will agree, is partly eclectic but primarily an Indo-Anglian version of the Westminster model with quasi-federal adaptations, historical modifications, geo-political mutations and homespun traditions—basically a blended brew of the British parliamentary system, and the Government of India Act, 1935 and near-American, nomenclature-wise and in some other respects.

Not the Potomac, but the Thames, fertilises the flow of the Yamuna, if we may adopt a riverine imagery. In this thesis we are fortified by precedents of this Court, strengthened by Constituent Assembly proceedings and reinforced by the actual working of the organs involved for about a 'silver jubilee' span of time.

Historically, the Indian constitutional aspirations flowed along the British pattern. Granville Austin refers, in his book, to the Motilal Nehru Report and the Tej Bahadur Sapru Report and K.M. Munshi's

(1) [1970] 3 S. C. R. 461.

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Draft Constitution, in support. Several pages from the many volumes of the Constituent Assembly debates were read at the Bar and the keynote thought in the lengthy deliberations has been given by Granville Austin in these words :

> "In the rapidly moving world of the mid-twentieth century, a new India had to be built almost overnight. How was the leadership for this task to be provided? What type of Executive would be stable, strong, effective, and quick, yet withal, democratic?
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> The Assembly chose a slighly modified version of the British cabinet system. India was to have a President, indirectly elected for a term of five years, who would be a constitutional head of State in the manner of the monarch in England.... As in England, there was to be a council of ministers, headed by the Prime Minister and collectively responsible to Parliament, to aid and advise the head of State. The President was to be nominal head of the Executive; the Prime Minister the real head."

Nehru, Patel, Munshi, Sir B.N. Rao, Sir Alladi Krishnaswamy Aiyar and, above all, Dr. Ambedkar, who was Chairman of the Drafting Committee, spoke in one voice, with marginal variations on points immaterial to our major purpose. What emerges from such a study is that, with minimal innovations, a Parliamentary-style quasi-federalism was accepted, rejecting the substance of a Presidential-style executive. This welding of statesmanship and scholarship and willingness to borrow whatever was beneficial resulted in a constitutional college where the Westminster symbols, backed by Indian experience, were reverentially preserved and the pattern of ministerial responsibility was built into the framework of federal republicanism. While the shopping list of Constitutions was large, our founders' selectivity narrowed it down to the Constitutions of Commonwealth countries. Also British export of Cabinet Government had been made Swadeshi by past experience. Ill-assorted excerpts from the speeches of the activists make for marvellous unanimity on the Cabinet form.

Prime Minister Nehru explained the position with political clarity when moving the clause relating to the election of the President:

> "One thing we have to decide at the very beginning is what should be the kind of governmental structure, whether it is one system where there is ministerial responsibility or whether it is the Presidential system as prevails in the United States of America; many members possibly at first sight might object to this indirect election and may prefer an election by adult suffrage. We have given anxious thought to this matter and we came to the very definite conclusion that it would not be desirable, first because we want to emphasize the ministerial character of the government, that power really resided in the Ministry and in the Legislature and not in the President as such. At the same time we did not want to make the President just a mere figurehead like the French President. We did not give

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him any real power but we have made his position one of great authority and dignity. You will notice from this Draft Constitution that he is also to be Commander-in-Chief of the Defence Forces just as the American President is. Now, therefore if we had an election by adult franchise and yet did not give him any real powers, it might become slightly anomalous and there might be just extraordinary expense of time and energy and money without any adequate result."

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His opposition to a fixed tenure for Ministers stemmed from the same ground :

> "That raises a very fundamental issue of what form you are going to give to your Constitution, the ministerial parliamentary type or the American type. So far we have been proceeding with the building up of the Constitution in the Ministerial sense and...we cannot go back upon it."

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Shri K.M. Munshi expressed the historical reason for the acceptance of the parliamentary system :

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> "We must not forget a very important fact that during the last one hundred years Indian public life has largely drawn upon the traditions of the British constitutional law. Most of us, and during the last several generations before us, public men in India, have looked up to the British model as the best. For the last thirty or forty years, some kind of responsibility has been introduced in the governance of this country. Our constitutional traditions have become Parliamentary and we have now all our Provinces functioning more or less on the British model. As a matter of fact, today, the Dominion Government of India is functioning as a full-fledged Parliamentary Government."

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At another stage, opposing Prof. Shah's motion for adoption of the American Presidency, he stressed the same note, in a comparative vein :

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> "We know that the Constitution in America is not working as well as the British Constitution, for the simple reason that the Chief Executive in the country is separated from the legislature. The strongest Government and the most elastic Executive have been found to be in England and that is because the executive powers vest in the Cabinet supported by a majority in the Lower House which has financial powers under the Constitution. As a result, it is the rule of the majority in the legislature, for it supports its leaders in the Cabinet, which advises the Head of the State, namely, the King or the President. The King or the President is thus placed above party. He is made really the symbol of the impartial dignity of the Constitution.

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> The power of the Cabinet in England today is no whit less than the powers enjoyed by the President of the United States of America. By reason of the fact that the Prime Minister

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and the whole Cabinet are members of the Legislature, the conflict between the authority wielding the executive power and the legislature is reduced to minimum; *really there is none at all;* because, at every moment of time, the Cabinet subsists only provided it carries with it the support of the majority in the Parliament."

B. N. Rau's preliminary note suggested that the President be clothed with some discretionary powers, but the Union Constitution Committee early in June 1947 "decided unreservedly in favour of the parliamentary type of government in which the President would have no special powers vested personally in him but would exercise all his functions, including the dissolution of the lower chamber of Parliament, only on the advice of his Ministers."

The deletion of the earlier proposal for an Instrument of Instructions, has been mentioned in this context by some writers, but the reason for dropping it was set out by Alladi Krishnaswamy Ayyar in the Assembly thus :

"It was provided in the Constitution... that the Council of Ministers would be collectively responsible to the House of the People. If a President stood in the way of the Council of Ministers discharging that responsibility, he would be guilty of violation of the Constitution and would even be liable for impeachment. It was, therefore, merely a euphemistic way of saying that the President had to be guided by the advice of his Ministers. The Council of Ministers was collectively responsible to the House of the People, answerable to the House in regard to the budget, all legislation and *indeed for every matter connected with the administration of the country*. There was therefore no necessity for setting out in detail in an article of the Constitution what the functions and incidents of responsible government would be."

On another occasion he reiterated :

"....the Union Constitution Committee and this Assembly have all adopted what may be called the Cabinet System of Government." "An infant democracy cannot afford under modern conditions, to take the risk of perpetual cleavage, feud, or conflict, or threatened conflict between the Legislature and the executive."

Dr. Ambedkar's comprehensive statement introducing the Draft Constitution on November 4, 1948, is scintillating. He said :

"In the Draft Constitution there is placed at the head of the Indian Union a functionary who is called the President of the Union. The title of this functionary reminds one of the President of the United States. But beyond identity of names there is nothing in common between the form of government prevalent in America and the form of government proposed under the Draft Constitution. Under the Draft Constitution the President occupies the same position as the King under the

A English Constitution. He is the head of the State but not the executive. He represents the nation but does not rule the nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device on a seal by which the nation's decisions are made known. Under the American Constitution the President has under him Secretaries in charge B of different Departments. In like manner the President of the Indian Union will have under him Ministers in charge of different departments of administration. Here again there is a fundamental difference between the two. The President of the United States is not bound to accept any advice tendered to him by any of his Secretaries. The President of the Indian Union will be generally bound by the advice of his Ministers. He can C do nothing contrary to their advice nor can he do anything without their advice. The President of the United States can dismiss any Secretary at any time. The President of the Indian Union has no power to do so so long as his Ministers command a majority in Parliament.

You can have a system which can give you more stability D but less responsibility or you can have a system which gives you more responsibility but less stability. The American and the Swiss systems give more stability but less responsibility. The British system on the other hand gives you more responsibility but less stability.

In England, where the Parliamentary system prevails, the assessment of responsibility of the executive is both daily and E periodic. The daily assessment is done by members of Parliament, through questions, resolutions, no-confidence motions, adjournment motions, and debates on addresses. Periodic assessment is done by the electorate at the time of the election which may take place every five years or earlier. The daily assessment of responsibility which is not available under the American system is, it is felt, far more effective than the periodic assess- F ment and far more necessary in a country like India. The Draft Constitution in recommending the Parliamentary system of executive has preferred more responsibility to more stability."

He silenced Mr. Kamath, who asked in the Assembly if refusal to accept Ministerial advice would amount to violation of the Constitution, with the words : "There is not the slightest doubt about it." G Austin, in his well known book, adds: "Ayyar concurred with Ambedkar that a President who did not heed the advice of his Ministers would in fact be thwarting the will of Parliament, for which he could be impeached."

Sardar Patel clinched the issue at a joint-session of two crucial Committees, in these words :

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"Both these Committees (Union Constitution Committee and the Committee on: he Model Provincial Constitution) met

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and they came to the conclusion that it would suit the conditions of this country better to adopt the Parliamentary system of Constitution, the British type of Constitution with which we are familiar"

During the general discussion on the Constitution, at the concluding stage, T.T. Krishnamachari said :

"It has been mentioned that one of the chief defects of this Constitution is that we have not anywhere mentioned that the President is a constitutional head and the future of the President's powers is, therefore, doubtful... This is a matter which has been examined by the Drafting Committee to some extent. The position of the President in a responsible government is not the same as the position of the President under a representative Government like America and that is a mistake that a number of people in the House have been making, when they said that the President will be an autocrat, and no one appears to realise that the President has to act on the advice of the Prime Minister... So far as the relationship of the President with the Cabinet is concerned, I must say that we have, so to say, completely copied the system of responsible government that is functioning in Britain today; we have made no deviation from it and the deviations that we have made are only such as are necessary because our Constitution is federal in structure."

Participating in the same discussion, President Rajendra Prasad said :

"We have had to reconcile the position of an elected President with an elected legislature, and in doing so, we have adopted more or less, the position of the British monarch for the President... His position is that of a constitutional President. Then we come to the Ministers. They are, of course, responsible to the Legislature and tender advice to the President who is bound to act according to that advice. Although there are no specific provisions, so far as I know, in the Constitution itself making it binding on the President to accept the advice of his Ministers, it is hoped that the convention under which in England the King acts always on the advice of his Ministers will be established in this country also and the President, not so much on account of the written word in the Constitution, but as a result of this very healthy convention, will become a constitutional President in all matters."

These solemn words were uttered by the President of the Constituent Assembly at the great moment when the motion or final adoption of the Constitution was put to the vote of the Chamber.

The most powerful dramatisation of the Constitutional issue is found in a debating episode in the Constituent Assembly when Dr. Rajendra Prasad had pointed exchanges with Dr. Ambedkar. We may reproduce those telling pages here :

"*Mr. President* : There is another amendment which has been moved by Sardar Hukum Singh in which he says that the

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A President may promulgate ordinances after consultation with his Council of Ministers.

The Honourable Dr. B.R. Ambedkar : I am very grateful to you for reminding me about this. The point is that that amendment is unnecessary because the President could not act and will not act except on the advice of the Ministers.

B *Mr. President :* Where is the provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers?

Dr. Ambedkar : I am sure that there is a provision and the provision is that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions.

C *Mr. President :* Since we are having this written Constitution, we must have that clearly put somewhere.

Dr. Ambedkar : Though I cannot point it out just now, I am sure there is a provision. I think there is a provision that the President will be bound to accept the advice of the Ministers. In fact, he cannot act without the advice of his Ministers.

D *Some Honourable Members :* Article 61(1).

Mr. President : It only lays down the duty of the Ministers, but it does not lay down the duty of the President to act in accordance with the advice given by the Ministers. It does not lay down that the President is bound to accept the advice. Is there any other provision in the Constitution? We will not be able even to impeach him, because he will not be acting E in violation of the Const itution, if there is no provision.

Dr. Ambedkar : May I draw your attention to Article 61, which deals with the exercise of the President's functions? He cannot exercise any of his functions, unless he has got the advice, 'in the exercise of his functions'. It is not merely 'to aid and advise'. 'In the exercise of his function,' those are F the most important words.

Mr. President : I have my doubts if this word could bind the President. It only lays down that 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. It does not say that the President will be bound to accept that advice.

G *Dr. Ambedkar :* If he does not accept the advice of the existing Ministry, he shall have to find some other body of Ministers to advise him. He will never be able to act independently of the Ministers.

Mr. President : Is there any real difficulty in providing somewhere that the President will be bound by the advice of the Ministers?

H *Dr. Ambedkar :* We are doing that. If I may say so, there is a provision in the Instrument of Instructions.

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Mr. President : I have considered that also.

Dr. Ambedkar : Paragraph 3 reads : In all matters within the scope of the executive power of the Union, the President shall, in the exercise of the powers conferred upon him, be guided by the advice of his Ministers. We propose to make some amendment to that.

Mr. President : You want to change that? As it is, it lays down that the President will be guided by the Ministers in the exercise of the executive powers of the Union and not in its legislative power.

Dr. Ambedkar : Article 61 follows almost literally various other constitutions and the Presidents have always understood that that language means that they must accept the advice. If there is any difficulty, it will certainly be remedied by suitable amendment.

The Ambedkar approach, unequivocally accepted, was :

> "It is the Prime Minister's business, with the support of the Ministers, to rule the country and the President may be permitted now and then to aid and advise the Council of Ministers. Therefore, we should look at the substance and not at the mere phraseology which is the result of conventions."

If the 'inner voice' of the founding fathers may be any guide, it is proved beyond reasonable doubt that the President and, *a fortiori*, the Governor, enjoy nothing more and nothing less than the status of a constitutional head in a Cabinet-type government—a few exceptions and marginal reservations apart.

We must however notice that a strong current of high-placed scholarship has expressed itself in the opposite direction. For instance, Mr. K.M. Munshi, the author, has gone back on his thesis as framer. He writes in 'The President under the Indian Constitution' that the President is 'an independent organ of the State representing the whole Union and exercising independent powers' and reads our Constitution as a composite one 'in which the Parliamentary form of executive and a President with power and authority are combined'. Why? 'To prevent a parliamentary government from becoming parliamentary anarchy.' Indeed, he has regarded the importation of English conventions as 'tantamount to an amendment of the Constitution'. The election of President, his oath of office, his specific powers and his obligation to prevent Cabinet dictatorship, have been marshalled by this respected statesman. He has climaxed his reasoning by taking the view that 'aid and advice' in Art. 74, do not imply that the advice must be accepted in all cases. Shri K. Santhanam, another elder statesman, also shares this view. Even Dr. Rajendra Prasad is reported to have had second thoughts on the denudation of Presidential powers (p. 141, The Constitution of India—How it has been framed—Pratap Kumar Ghosh). This interpretative *volte face* may be due to disillusionment; for, Shri Munshi has plainly stated :

> "During the framing of the Constitution, we all dreamt that we would make a success of parliamentary democracy and

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> the British Cabinet system. It must be confessed that this experiment has failed. If I had to make a choice again, I would vote for the Presidential form of Government, so that, whenever the politicians fail the country, there is at least one strong organ of the State capable of tiding over the crisis."

In the field of legal interpretation, is wish to be father to the thought?

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Similarly, Mr. Justice P.B. Mukherjea and Mr. Justice Ismail have argued that the Rashtrapati is more than the British Crown, that he reigns and rules and is not a faint presence like a full moon at mid-day, but queen of the Constitutional sky. We will briefly examine the arguments which have been set forth to substantiate the thesis 'that while the initiative to deal with all matters of policy will C be with the Cabinet and the Prime Minister, the final decision shall be such that the President can give his assent with honour and self-respect' [quoted from p. 98 of (1) supra]. After bewailing how 'when unconcealed opportunism reigns supreme, when principles are thrown to the winds in favour of office and power, when ideologies are given the go-by for the temporary advantage of gaining and gathering votes on the basis of catchy slogans, when self-interest and petty considera- D tions prevail over national interest and when an object of immediate gain gets ascendancy over the permanent and paramount object of bringing into existence a healthy and contented society assured of the basic requirements of life, there can be no guarantee against perversion and subversion of any Constitution howsoever perfectly it might have been drawn up', the learned jurist-judge states his sequitur :

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> "In view of all these aspects, my view is that the Constitution has not imposed on obligation either on the President or on the Governors to act in accordance with the advice of the Council of Ministers in all matters and under all circumstances and they have got a certain amount of discretion in the matter of preserving, protecting and defending the Constitution and devoting themselves to the service and well-being of the people of India, overriding the temporary advantages sought to be gained by any F particular party in power for the time being."

Shri P.B. Mukherjea, in his Chimanlal Setalvad Lectures, has propounded the thesis that—

> "These constitutional features and provisions are not mere pious wishes devoid of constitutional and legal substance, but are specific tenets of the Indian Constitution. Their G wisdom lies in the fact that the President is a Constitutional and effective check on Cabinet dictatorship, flowing out of the overwhelming strength of a single political party without any effective opposition...."

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> "It is submitted on this analysis that the Indian Executive H is authorised by the Constitution to be strong and effective. But by wrong action and wrong interpretation of the constitutional provisions it has been reduced to a degree of ineffectiveness

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which unless corrected is going to create not only Constitutional problems but extra-Constitutional problems which might spell disaster for the country."

Which means that the President and Governor actually govern and the Council of Ministers live up to their name by merely tendering advice in a 'take it or leave it' spirit. It is at once difficult and dangerous to enshrine the personality cult in a Republican Constitution and emasculate Cabinet Government into a cabal of counsellors. It is easier for one person dressed in omipotent authority and answerable to none to misuse power or for a collective body, exposed to opposition frequently and diversely and obligated to command the confidence of a Parliament of elected representatives? Is it not straining at a gnat and swallowing the camel? Those who are critical of popular government being perverted by party mis-rule may argue for a change in the Constitution if they have a case, but cannot miss the meaning of the organic law as it is, enacted wisely or foolishly, but with eyes open, on the basic fabric of the Westminster model. Nor can constitutional construction be deflected from its natural role of gathering the intendment, by an elitist touch reminiscent of imperial argument against Indian aspiration for Poorna Swaraj. Here is an introductory passage by Shri Ismail on the subject :

"Certainly it cannot be said that, in this connection, there is either similarity or identity between England and India. In India, with its vast illiteracy and ignorance, the traditions of the British Parliamentary democracy will take a long time to acquire effective acceptance or find useful and beneficial adoption. The history of India has been characterised only by benevolent monarchical traditions and not by any completely popular democratic institutions. The temperament and emotions of the Indian people have been attuned only to such institutions and they will have to gradually acclimatize themselves to a total democratic tradition."

This attitude may give insight into why the conclusion he has drawn has been reached.

It is argued that the President's action is beyond the scrutiny of the Court to know if it is based on Ministerial advice. Even so, the fact that Courts cannot enquire into whether any and, if so, what advice has been given by his Ministers to the Constitutional head does not mean the latter can act as he fancies. A thing is lawfully done not because a Court can examine it but because it is sanctioned by the law. Many are the ways, e.g. impeachment, censure by Parliament, massive protest—in which law is recognised by social organs. Rights are enforced not by Courts alone and remedies are not the source of right.

The argument about the oath of office of President to defend the Constitution is sometimes put forward by antiministerialist advocates. Yes, he defends the Constitution not by denying its spiritual essence of Cabinet responsibility—indeed he subverts it that way—but by

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A accepting as his Constitutional function what his 'responsible' ministers have decided. Can a Judge, in fulfilment of the oath of his office, ignore all binding precedents and decide according to the *ad hoc* dictates of his uninformed conscience? *Tribhovandas' Case* (1) answers the point in the negative. If every functionary who takes the oath by the Constitution interprets it according to his lights, this solemn B document would be the source of chaos and collupsion and the first casualty would be the rule of law. Such mischief cannot merit juristic acceptance.

Seervai and other jurists take the view that 'our Constitution had adopted the English system of parliamentary executive; that the President and the Governors were constitutional heads of the executive and that real executive power was vested in the Council of Minis- C ters' (2). Alexandrovicz has brought out the same point :

> "The provisions of Chapter I of Part V of the Constitution relating to the executive convey *prima facie* the impression that the President of India, the Head of the State, is also the real head of the Executive, and the Ministry is only there to aid and to advise him in the exercise of his functions. However, a careful D reading of the Constituent Assembly debates and the examination of Constitutional practice in the post-independence years show beyond doubt that the position is exactly the reverse and that the President is by convention reduced to a mere figurehead while the Ministry is the real Executive."
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> E "Within the definite adoption of parliamentary Government the vesting clause in Article 53(1) remained to a great extent meaningless as real executive power was in the Ministry. The President remained therefore divested of such executive power by those conventions which are generally at the basis of parliamentary Government."

Sir B.N. Rao, who, after considerable study, established that the F parliamentary system of Government in India, with periodic elections, parliamentary control of Ministers and a constitutional monarch at the head, was part of our cultural heritage from the days of Manu and Kautilya, has met the familiar arguments urged to invest powers in the President as against the Council of Ministers. In an article published in 1957, captioned 'To what extent is the President under, the Indian Constitution required, in the discharge of his functions, G to act upon the advice of his Ministers', he has dealt with the relevant Article and the usual considerations put forward to reject the theory of a symbolic presidency. We quote :

> It was well understood during the framing of the Indian Constitution that the President must act on Ministerial advice.
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> (a) In justifying the provision relating to the mode of H election of the President—indirect election by the elected members

(1) [1968] S.C.R. 455, 465.

(2) Constitutional Law of India—H. M. Seervai—1968 reprint Vol. II p. 774.

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of Parliament and of the State Assemblies all over India instead of direct election based on adult suffrage (now art. 54 of the Constitution)—the Prime Minister said :

"If we had the President elected on adult franchise and did not give him any real powers, it might become a little anomalous."

In other words, the intention was to emphasize that real power was vested by the constitution in the Ministry and not in the President.

(b) It will be remembered that the draft of the Indian Constitution originally contained a schedule of instructions to the President and an article one of whose clauses provided that, in the exercise of his functions under the constitution, he must be generally guided by these instructions. These instructions provided *inter alia* that he must act on ministerial advice. The relevant instruction ran : "In all matters within the scope of the executive power of the Union, the President shall in the exercise of the powers conferred upon him be guided by the advice of his ministers". Ultimately, the instructions as well as the clause were omitted as unnecessary. A number of members objected to the omission because they thought that it was not all at clear how far the conventions of the British Constitution would be binding under the Indian Constitution. But the Law Minister was emphatic that they would be....That the convention about acting on ministerial advice ought to be the same in India as in England no one appears to have doubted : the only doubt voiced was whether this was sufficiently clear in the Indian Constitution. The Constituent Assembly, on the assurance of the Law Minister that the point admitted of no doubt, agreed to omit the schedule and the clause. (Constituent Assembly Debates, Volume 10, 1949, pp. 268-271).

II. It is clear from article 74(1) that it is the function of the Council of Ministers to advise the President over the whole of the Central field. Nothing is left to his discretion or excepted from that field by this article. By way of contrast, see Art. 163 which is the corresponding provision for Governors and which expressely excepts certain matters in which the Governor is, by or under the constitution, required to act in his discretion. There is no such exception in the case of the President.

Moreover, art. 75(3) makes the Council of Ministers responsible to the House of the People. If, therefore, the President acted contrary to advice, the ministers would either resign or, since the advice tendered reflected the view of the House of the People, they would be thrown out of office by the House of the People. For the same reasons, no one else would then be able to form a government. The President would, therefore, be compelled to dissolve the House. Apart from the technical difficulty of carrying out t the man details of a general election in such

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A a situation—the President might have to dismiss the Ministry and instal a 'caretaker' government to co-operate with him in ordering a general election—the consequences of the election might be most serious. If the electorate should return the same government to power, the President might be accused of having sided with the Opposition and thrown the country into the turmoil and expense of a general election in a vain attempt to get rid of a Ministry that had the support of Parliament and the People. This would gravely impair the position of the President.

III. If we hold that in a conflict between the Ministry and the President, the President's voice should prevail in the last resort, either generally or even in a particular class of cases, this would mean the elimination to that extent of the authority of a Ministry which is continuously subject to control or criticism by the House of the People, in favour of the authority of a President who is not so subject. It would thus result in a reduction of the sphere of 'responsible government'. So important a subtraction must be justified by some express provisions in our constitution.

IV. If the President, in a particular case where his own views differ from those of his Ministers, ultimately accepts their advice in defence to a well-understood convention, then even if the act should result in a breach of some 'fundamental right' or 'directive principle' enunciated in the constitution, the responsibility will be that of the ministers and not of the President.

The considerations mentioned above in the second group of arguments seem to be decisive in favour of the proposition that, in the last resort, the President should accept the advice of his ministers as in England...."

Does this reduce the President, under the Indian Constitution, to a figurehead? Far from it. Like the King in England, he will still have the right 'to be consulted, to encourage and to warn'. Acting on ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he must accept their final advice. It has been observed that the influence of the Crown—and of the House of Lords as well—in England has grown with every curtailment of its legal powers by convention or statute. A similar result is likely to follow in India too; for, as has been well said, "the voice of reason is more readily heard when it can persuade but no longer coerce", One can conceive of no better future for the President of India than that he should be more and more like the Monarch in England, "eschewing legal power, standing outside the clash of parties and gaining in moral authority." These words of constitutional wisdom come from one who played a key role in shaping the framework of the Republic and had no political affiliations.

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Text book writers have taught law students and lawyers in the same strain. Indeed, a national disposition for parliamentary democracy has taken shape among the post-Independence generation of students in school parliaments and university replicas. Almost all political parties have, at least at State level, been in and out of office on the basic assumption of Cabinet Government. While these pervasive social factors are not germane to statutory construction, they are not impertinent to an understanding by a whole people of what they gave to themselves.

Sir Ivor Jennings(1) has acknowledged that 'the President in the Union, or the Governor or Rajpramukh in a State, is essentially a constitutional monarch. The machinery of government is essentially British and the whole collection of British constitutional conventions has *apparently* been incorporated as conventions.' The text, the author notes, vests vast powers in the President but past history must provide the *modus vivendi*. In an article entitled 'Crown and Commo nwealth in Asia' he, however, wrote :

> "Dr. Rajendra Prasad seems to have been following British conventions with some fidelity; but there is nothing in the Constitution which requires him or his successors to do so, and one of them may well say that he is not bound by the constitutional practices followed in a foreign monarchy and that he proposes to carry out the law and law alone."

We have extensively excerpted from various sources not for adopting 'quotational jurisprudence' but to establish that the only correct construction can be that in *constitutional law* the 'functions' of the President and Governor and the 'business' of Government belong to the Ministers and not to the head of State, that 'aid and advice' of ministers are terms of art which, in law mean, in the Cabinet context of our constitutional scheme, that the aider acts and the adviser decides in his own authority and not subject to the power of President to accept or reject such action or decision, except, in the case of Governors, to the limited extent that Art. 163 permits and his discretion, remote controlled by the Centre, has play.

When Dr. Prasad, as President of India, hesitated to sign the Hindu Code Bill in September 1951 and wrote to Prime Minister Nehru whether he could not exercise his judgment, the latter did not mince words :

> "The whole conception of constitutional government is against any exercise by the President of any such authority."

The first Attorney General of India, whom both the first President and the first Prime Minister consulted on the question, counselled thus :

> "I went into the matter most carefully and I reached the conclusion that the President was under our Constitution which had borrowed the British Parliamentary form of Government making the cabinet collectively responsible to the Parliament

(1) Some Characteristics of the Indian Constitution, p. 2.

A

(The House of the People) a strictly constitution head . . . . Having regard to the meaning of the expression 'aid and advise' in British Constitutional law and practice it meant that the President was bound to act in accordance with the aid and advice tendered to him by the Council of Ministers. I referred to a number of authorities in support of my view. I stated that once this theory was accepted it would govern all presidential action except, perhaps, a few situations in which the Council of Ministers would not be capable of advising him by reason, for example, of it not existing when the President was supposed to discharge a particular executive function."

B

C

Shri Setalvad further narrates two incidents when the President Dr. Rajendra Prasad asked his opinion on two matters. The President wanted to know whether he could prevent the Hindu Code Bill from becoming law. The Attorney General advised him that the President was bound to act according to the advice of his Ministers. On another occasion, the President wanted to know whether, as the Supreme Commander of Forces, he can send for individual army officers to elicit information about the defence forces. In this case also, Shri Setalvad gave his answer in "firm negative". Sir Alladi, whose views were also elicited by President Prasad on the same sensitive issues, struck the same note thus :

D

"In not stating in detail the incidents of responsible government, our Constitution has followed the example of most of Dominion Constitutions excepting that of Ireland. In the case of Ireland, as is well known, having regard to the circumstances under which the Irish Constitution came into existence, an attempt has been made to state in detail the incident of the Cabinet Government."

E

"The one point which the President misses in the note is that though the executive power is technically vested in the President, just as the same is vested in the Crown in England, under Article 74 of the Constitution a Council of Ministers with the Prime Minister as the head has to aid and advise the President in the exercise of his functions. Article 74 is all-pervasive in its character and does not make any distinction between one kind of function and another. It applies to every function and power vested in the President, whether it relates to addressing the House or returning a Bill for re-consideration or assenting or withholding assent to the Bill.

F

G

It will be constitutionally improper for the President not to seek to be guided by the advice of his Ministers in exercising any of the functions legally or technically vested in the President. The expression 'aid and advise' in Article 74 cannot be construed so as to enable the President to act independently or against the advice of the Cabinet." "The President also misses in his Note the main point underlying Article 111 dealing with the power to remit a Bill for reconsideration. Here again, the President

H

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is not intended to be a revisional or appellate authority over the Cabinet. A bill might have been introduced either by a private member or a member of the Cabinet. It may be rushed through in the Parliament. The Cabinet might notice an obvious slip or error after it had passed the Houses. This power vested in the President is as much intended to be exercised on the advice of the Cabinet as any other power."

"Through the discussion in the Constituent Assembly, the matter was put beyond doubt by Dr. Ambedkar and such of us as took a fairly leading part in the debates that every power conferred on the President has to be exercised by him according to the advice of the Ministers. Otherwise, he might be even guilty of violating the Constitution, vide Constituent Assembly Debates, Vol. 7, pages 935, 998, 1158 and Vol. 9, p. 150 etc."

We are citing these opinions not as *argumentum ad verecundium*, although the authors are legal celebrities, but because every fresh exposure of this sensitive constitutional issue found meaningful response which moulded the shape and stabilised the course of the constitutional process early in its history, Barring murmurs in seminars and mild queries from high quarters the constitution-in action has been well set on this theory of responsible Government.

In Felix Frankfurter's phrase, this is the 'gloss which life has written' on our constitutional clauses, and the Court, true to its function, must try to reflect that gloss by balancing in its ruling the origin, formulation, and growth of a constitutional structure denying judicial aid to undermining the democratic substance of Cabinet Government. A coup can be constitutionally envisioned by an erroneously literal interpretation of the living words of the Organic Law. Prof. Alen Glendhill, we must warn ourselves, wrote :

"Let us assume that a President has been elected who has successfully concealed his ambition to establish an authoritarian system of Government. One-fourth of the members of a House of Parliament, suddenly aware of the danger, give notice of a motion to impeach the President. Before the fourteen days within which it can be moved, the President dissolves Parliament, a new House must be elected but it need not meet for six months. He dismisses the Ministers and appoints others of his own choice, who for six months need not be Members of Parliament and during that period he can legislate by Ordinance. He can issue a proclamation of Emergency, legislate on any subject and deprive the States of their shares in the proceeds of distributable taxes. He can issue directions to States calculated to provoke disobedience and then suspend the States' Constitutions. He can use the armed forces in support of the civil power. He can promulgate preventive detention Ordinances and imprison his opponents."

Again, that learned jurist has commented :

"The Constitution vests the executive power of the Union in the President and provides that all executive action shall

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A be taken in his name. The President is also given many powers, shortly to be discussed, but the last fourteen years have shown the world that India is a parliamentary democracy in which Ministers decide policy and carry on Government, but the Constitution does not say in as many words that the President must act on ministerial advice; what it says is that there shall be a Council of Ministers to aid and advice the President; no B court may inquire into the question whether any, and if so what, advice was tendered to the President. What the Constitution contemplates is that normally the government shall be carried on by a committee of Ministers selected from the elected representatives of the people, but it recognises that circumstances may arise in which that system may break down, so it is discrable that there should be some authority empowered to continue the C government and set about restoring parliamentary government as soon as possible. It is for this reason that the Constitution legally vests the executive power in the President."

We eannot allow a 'confusion of vision' to creep into our constitutional interpretation because political scientists notice grave shortcomings in the electoral process, social workers complain of corrupt D misuse of power by parties in office or the ordinary people find legislators indifferent and ineffective. After all, any social scientist will agree that in a rapidly changing and inter-acting world the technology of Government by the people has to be a continuous process of readjustment and fresh experiment. As Judges, we only essay a creative understanding of the constitutional complex, not a programme for possible innovations.

E

Since a constitution is a declaration of articles of faith, not a compilation of laws, a prior pronouncement must be put out of the way if it has breached our constitutional philosophy or amputated the amplitude of cardinal creeds expressed in its vital words. Therefore, we have to examine what this Court has held in the past, from the functional angle, on the President (or Governor) *vis a vis* his Council F of Ministers, on the administrative power of the High Court over the State Judicature and on the processual rights, if any of a probationer before his precarious tenure is terminated.

The number of decisions of this Court and of the High Courts on the above points is legion and the legal gossamer webs sometimes woven by them are so fine that one sometimes wonders whether profusion of precedents beyond a point become counter-productive in the G understanding of the Constitution meant to govern and therefore to be within the ken of the common man. We will focus largely on the leading decisions, the rest of the skein of case-law wound round the principal constitutional propositions deserving but passing reference.

The overwhelming weight of judicial authority is in favour of the Cabinet system of government as inscribed in the Constitution. H Mukherjea, C. J., in *Rai Sahib Ram Jawaya Kapur* v. *State of Punjab*(1) observed:

(1) [1955] 2 SCR 225.

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

* *

In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this Control exercised by the legislature? Under article 53 (1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the state but it is virtually the Council of Ministers in each state that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does of the members of the legislature is, like the British Cabinet." a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions and as the 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."

In *Bejoy Lakshmi Cotton Mills Ltd.* v. *State of West Bengal* (1) a Constitution Bench of this Court expressly ruled that "the Governor's *personal satisfaction* was not necessary in this case as this is not an item of business with respect to which the Governor is, by or under the Constitution, required to act in his discretion. Although the executive Government of a State is vested in the Governor, *actually it is carried on by Ministers* and, in this particular case, under rr. 4 and 5 of the Rules of business, referred to above the business of Government is to be transacted in the various departments specified in the First Schedule thereof" (emphasis supplied).

In *Sanjeevi Naidu* v. *State of Madras* (2) the question arose whether in a case where a central statute, *namely the Motor Vehicles Act, vested certain* powers in the State Government, which by definition in the General Clauses Act means the Governor, the order passed by the

(1) [1967] 2 S.C.R. 406.
(2) [1970] 3 S.C.R. 505.

A Minister to whom the relevant business had been allocated by the rules of business was valid. Hegde, J., speaking for himself and his five colleagues, observed:

> "Under our Constitution, the Governor is essentially a constitutional head; the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-Art. (3) of Art 166 to make rules for the more convenient transaction of business of the government of the State and for the allocation amongst its Ministers, the business of the Government. *All matters* excepting those in which Governor is required to act in his discretion *have to be allocated to one or the other of the Ministers* on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can, not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do *only on the advice of the Council of Ministers.*

The Cabinet is responsible to the legislature for every action taken in any of the Ministries. That is the essence of joint responsibility. That does not mean that each and every decision must be taken by the Cabinet. The political responsibility of the Council of Ministers does not and cannot predicate the personal responsibility of the Ministers to discharge all or any of the governmental functions. Similarly an individual Minister is responsible to the legislature for every action taken or omitted to be taken in his ministry. This again is a political responsibility and not personal responsibility."

Again a Bench consisting of eleven Judges of this Court, in the well-known Bank Nationalisation case (*R. C. Cooper* v. *Union of India* (1) pronounced on the character of *our constitution in these decisive words:*

> "Under the Constitution, the President being the Constitutional head, *normally acts in all matters including the promulgation of an Ordinance on the advice of his Council of Ministers.* Whether in a given case the President may decline to be guided by the advice of his Council of Ministers is a matter which need not detain us. The Ordinance is promulgated in the name of the President and in a constitutional sense on his satisfaction; it is *in truth promulgated on the advice of his Council of Ministers and on their satisfaction.*"

(1) [1970] 3 SCR 570.

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In a recent decision *U. N. Rao* v. *Indira Gandhi*. (1). Sikri, C.J., speaking for a unanimous court, after reiterating 'that we are interpreting a Constitution and not an Act of Parliament, a constitution which establishes a parliamentary system of Government with a Cabinet', thought it proper to keep in mind the conventions prevalent at the time the Constitution was framed.

A curious facet of the cabinet system arose in that case viz, whether the President could constitutionally continue his Council of Ministers to govern the country instead of holding the reins in his own hands after the Parliament, responsibility to which is the credential of the Cabinet to rule in the name of the people, had been dissolved. The conspectus of clauses bearing on the President's election, oath of office, legal capacity to carry on the administration directly were all considered, and Sikri, C. J., declared the law thus:

> "The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no 'council of Ministers' nobody would be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61."
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> * * *
>
> The appellant urges that the House of People having been dissolved this clause cannot be complied with. According to him it follows from the provisions of this Clause that it was contemplated that on the dissolution of the House of People the Prime Minister and the other ministers must resign or be dismissed by the President and the President must carry on the Government as best as he can with the aid of the Services. As we have shown above, *Article* 74(1) *is mandatory and, therefore, the President cannot exercise power without the aid and advice of the Council of Ministers.* We must then harmonise the provisions of Article 75 (3) with Article 74 (1) and Article 75(2). Article 75 (3) brings into existence what is usually called 'Responsible Government'. In other words the Council of Ministers must enjoy the confidence of the House of People. While the House of People is not dissolved under Article 82(2) (b) Article 75 (3) has full operation. But when it is dissolved the Council of Ministers cannot naturally enjoy the confidence of the House of People. Nobody has said that the Council of Ministers does not enjoy the confidence of the House of People when it is prorogued. In the context therefore, this clause must be read as meaning that Article 75(3) only applies when the House of People does not stand dissolved or prorogued. We are not concerned with the cases where dissolution of the House of People takes place under Article 83(2) on the expiration of the period of five years prescribed therein, for Parliament has provided for that contingency in S. 14 of the Representation of the People Act, 1951.

(1) [1971] Supp. S.C.R. 46.

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A On our interpretation other articles of the Constitution also have full play, i.e. Art 77(3) which contemplates allocation of business among Ministers, and Articles 78 which prescribes certain duties of Prime Minister."(emphasis supplied)

The Constitutional right of the Ministry to continue in office after the dissolution of the State Assembly was highlighted in *K. N. Rajagopal* v. *M. Karunanidhi.* (1) This Court, adopting the ratio in B *Indira Gandhi's case (supra)* repelled the challenge—'a la' the U. K. Practice.

The analysis which appeals to us, in the light of this Court's rulings, accords with the view expressed by Mr. Keith in his Preface to 'The King and the Imperial Crown' :

C "It is a conviction of the public in the self-governing Dominions of the Crown that the Governor-General in matters official serves no more distinguished purpose than that of a 'rubber stamp".

As for the semantic gap between the verbal and the real, even in England, as William Paley has explained :

D "there exists a wide difference between the actual state of the government and the theory. When we contemplate the theory of the British government; we see the king vested with ... a power of rejecting laws. Yet when we turn our attention from the legal extent to the actual exercise of royal authority in England we see these formidable prerogatives dwindled into more ceremonies; and in their stead a sure and commanding influence E of which the constitution, it seems, is totally ignorant."

In Blackstone's commentaries on the Laws of England, said Dicey, students might read that the Constitution concentrated all executive power in the hands of the King. 'The language of this passage', he remarked, 'is impressive.....It has but one fault : the statements it contains are the direct opposite of the truth".

F

The President in India is not at all a glorified cipher. He represents the majesty of the State, is at the apex, though only symbolically, and has rapport with the people and parties, being above politics. His vigilant presence makes for good government if only he uses, what Bagehot described as, 'the right to be consulted, to warn and encourage'. Indeed, Art. 78 wisely used, keeps the President in close touch with the G Prime Minister on matters of national importance and policy significance, and there is no doubt that the imprint of his personality may chasten and correct the political government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors. i.e., the Prime Minister and his colleagues. In short, the President, like the King, has not merely been constitutionally romanticised but actually vested with a pervasive H and persuasive role. Political theorists are quite conversant with the dynamic role of the Crown which keeps away from politics and power

(1) AIR 1971 SC 1551.

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and yet influences both. While he plays such a role, he is not a rival centre of power in any sense and must abide by and act on the advice tendered by his Ministers except in a narrow territory which is sometimes slippery. A

Of course, there is some qualitative difference between the position of the President and the Governor. The former, under Art. 74 has no discretionary powers; the latter too has none, save in the tiny strips covered by Art. 163(2), 371 A (1)b & (d) 371A (2)(b) and (f), VI Schedule para 9(2) (and VI Schedule para 18(3) until omitted recently with effect from 21-1-1972). These discretionary powers exist only where expressly spelt out and even these are not left to the sweet will of the Governor but are remote-controlled by the Union Ministry which is answerable to Parliament for those actions. Again, a minimal area centering round reports to be despatched under Art. 356 may not, in the nature of things, be amenable to ministerial advice. The practice of sending periodical reports to the Union Government is a pre-constitutional one and it is doubtful if a Governor could or should report behind the back of his Ministers. For a Centrally appointed constitutional functionary to keep a dossier on his Ministers or to report against them or to take up public stances critical of Government policy settled by the cabinet or to interfere in the administration directly—these are unconstitutional *faux pas* and run counter to parliamentary system. In all his constitutional 'functions' it is the Ministers who act; only in the narrow area specifically marked out for discretionary exercise by the Constitution, he is untrammelled by the State Ministers' acts and advice. Of course, a limited free-wheeling is available regarding choice of Chief Minister and dismissal of the Ministry, as in the English practice adapted to Indian conditions. B C D E

Shri Sanghi, counsel for the appellant, adopted an ingenious argument to get round the holdings of this Court that India has accepted the Cabinet form of Government, by urging that while the Ministers exercise powers by virtue of allocation of business of Government under Art. 77(3) and have, on the strength of Art. 74, the authority to discharge all the functions of the head of State, still wherever the Constitution has expressly vested powers in the President by Governor, they belong to him alone and cannot be handled on his behalf by Ministers under the relevant Rules of Business. He concedes that we cannot read the Articles literally in the context of a Parliamentary Executive but insists on an exception in the category just mentioned. Inspiration for this argument comes from *Sardarilal* (2) and a few other Cases which do lend countenance to this rather extravagant claim of personal power for President and Governor. How ambitious and subversive such an interpretation can be to Parliamentary (and popular) authority unfolds itself when we survey the wide range of vital powers so enunciated in the Constitution. F G

The argument of the counsel for the appellant is that wherever the President is invested with power—and the same holds good for the Governor—he is sovereign in his own right and has to exercise the functions *personally* and the orders of a proxy, even a Minister, cannot do duty for the exercise of Presidential power. There is logic in arguing H

A that if, under Art. 311, the President or Governor means President or Governor *personally*, under other similar Articles the rules of business making over exercise of functions to Ministers and officers cannot be valid. Indeed, a whole host of such Articles exist in the Constitution, most of them very vital for the daily running of the administration and embracing executive, emergency and legislative powers either of a routine or momentous nature. The power to grant pardon or to remit B sentence (Art. 161), the power to make appointments including of the Chief Minister (Art 164), the Advocate General (Art. 165), the District Judges (Art. 233), the Members of the Public Service Commission (Art. 316) are of this category. Likewise, the power to prorogue either House of Legislature or to dissolve the Legislative Assembly (Art. 174) the right to address or send messages to the Houses of the Legislature (Art. 175 and Art.16), the power to assent to Bills or with- C hold such assent (Art. 200), the power to make recommendations for demands of grants (Art.203(3)), and the duty to cause to be laid every year the annual budget (Art. 202), the power to promulgate ordinances during recesses of the Legislature (Art. 213) also belong to this species of power. Again, the obligation to make available to the Election Commission the requisite staff for discharging the functions conferred by Art. 324(1) on the Commission (Art. 324 (6)), the power to nominate D a member of the Anglo-Indian Community to the Assembly in certain situations (Art. 333), the power to authorise the use of Hindi in the proceedings in the High Court (Art. 348(2)), are illustrative of the functions of the Governor *qua* Governor.

Similarly, the President is entrusted with powers and duties covering a wide range by the Articles of the Constitution. Indeed, he is the E Supreme Commander of the Armed Forces (Art 53(2)), appoints Judges of the Supreme Court and the High Courts and determines the latter's age when dispute arises, has power to refer questions for the Advisory opinion of the Supreme Court.(Art 143) and has power to hold that Government of a State cannot be carried in accordance with the Constitution (Art. 356). The Auditor-General, the Attorney General, the Governors and the entire army of public servants hold office during the F pleasure of the President. Bills cannot become law, even if passed by Parliament, without the assent of the President. Recognising and derecognising rulers of former native States of India is a power vested in the President. The extraordinary powers of legislation by Ordinances, dispensing with enquiries against public servants before dismissal, declaration of emergency and imposition of President's rule by proclamation upon States. are vast powers of profound significance. G Indeed, even the power of summoning and proroguing and dissolving the House of the People and returning Bills passed by the Parliament belongs to him. If only we expand the *ratio* of *Sardarilal* (2) and *Jayantilal* (12) to every function which the various Articles of the Constitution confer on the President or the Governor, Parliamentary democracy will become a dope and national elections a numerical exercise in expensive futility. We will be compelled to hold that H there are two parallel authorities exercising powers of governance of the country, as in the dyarchy days, except that Whitehall is substituted by Rashtrapati Bhavan and Raj Bhawan. The Cabinet will shrink at Union and State levels in political and administrative authority and,

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having solemn regard to the gamut of his powers and responsibilities, the Head of State will be a reincarnation of Her Majesty's Secretary of State for India, untroubled by even the British Parliament—a little taller in power than the American President, Such a distortion, by interpretation, it appears to us, would virtually amount to a subversion of the structure, substance and vitality of our Republic, particularly when we remember that Governors are but appointed functionaries and the President himself is elected on a limited indirect basis. As we have already indicated the overwhelming catena of authorities of this Court have established over the decades that the cabinet form of Government and the Parliamentary system have been adopted in India and the contrary concept must be rejected as incredibly allergic to our political genius, constitutional creed and culture.

The contention of the appellant, however, has been built upon *Sardari Lal* v. *Union of India*.(2) There the Court had to consider 'the exercise of powers expressly conferred on the President by cl. (c) of the proviso to Art. 311(2) of the Constitution'. It was common ground in that case that the President had no occasion to deal with the case of the appellant himself and the order was made by a subordinate official of the Government of India. The dispute was as to whether the function of dispensing with enquiry in the name of the security of the State had to be performed by the President *personally*, under cl. (10) of the proviso to Art. 311 (2), or could be one of the functions allocable under the Allocation of Business Rules. Of course, the relevant text of Art. 311 speaks of the President being satisfied and the Court came to the conclusion that what was intended was not Ministerial but Presidential satisfaction. Grover, J., speaking for a unanimous Court, observed :—

> "On the principles which have been enunciated by this Court, the function in clause (c) of the proviso to Art. 311(2) cannot be delegated by the President to any one else in the case of a civil servant of the Union. In other words he has to be satisfied *personally* that in the interest of the security of the State, it is not expedient to hold the inquiry prescribed by clause (2). In the first place, the general consensus has been that executive functions of the nature entrusted by the Articles, some of which have been mentioned before and in particular those Articles in which the President has to be satisfied himself about the existence of certain fact or state of affairs cannot be delegated by him to any one else. Secondly even with regard to clause(c) of the proviso, there is a specific observation in the passage extracted above from the case of *Jayantilal Amrit Lal Shodhan* that the powers of the President under that provision cannot be delegated. Thirdly, the dichotomy which has been specifically introduced between the authority mentioned in clause (b) and the President mentioned in clause (c) of the proviso cannot be without significance, The Constitution makers apparently felt that a matter in which the interest of the security of the State has to be considered should receive the *personal* attention of the President or the head of the State and he should be *himself satisfied* that an inquiry under the

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A substantive part of clause (2) of Art. 311 was not expedient for the reasons stated in clause (c) of the proviso in the case of particular servant".

Some observations in the ruling relied upon, namely *Jayantilal Amritlal Shodhan* v. *F N. Rama* (1) apparently seem to support the conclusion reached in *Sardarilal*,(*Supra*) but it must be remembered that the actual case turned on the constitutionality of the President delegating executive powers conferred on him by Art. 258 to a government of a State. In that case a distinction was made between functions with which the *Union Government* is invested and those vested in the *President*. The Court took the view that Art.258 (1) did not permit the President to part with powers and functions with which he is, by express provisions of the Constitution *qua* President, invested. The particular observations relied upon in *Sardarilal* may well be extracted here:

> "The power to promulgate Ordinances under Art. 123; to suspend the provisions of Arts. 268 to 279 during an emergency; to declare failure of the Constitutional machinery in States under Art. 356; to declare a financial emergency under Art. 360 to make rules regarding the recruitment and conditions of service of persons appointed to posts and services in connection with the affairs of the Union under Art. 309—to enumerate a few out of the various powers—are not powers of the Union Government; these are powers vested in the President by the Constitution and are incapable of being delegated or entrusted to any other body or authority undr Art. 258 (1). The plea that the very nature of these powers is such that they could not be intended to be entrusted under Art. 258 (1) to the State or officer of the State, and, therefore, that clause must have a limited content, proceeds upon an obvious fallacy. Those powers cannot be delegated under Art. 258(1) because they are not the powers of the Union and not because of their special character. There is a vast array of other powers exercisable by the President—to mention only a few appointment of judges; Art. 124 & 217, appointment of Committees of Official Languages Act, Art. 344, appointment of Commissions to investigate conditions of backward classes; Art. 340, appointment of Special Officer for Scheduled Castes and Tribes; Art. 338, exercise of his pleasure to terminate employment; Art. 310 declaration that in the interest of the security of the State it is not expedient to give a public servant sought to be dismissed an opportunity contemplated by Art. 311 (2)—these are executive powers of the President and may not be delegated or entrusted to another body or officer because they do not fall within Art. 258".

The Court there was not concerned with the question whether the President must exercise these executive powers personally or they can be exercised by a Minister or an officer on his behalf according to the allocation made under the Rules of Business.

(1) [1964] 5 S.C.R. 294, 307 & 308.

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Before jettisoning wholesale the theory of absolute power of Presidency we must deal with two Articles of the Constitution, one relating to the determination of the age of High Court Judges [Art 217 (3)] and the other relating to the Election Commission (Art 361) which have come up for judicial consideration. Counsel for the appellant has relied on passages from these cases which hark back, in a way, to the theory of individual judgment of the Head of State.

In *J. P. Mitter* v. *Chief Justice, Calcutta* (1) this Court had to consider the decision of the Government of India on the age of a Judge of the Calcutta High Court and, in that context, had to ascertain the true scope and effect of Art. 217 (3) which clothes the President with exclusive jurisdiction to determine the age of a Judge finally. In that case the Ministry of Home Affairs went through the exercise prescribed in Art. 217 (3). "The then Home Minister wrote to the Chief Minister, West Bengal, that he had consulted the Chief Justice of India, and he agreed with the advice given to him by the Chief Justice, and so he had decided that the date of birth of the appellant was.... It is this decision which was, in due course communicated to the appellant." When the said decision was attacked as one reached by the Home Minister only and not by the President *personally*, the Court observed:

> "The alternative stand which the appellant took was that the Executive was not entitled to determine his age; and it must be remembered that this stand was taken before Art. 217 (3) was inserted in the Constitution; the appellant was undoubtedly justified in contending that the Executive was not competent to determine the question about his age because that is a matter which would have to be tried normally, in judicial proceedings instituted before High Courts of competent jurisdiction. There is considerable force in the plea which the appellant took at the initial stages of this controversy that if the Executive is allowed to determine the age of a sitting Judge of a High Court, that would seriously affect the independence of the Judiciary itself."

Based on this reasoning, the Court quashed the order, the *ratio* of the case being that the President himself should decide the age of the Judge, uninfluenced by the Executive, i. e., by the Minister in charge of the portfolio dealing with Justice.

This decision was reiterated in *Union of India* v. *Jyoti Prakash Mitter*. (2) Although an argument was made that the President was guided in that case by the Minister of Home Affairs and by the Prime Minister, it was repelled by the Court which, on the facts, found the decision to be that of the President himself and not of the Prime Minister or the Home Minister.

In the light of the scheme of the Constitution we have already referred to it is doubtful whether such an interpretation as to the personal satisfaction of the President is correct. We are of the view that

(1) [1965] 2 S.C.R. 53, 68.
(2) [1971] 3 S.C.R. 483.

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A the President means, for all practical purposes, the Minister or the Council of Ministers as the case may be, and his opinion, satisfaction or decision is constitutionally secured when his Ministers arrive at such opinion, satisfaction or decision. The independence of the Judiciary, which is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant Article making consultation with the Chief Justice of India obligatory. In B all conceivable cases consultation with that highest dignitary of Indian justice will and should be accepted by the Government of India and the Court will have an opportunity to examine if any other extraneous circumstances have entered into the verdict of the Minister, if he departs from the counsel given by the Chief Justice of India. In practice the last word in such a sensitive subject must belong to the Chief Justice of India, the rejection of his advice being ordinarily regarded as C prompted by oblique considerations vitiating the order. In this view it is immaterial whether the President or the Prime Minister or the Minister for Justice formally decides the issue.

In *Brundaban Nayak* v. *Election Commission* (1) another sensitive situation relating to the functions of the President (Art. 103) and the Governor (Art. 192) arose. It is a sacred principle of our democracy, D like the independence of the Judiciary, that decisions on the disqualifications of Members of Assemblies should be unbiassed. While formally the power to decide a dispute in this behalf is vested in the President and the Governor under Arts 103 and 192 respectively, it would be a travesty of impartiality if such decision were to be made on the aid and advice of a Ministry which is essentially chosen from a party or combination of parties. How can a political activist with party E loyalty in our pluralistic society judge a cause in which he has deep concern? Therefore the Constitution has made the Election Commission the real arbiter in the dispute, it being assumed that the Election Commission is free and fearless and unobliged to the party in power. The constitutional mechanism is that the President (Governor) shall refer the question of disqualification of a member for the opinion of the Election Commission and 'shall act according to such opinion', so that F whether the right to decide is formally in the President or is to be exercised by the aid and advice of his Ministers, it is immaterial, since the actual adjudication has always to be made by the Election Commission which binds the Government and the President merely appends his signature to the order in regard to such decision. In this view, *Brundaban*(2) deals with a special situation and does not affect the otherwise universal rule of the Head of State being bound to act only in accordance with G the aid and advice of his Ministers.

Gajendragadkar, C. J., outlined the scheme relating to the decision about the disqualification of members of the Legislature, at p.60, thus:

> "The object of this provision (Art 192) clearly is to leave it to the Election Commission to decide the matter, though the decision as such would formally be pronounced in the

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(1) [1965] 3 S.C.R. 53.

(2) Constitutional Government in India—by M. V. Pylee p. 770-1965 Edition—Asia Publishing House.

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name of the Governor. When the Governor pronounces his decision under Art. 192 (1), he is not required to consult his Council of Ministers; he is not even required to consider and decide the matter himself; he has merely to forward the question to the Election Commission for its opinion, and as soon as the opinion is received, 'he shall act according to such opinion'. In regard to complaints made against the election of members to the Legislative Assembly, the jurisdiction to decide such complaints is left with the Election Tribunal under the relevant provisions of the Act. That means that all allegations made challenging the validity of the election of any member, have to be tried by the Election Tribunals constituted by the Election Commission. Similarly, all complaints in respect of disqualifications subsequently incurred by members who have been validly elected, have, in substance, to be tried by the Election Commission, though the decision in form has to be pronounced by the Governor."

All these add up to making a Sovereign who can scotch the Legislature, rubberise the judiciary and overrule the Cabinet. One has only to case a glance at similar powers relating to the Governor to reach the same conclusion at the State level, with the additional factor that an area of discretionary power is expressly left to him. What is of grave import is that the Court has no jurisdiction to inquire what advice has been given by the Ministers to the President or the Governor and thus the effctive judicial check on exercise of power is also under eclipse. If we read these powers literally as 'personal' to the Head of State. the conclusion is rather disquieting in a country which has already had a long night of imperial subjection and monarchical tradition. Dr. Ambedkar expressed this warning in the Constituent Assembly in words which have contemporary relevance:

"This caution is far more necessary in the case of India than, in the case of any other country. For, in India, *Bhakti* or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. *Bhakti* in religion may be a road to the salvation or the soul. But in politics, *Bhakti* or hero-worship is a sure road to degradation and eventual dictatorship.

The omnipotence of the President and of the Governor at State level is euphemistically inscribed in the pages of our Fundamental Law with the obvious intent that even where express conferment of power or functions is written into the Articles, such business has to be disposed of decisively by the Ministry answerable to the Legislature and through it vicariously to the people, thus vindicating our democracy instead of surrendering it to a single summit soul whose deification is incompatible with the basis of our political architecture lest national elections become Dead Sea fruits, legislative organs become labels full of sound and fury signifying nothing and the Council of Ministers put in a quandary of responsibility to the House of the People and submission to the personal decision of the Head of State. A parliamentary style Republic like ours could not have conceptualised its self-liquidation by this process.

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A On the contary, democratic capital-formation to strengthen the people' rights can be achieved only through invigoration of the mechanism of Cabinet House Elections.

Certainly, the key words of wide import in the fasciculus of Articles relating to the President and Governor are 'functions' (Arts. 74 & 163) and 'business' and allocation of portfolios, rules of business and dele- B gation to subordinate officials are but the methodology of working out the Cabinet process. Long arguments on the terminological niceties of the various provisions, divorced from the essentials of parliamentary perspective,will land us in 'Himalayan' constitutional blunders. Similarly, expressions like 'is satisfied', 'opinion' 'as he thinks fit', 'if it appears to' have to be interpreted by super-imposing the invisible but very real presence of the Ministry over the Head of State.

C Before we conclude on this part of the case we remind ourselves that so long as the Constitution shall endure—no one can say how long, each generation being almost a separate nation this Court must exist with it, deciding in the peaceful forms of forensic proceeding, the delicate and dangerous controversies *inter alia*, between sub-sovereignties and citizens. And the pronouncements of this summit tribunal D being law under Art. 141, it binds until reinterpreted differently and competently. But as Judges we have solemnly to remind ourselves of the words of the historian of the U. S. Supreme Court, Mr. Charles Warren(1):

> "However the Court interpret the provisions of the Constitution, it is still the Constitution which is the law and not the decision of the Court."

E Nor is *Sardarilal*(2) of such antiquity and moment that a reversal would upset the sanctity of *stare decisis*. Some rulings, even of the highest Court, when running against the current of case-and the clear stream of Constitutional thought, may have to fall into the same class as restricted railroad ticket, goods for the day and train only, to adopt the language of Justice Roberts (*Smith* v. *Alleright*, 321 U. S. 649, 665).

F We declare the law of this branch of our Constitution to be that the President and Governor, custodians of all executive and other powers under various Articles, shall, by virtue of these provisons, exercise their formal constitutional powers only upon and in accordance with the advice of their Ministers save in a few well known exceptional situations. Without being dogmatic or exhaustive, these situations relate to (a) the G choice of Prime Minister (Chief Minister), restricted though this choice is by the paramount consideration that he should command a majority in the House; (b) the dismissal of a Government which has lost its majority in the House but refuses to quit office; (c) the dissolution of the House where an appeal to the country is necessitous, although in this area the Head of State should avoid getting involved in politics and must be advised by his Prime Minister (Chief Minister) who will eventually take the responsibility for the step. We do not examine in detail the H constitutional proprieties in these predicaments except to utter the

(1) The Supreme Court in United States History, III p. 470-471 (1922).

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caution that even here the action must be compelled by the peril to democracy and the appeal to the House or to the country must become blatantly obligatory. We have no doubt that de Smith's statement(1) regarding royal assent holds good for the President and Governor in India :

> "Refusal of the royal assent on the ground that the monarch strongly disapproved of a bill or that it was intensely controversial would nevertheless be unconstitutional. The only circumstances in which the withholding of the royal assent might be justifiable would be if the Government itself were to advise such a course—a highly improbable contingency—or possibly if it was notorious that a bill had been passed in disregard to mandatory procedural requirements; but since the Government in the later situation would be of the opinion that the deviation would not effect the validity of the measure once it had been assented to, prudence would suggest the giving of assent."

So far as the appeals before us are concerned, the effect is that there is no infirmity in the impugned orders on the score that the Governor has not himself pursued the papers or passed the orders.

The second spinal issue in the case, as earlier indicated, bears on fearless justice, another prominent creed of our Constitution. The independence of the Judiciary is a fighting faith of our founding document. Since the days of Lord Coke, judicial independence from executive control has been accomplished in England. The framers of our Constitution, impressed by this example have fortified the cherished value of the rule of law by incorporating provisions to insulate the judicature. Justice becomes fair and free only if institutional immunity and autonomy are guaranteed (of course there are other dimensions to judicial independence which are important but irrelevant for the present discussion). The exclusion of executive interference with the Subordinate Judiciary, i.e., grass-roots justice, can prove a teasing illusion if the control over them is vested in two masters viz., the High Court and the Government, the latter being otherwise stronger. Sometimes a transfer could be more harmful than punishment and discipline-control by the High Court can also be stultified by an appellate jurisdiction being vested in Government over the High Court's administrative orders. This constitutional perspective informed the framer of our Constitution when they enacted the relevant Articles, 233 to 237. Any interpretation of administrative jurisdiction of the High Court over its subordinate limbs must be aglow with the thought that separation of the Executive from the Judiciary is a cardinal principle of our Constitution. However, we do not pursue this question further since in the present case, Government has agreed with and acted on the High Court's 'recommendation' and, moreover, the methodology of conflict resolution, when the view of the High Court is unpalatable to the Executive, falls to be directly considered in a different set of pending appeals.

(1) Constitutional and Administrative Law—by S.A. de Smith—Penguin Books on Foundations of Law.

A Nevertheless, we must refer to one aspect of the matter. It is nice on paper to invest disciplinary authority over the subordinate judiciary in the High Court. But when charges or aspersions of corrupt practice or incompetence against the members of the lower judiciary are brought to the Cognisance of the High Court, there is an operational handicap. Who is to investigate into the truth of the allegations? Is there a machinery at the exclusive disposal of the High Court to probe into B the *prime facie* veracity of such complaints? It is awkward and, ineffectual for a superior Judge, trained in formal procedures and weighing and not collecting evidence, to undertake the *sub-rosa*, informal, extensive and technical job of investigation which demands a different kind of expertise. At the same time if the police are permitted to check upon complaints, the successful invasion of judicial independence is inevitable. No Magistrate may function fearlessly if the prosecuting de- C partment may also investigate against him. It is indeed regrettable that this sensitive side of the issue was overlooked by the Punjab High Court when it requested Government to direct the Vigilance Commissioner to report on a member of the judicature. The true intendment of judicial independence is fulfilled not by declining to investigate into delinquencies of judicial personnel nor by holding an open enquiry by a Judge which is a poor substitute for collection of evidence but by D creating an apparatus for collecting intelligence and presenting evidence, which is under the complete control of the High Court. This is no new idea but had been mooted in the 50s at an all-India Law Minister's Conference but at least, now after such a long lapse of time, this felt want may be remedied.

The third contention, argued elaborately by both sides, turns on E the scope and sweep of Art. 311 in the background of the rules framed under Art. 309 and the '*pleasur*' doctrine expressed in Art. 310. The two probationers, who are appellants, have contended that what purport to be simple terminations of probation on the ground of 'unsuitability' are really and in substance by way of punishment and falling short of the rigorous prescriptions of Art. 311 (2), they are bad. Their complaint is that penal consequences have been visited on them by the F impugned orders and since even a probationer is protected by Art. 311 (2), in such situations the Court must void those orders. Naturally, the launching pad of the argument is *Dhingra's Case* (supra). In a sense, *Dhingra* is the *Manga Carta* of the Indian civil servant, although it has spawned diverse judicial trends, difficult to be disciplined into one single, simple, practical formula applicable to termination of probation of freshers and of the services of temporary employees. The Judicial G search has turned the focus on the discovery of the element of punishment in the order passed by Government. If the proceedings are disciplinary, the rule in *Dhingra's Case* (1) is attracted. But if the termination is innocuous and does not stigmatise the probationer or temporary servant, the constitutional shield of Art. 311 is unavailable. In a series of cases, the Court has wrestled with the problem 'of devising a principle or rule to determine this questions' where non-punitive termination of H probation for unsuitability ends and punitive action for delinquency begins. In *Gopi Kishore* (2) this Court ruled that where the State

(1) A.I.R. 1958 S.C. 36. (2) A.I.R. 1960 S.C. 689.

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holds an enquiry on the basis of complaints of misconduct against a probationer or temporary servant, the employer must be presumed to have abandoned his right to terminate simpliciter and to have undertaken disciplinary proceedings bringing in its wake the protective operation of Art 311. At first flush, the distinguishing mark would therefore appear to be the holding of an inquiry into the complaints of misconduct Sinha C. J., observed :

> "It is true that, if the Government came to the conclusion that the respondent was not a fit and proper person to hold a post in the public service of the State, it could discharge him without holding any enquiry into his alleged misconduct....Instead of taking that easy course, the Government chose the more difficult one of starting proceedings against him and of branding him as a dishonest and incompetent officer. He had the right, in those circumstances, to insist upon the protection of Art. 311 (2) of the Constitution."

The learned Chief Justice summarised the legal position thus:

> "1. Appointment to a post on probation gives the person so appointed no right to the post and his services may be terminated, without taking recourse to the proceedings laid down in the relevant rules for dismissing a public servant, or removing him from service.
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> 2. The termination of employment of a person holding a post on probation without any enquiry whatsoever cannot be said to deprive him off any right to a post and is, therefore, no punishment.
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> 3. But if instead of terminating such a person's service without any enquiry, the employer chooses to hold an enquiry into his alleged misconduct, or inefficiency, or for some similar reason, the termination of service is by way of punishment, because it puts a stigma on his competence and thus affects his future career. In such a case, he is entitled to the protection of Art. 311 (2) of the Constitution.
>
> 4. .....
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> 5. But, if the employer simply terminates the services of a probationer without holding an enquiry and without giving him a reasonable chance of showing cause against his removal from service, the probationary civil servant can have no cause of action, even though the real motive behind the removal from service may have been that his employer thought him to be unsuitable for the post he was temporarily holding, on account of his misconduct, or inefficiency, or some such cause."

The 5th proposition states that the real motive behind the removal is irrelevant and the holding of an enquiry leaving an indelible stain as a consequence alone attracts Art. 311 (2). *Ram Narayan Das* (1) dealt with a case where the rules under the proviso to Art. 309 provided some sort of an enquiry before termination of probation. In such

(1) A.I.R. 1961 S.C. 177.

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A a case, the *enquiry* test would necessarily break down and so the Court had to devise a different test. Mr. Justice Shah (as he then was) stated the rule thus :

> "The enquiry against the respondent was for ascertaining whether he was fit to be confirmed....The third proposition in....(the *Gopi Kishore*) case refers to an enquiry into allegations
B of misconduct or inefficiency with a view, if they were found established, to imposing punishment and not to an enquiry whether a probationer should be confirmed. Therefore, the fact of holding of an enquiry is not decisive of the question. What is decisive is whether the order is by way of punishment, in the light of the tests laid down in *Purshottam Lal Dhingra's Case*."

C Thus a shift was made from the *factum of enquiry* to the *object of the enquiry*. *Madan Gopal* (1) found the Court applying the *object of enquiry* doctrine to a simple order of termination which had been preceded by a show cause notice and enquiry. It was held that if the enquiry was intended to take traumatic action, the innocent phraseology of the order made no difference. Then came *Jagdish Mitter* v. *Union of India* (2) where Mr. Justice Gajendragadkar (as he then was),
D held :

> "No doubt the order purports to be one of discharge and, as such, can be referred to the power of the authority to terminate the temporary appointment with one month's notice. But it seems to us that when the order refers to the fact that the appellant was found undesirable to be retained in Government service, it expressly casts a stigma on the appellant and in that sense,
E must be hold to be an order of dismissal and not a mere order of discharge."

Thus we see how memberanous distinctions have been evolved between an enquiry merely to ascertain unsuitability and one held to punish the delinquent—to impractical and uncertain, particularly when we remember that the machinery to apply this delicate test is the ad-
F ministrator, untrained in legal nuances. The impact on the 'fired' individual, be it termination of probation or removal from service, is often the same. Referring to the anomaly of the *object of inquiry* test, Dr. Tripathi has pointed out (3) :

> "The 'object of inquiry' rule discourages this fair procedure and the impulse of justice behind it by insisting that the order setting up the inquiry will be judicially scrutinised for the pur-
G pose of ascertaining the object of the inquiry."

Again, could it be that if you summarily pack off a probationer, the order is judicially unscrutable and immune ? If you conscientiously seek to satisfy yourself about allegations by some sort of enquiry you get caught in the coils of law, however harmlessly the order may be phrased? And, so this sphinx-complex has had to give
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(1) A.I.R. 1963 S.C. 531. (2) A.I.R. 1964 S.C. 449.

(3) Spotlights on Constitutional Interpretation—1972—N. M. Tripathi Pvt. Ltd., Bombay.

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way in later cases. In some cases the rule of guidance has been stated to be 'the substance of the matter' and the 'foundation' of the order. When does 'motive' trespass into 'foundation'? When do we lift the veil of form to touch the 'substance'? When the Court says so. These 'Freudian' frontiers obviously fail in the work-a-day world and Dr. Tripathi's observations in this context are not without force. He says :

> "As already explained, in a situation where the order of termination purports to be a mere order of discharge without stating the stigmatizing results of the departmental enquiry a search for the 'substance of the matter' will be indistinguishable from a search for the motive (real, unrevealed object) of the order. Failure to appreciate this relationship between motive (the real, but unrevealed object) and from (the apparent, or officially revealed object in the present context has led to an unreal interplay of words and phrases wherin symbols like 'motive', 'substance' 'form' or 'direct' parade in different combinations without communicating precise situations or entities in the world of facts."

The need, in this branch of jurisprudence, is not so much to reach perfect justice but to lay down a plain test which the administrator and civil servant can understand without sublety and apply without difficulty. After all, between 'unsuitability' and 'misconduct' 'thin partitions do their bounds divide'. And, over the years, in the rulings of this Court the accent has shifted, the canons have varied and predictability has proved difficult because the play of legal light and shade has been baffling. The learned Chief Justice has in his judgment, tackled this problem and explained the rule which must govern the determination of the question as to when termination of service of a probationer can be said to amount to discharge simpliciter and when it can be said to amount to punishment so as to attract the inhibition of Art. 311. We are in agreement with what the learned Chief Justice has said in this connection. So far as the present case is concerned, it is clear on the facts set out in the judgment of the learned Chief Justice that there is breach of the requirements of Rule 7 and the orders of termination passed against the appellants are, on that account liable to be quashed and set a side.

In the result, we agree with the conclusion reached by the learned Chief Justice and concur in the order proposed by him.

P.H.P.