

# DISCRETIONARY POWERS OF THE PRESIDENT UNDER THE INDIAN CONSTITUTION

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Traditionally, the structure of government has been divided into three components: (1) the legislature to make laws; (2) the executive to implement laws and (3) the judiciary to interpret laws and administer justice. The Central Executive in India consists of the President and the Council of Ministers headed by the Prime Minister. The executive power of the Union is vested in the President.<sup>1</sup> He is not elected directly by the people, but by an electoral college consisting of the elected members of both Houses of Parliament and the State Legislative Assemblies.<sup>2</sup> A candidate for the President's office should be a citizen of India of at least thirty five years of age, qualified for election to the House of People and should not hold any office of profit under the Government of India or a state government or under any local authority.<sup>3</sup> Before assuming office, the President takes an oath whereby he vows to preserve, protect and defend the Constitution and the law.<sup>4</sup> He can be impeached for violation of the Constitution.<sup>5</sup>

To analyse the position and powers of the President of India, one needs to analyse the model of government that we have. Most authors are of the view that we have a parliamentary form of government. Some go the extent of saying that we have a system akin to the British, with the President being equivalent to the British Crown, i.e., he is merely a Constitutional Head and has absolutely no powers of his own.<sup>6</sup> It would be pertinent to examine the forms of government in Britain and the United States of America to determine the system of government that the Indian Constitution envisages.

In Britain, the Crown is the supreme authority in whose name all executive action is taken. The Crown is bound by tradition and convention. The monarch can do no wrong and hence, cannot be impeached. Munshi says that the British Monarch is the apex of the social system and quotes Finer, who says that the Crown is a natural fact.<sup>7</sup> Over the years, Parliament has become supreme and the

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1 Article 53(1), Constitution of India.

2 Article 54, Constitution of India.

3 Article 58, Constitution of India.

4 Article 60, Constitution of India.

5 Article 61, Constitution of India.

6 M. P. Jain, *Indian Constitutional Law*, 94 (1994).

7 K. M. Munshi, *The President under the Indian Constitution*, 13 (1963).

Crown has been reduced to a rubber stamp. It is said, ultimately, that England follows a Cabinet form of Government.

In the United States, the presidential form of government is followed. There the President is both the *de jure* as well as the *de facto* head. He is vested with a great deal of discretionary power and is not bound by the advice given by his Secretaries.

When we talk about “power”, we need to comprehend what the term actually means. Power in a general sense could mean strength or authority. Being vested with a power carries with it the implied authority to determine the occasions that call for the exercise of that power as well as the manner in which it shall be exercised. This should be contrasted with the term “function”. A function is a duty or job. To perform a function, one is generally dependent on another, who exercises his power in asking one to do a certain job. Thus, a crude distinction between the terms *power* and *function* can be drawn. It is necessary to understand the implications of these terms to interpret various Articles of the Constitution that refer to the *powers* of the President of India and to examine the manner in which they have been interpreted by the Courts.

### The Powers of the President

An overview of the powers of the President, if any, has to begin with the judicial interpretation on this issue. The words “if any” have been used here since the Supreme Court has concluded in numerous judgments, that the President of India is a powerless entity.

In *Ram Jawaya Kapur v. State of Punjab*<sup>8</sup>, the Supreme Court held that the Indian Constitution had adopted the English system of a parliamentary executive and that the real power lay with the “Cabinet”. The Court in *U. N. R. Rao v. Indira Gandhi*<sup>9</sup>, ruled that the conventions in England governing the relationship between the Crown and the Council of Ministers were pertinent to the Indian Constitution as well, and that the exercise of powers under the Indian Constitution should be read in the light of those conventions. The powers of the President were further curtailed by the Court in *R. C. Cooper v. Union of India*<sup>10</sup>, where it held that the President is merely a Constitutional Head and has to work only on the advice of the Council of Ministers. In *Samsher Singh v. State of Punjab*<sup>11</sup>, Krishna Iyer, J., went to the extent of saying that in India, where both the parliamentary and cabinet forms of government have been adopted, the President for all practical purposes

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8 AIR 1955 SC 549.

9 AIR 1971 SC 1002.

10 AIR 1970 SC 564.

11 AIR 1974 SC 2192, 2226.

means the Council of Ministers. Thus, the judiciary has consistently held that the President, in practice, has no powers at all. All these decisions subscribe to that school of thought which argues that the position of the Indian President is analogous to that of the British Monarch. He is only a titular or Constitutional Head of State, with real power being exercised by the Prime Minister and the Council of Ministers.<sup>12</sup>

There is a contrary view which says that the President being bound by oath to defend the Constitution and being the Head of the executive, has all the powers that are given to him by the Constitution, in the exercise of which he can use his discretion.

Before attempting to determine which of the above views is correct, it is necessary to differentiate between the powers and functions of the President. The distinction between powers and functions in general usage has been made earlier. In a very simplistic sense, the President is granted the power to do something when he is required to apply his mind before taking a decision. He has the authority to assent or dissent. In other words, provisions of the Constitution which require the President to use his discretion, can be said to lay down presidential powers. Functions of the President, on the other hand, can be said to be those duties that have been imposed on him in order to serve as a check on the powers of the Council of Ministers and the other two branches of government. When performing his duties, the President merely acts like a screening mechanism.

The provisions of the Constitution that can be regarded as conferring powers on the President are Articles 53, 72, 76, 85, 86, 108, 111, 123, 124(2), 124(3), 127, 128, 143, 148, 240, 263, 304, 352, 354, 356, 359, 360 and 366(22). The exercise of power under these provisions carries a strong element of discretion. Some provisions such as Articles 103, 118(3) and 258 can be considered to confer powers in one sense and impose duties in another. Articles 87, 112, 115 and 124(4) may be considered purely functions of the President.

The question that arises in this context is whether all these powers are in reality those of the President. Does the President have to heed the advice of the Council of Ministers while exercising these powers?

### **The Doctrine of Aid and Advice: A Study of Article 74**

Article 74(1) reads thus: "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice."

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12 K. V. Kuriakose, "The President of India: Status and Position", 14 *Indian Bar Review* 238 (1987).

If literally interpreted, it is very clear that the Council of Ministers has to advise the President only in the exercise of his *functions*, in which case he has to act in accordance with such advice. By implication, the President can act on his own in the exercise of his *powers*. However, this has not been put into practice. Previous Presidents have rarely exercised the powers given to them by the Constitution. In fact, former President R. Venkataraman states in his book, that the President is not an appellate or supervisory authority over the Prime Minister and that it is his duty to act as per the aid and advice of the Council of Ministers, provided it is not violative of the Constitution.<sup>13</sup>

Article 74 has been interpreted in an absurd manner by various authors as well. For instance, M. P. Jain says that it was widely recognised even before the amendment to Article 74 in 1976<sup>14</sup>, that under the “cabinet” form of government followed in India, the President had to act as per the instructions given to him by the Council of Ministers. This sort of understanding has emerged because of the manner in which the judiciary has been interpreting Article 74.

In *Ram Jawaya Kapur*<sup>15</sup> and *Samsher Singh*<sup>16</sup>, the Supreme Court held that since India follows the “cabinet system” as in England, it would be legitimate to refer to British conventions when interpreting Articles 74 and 75. The Court in *U. N. R. Rao*<sup>17</sup> ruled that Article 74(1) is mandatory and therefore, the President cannot exercise executive power without the aid and advice of the Council of Ministers. The Court went on to say that any exercise of executive power without such aid and advice would be unconstitutional in view of Article 53(1). This view was reiterated in *Samsher Singh*.

Two issues are worthy of note here. Firstly, all these decisions pre-date the 1976 amendment to Article 74. Hence, at the time, Article 74 actually read: “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 appears to be no logical reason why the court had to interpret this to mean that such advice would be binding on the President. The Court relied on British conventions to reach this absurd conclusion. Ironically, it was in the English case of *Adegbenre v. Akintola*<sup>18</sup>, that the Golden Rule of interpretation was stated as follows: “It is in the end the wording

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13 See generally, R. Venkataraman, *My Presidential Years*, (1994).

14 Prior to 1976, Article 74 read thus: “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.”

15 AIR 1955 SC 549.

16 AIR 1974 SC 2192.

17 AIR 1971 SC 1002.

18 [1963] 3 All E.R. 544.

of the Constitution itself that is to be interpreted and applied and this wording can never be overridden by extraneous principles of other Constitutions, which are not explicitly incorporated in the formulae that have been chosen as the frame of the Constitution.” Hence, the cases discussed above do not seem to rest on a logical foundation.

Secondly, the Court seems to have used the words *power* and *function* interchangeably. Article 74 clearly uses the term “functions” and since the Constitution makes a clear distinction between powers and functions, they cannot be used interchangeably.

The theoretical position, therefore, is that the President can take the aid and advice of the Council of Ministers in the exercise of his functions and in such cases, following the 1976 amendment, the advice shall be binding upon him. However, the amendment has not changed the fact that the President has total discretion in the exercise of his powers.

### **The Presidential Power of Pardon**

The President is empowered to grant pardon, reprieve, respite or remission of punishment or to suspend, remit or commute the sentence of any person convicted of any offence in all cases where punishment is by a court martial, where the punishment is for an offence against a law relating to a matter to which the executive power of the Union extends, or where the sentence imposed is one of death, by virtue of Article 72. It is to be noted that Article 72 expressly uses the term *power*. Hence, theoretically, Article 74 should not apply to this provision. The President’s power of pardon is a discretionary power to be exercised alone.

Not surprisingly, practice indicates otherwise. The issue of whether Article 72 is a discretionary power of the President arose in *Maru Ram v. Union of India*<sup>19</sup>. In this case, the Court held that the power under Article 72 was to be exercised on the aid and advice of the “Central Government” and not by the President on his own and that the advice of the “government” would be binding on the President. Justice Krishna Iyer went on to say that the President is but a functional euphemism, promptly acting on and only on the advice of the Council of Ministers.

The issue arose again in *Kehar Singh v. Union of India*<sup>20</sup>. In this case, the Supreme Court reiterated its decision in *Maru Ram* and held that in using his *power* under Article 72, the President has to take the advice of the Council of Ministers and is bound by such advice. However subsequently in the judgment<sup>21</sup>,

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19 AIR 1980 SC 2147.

20 1989 Cri. L.J. 941.

21 *Ibid.* at p. 946.

the Court expressed the view that it is open to the President in the exercise of the power vested in him by Article 72, to scrutinise the evidence on record of the criminal case and come to a different conclusion from that reached by the Court in regard to the conviction and sentence of the accused. The case contains a clear contradiction because if the President can take an independent decision on the basis of the evidence placed before him, it cannot be said that he is bound by the advice of the Council of Ministers. The Supreme Court's verdict did little to dispel the existing confusion on where the power of pardon really lay. When Kehar Singh's mercy petition was submitted to President Venkataraman, he referred the matter to the Home Ministry. He was of the opinion that he was bound to accept the advice of the Council of Ministers. Indeed, he observes in his book that despite the Supreme Court giving him discretion in *Kehar Singh*, he believed that it was for the Government to decide the matter and render advice to him.<sup>22</sup> It is precisely because of such an attitude that the position of the President has been reduced to that of a mere rubber stamp.

In comparison, the President of the United States of America has the power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. The power of the President is not subject to the control of Congress. It cannot limit the effect of a pardon nor exclude from its operations any class of offenders. The power to pardon includes the power to reduce or commute a sentence, but not to substitute one of a different nature.<sup>23</sup> Thus, the President has the exclusive power to grant pardon at his discretion. A similar model seems to have been incorporated in the Indian Constitution, although the courts have repeatedly followed British practice.

### **Assent to Bills – President's Powers under Article 111**

Article 111 provides that "When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom." The proviso allows the President to send a Bill back to the Houses for reconsideration, but obliges him to sign it after it has been reconsidered. Does this provision confer discretionary power on the President or must it also pass through the filter of Article 74?

The provision requires the President to decide whether to give assent to a Bill or to withhold such assent or refer it back to Parliament for reconsideration. If read through the filter of Article 74 this provision would be unnecessary, because

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<sup>22</sup> *Supra.*, n. 13 at p. 248.

<sup>23</sup> Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America*, 142-143 (1994).

even if Parliament passed an unconstitutional law, the Council of Ministers could advise the President to give his assent and the President (as has been the practice over the years) would comply, despite the consequent violation of Article 60. Who, then, would preserve, protect and defend the Constitution?

No case has arisen as yet on the interpretation of this article. There have been rare instances when the President has refused to give his assent to Bills. The first President, Dr. Rajendra Prasad, raised a dissenting voice when on 18 September 1951, he informed Prime Minister Nehru of his intention to act independently on the issue of assenting to the Hindu Code Bill.<sup>24</sup> However, legal experts such as M. C. Setalvad assured Nehru that the President was not constitutionally empowered to do this. What Dr. Rajendra Prasad would have done if the Bill were passed can only be a point of speculation, since the Bill was shelved. If he had acted according to his discretion, he might have provided the necessary impetus for a constitutional exercise of Presidential powers.

The American Constitution provides that a Bill, other than a Tax Bill, may originate in either house. If a Bill is passed in the House of Representatives by a majority vote, it goes to the Senate, where it must secure a majority vote to be sent to the President for his assent. The President may sign the Bill and make it law. He may veto it and return it with objections to the House in which it originated. If it is sent to the House of Representatives, it has to obtain a two-thirds majority to be sent to the Senate. If it secures a two-thirds majority in the Senate, it becomes law without the President's assent. This is called overriding the President's veto. If it fails to pass either House, it cannot become law. This is called sustaining the President's veto.<sup>25</sup> In such a case, it could be reintroduced in the very next session of Congress. If the President neither signs nor vetoes a Bill within ten days, it becomes law. If Congress adjourns within those ten days, however, the Bill does not become law, but is automatically vetoed. This is called the pocket veto.<sup>26</sup>

When the power of the Indian President to assent or withhold assent to bills is compared with the American President's power of veto, it is evident that the Indian President has more power than his American counterpart, but has never exercised it. The American President, except in the case of the pocket veto, cannot withhold assent to Bills, whereas the Indian President can do so under Article 111. Hence, it can be inferred that the framers of the Constitution vested the President with greater powers than the American President, which he is expected to exercise at his discretion.

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<sup>24</sup> *Supra.*, n. 12 at p. 246.

<sup>25</sup> Floyd G. Cullop, *The Constitution of the United States*, 36-37 (1984).

<sup>26</sup> *Ibid.*

### The Power to Issue Ordinances

The President has the power to promulgate ordinances when both Houses of Parliament are not in session. These remain in force until 6 weeks after both Houses have been reconvened, unless both Houses pass resolutions disapproving of them before that time. This power permits the executive to deal with emergency situations arising when Parliament is not in session. Article 123 confers the power to promulgate ordinances on the President, subject to two conditions. Firstly, both Houses of Parliament should not be in session and secondly, the President must be “satisfied” that a situation exists which warrants the issuing of an ordinance.

A literal interpretation of Article 123(1) makes it clear that the promulgation of an ordinance is a discretionary power of the President. This is obvious because of the use of the word “satisfied”. Hence, in theory, the President need not take the aid and advice of the Council of Ministers in the course of issuing ordinances.

As is to be expected, judicial interpretation has been to the contrary. In *R. C. Cooper v. Union of India*<sup>27</sup>, the Supreme Court ruled that the President has to act in all matters, including the promulgation of an ordinance, on the advice of the Council of Ministers. The Court speaking through Justice Shah said that although in a constitutional sense an ordinance is promulgated on the satisfaction of the President, in truth, it is promulgated on the advice of the Council of Ministers and upon their satisfaction. The Court therefore implied that the promulgation of ordinances was a function of the President. This position was reiterated in *Venkata v. State of Andhra Pradesh*<sup>28</sup>.

However, in *Sardari Lal v. Union of India*<sup>29</sup>, the Supreme Court speaking through Justice Grover held that in all places in the Constitution where the term satisfaction is used, it refers to the personal satisfaction of the President on the basis of the material placed before him. This was overruled in *Samsher Singh*<sup>30</sup>, where the Court held that satisfaction of the President was not his personal satisfaction, as also held in *Jayantilal Shodhan v. F.N.Rana*<sup>31</sup>, but the satisfaction of the Council of Ministers. Hence, *Samsher Singh* effectively ruled that the President had no discretion in the exercise of his powers under Article 123.

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27 AIR 1970 SC 564.

28 AIR 1985 SC 724.

29 AIR 1971 SC 1547.

30 AIR 1974 SC 2192.

31 AIR 1964 SC 648.

In recent years, however, the President has used his discretion and refused to promulgate ordinances as advised by the Council of Ministers. This realisation of the nature of the power conferred by Article 123 is a welcome development.

### **The Discretionary Power of the President with respect to Emergency Provisions**

The emergency provisions undoubtedly require checks and balances in their exercise, since rash usage of these provisions could throw the country into disarray. It is therefore important to enquire into whether the President has the power to refuse to invoke the emergency provisions when asked to do so by the Council of Ministers.

Article 352 of the Constitution provides that “If the President is *satisfied* that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by proclamation, make a declaration to that effect...” The use of the word “satisfied” means that all the arguments advanced in respect of Article 123 apply to this provision as well. However, this power of the President is circumscribed by the requirement under Article 352(3), of a written communication from the Union Cabinet, directing the issuance of a proclamation of emergency.

The President could exercise his discretion and refuse to issue such a proclamation. The only option then available to the Council of Ministers would be to initiate impeachment proceedings against him, if they were assured of a two-thirds majority. In the interests of the Constitution and the mandate of Article 60, it is imperative that the President exercise his discretion.

With respect to Article 356, in *State of Rajasthan v. Union of India*<sup>32</sup>, the Supreme Court ruled that the word “shall” in Article 74(1) suggests that regardless of whether the President has received a report from the Governor, he can act under Article 356(1) only in accordance with the advice tendered by the Union Council of Ministers and if the latter so advise, the President cannot but issue a proclamation under Article 356(1) in respect of the concerned state. This seems to be an incorrect interpretation of both Articles 356 and 74. As stated earlier, the use of the word “satisfied” should clarify that what is envisaged in the provision is the personal satisfaction and discretion of the President. Further, an interpretation to the effect that the President is bound to solicit and accept the advice of the Council of Ministers implies that Article 356 is a function, which it is not.

This incorrect position was reiterated in *S. R. Bommai v. Union of India*<sup>33</sup>. Justice Sawant ruled that the power under Article 356 was vested *de jure* in the President and *de facto* in the Council of Ministers. In the same case, Justice B. P. Jeevan Reddy said that the President has to decide on the basis of the material before him, whether the situation contemplated by Article 356(1) has arisen. The learned judge was of the opinion that the provision permits discretion, which has to be exercised fairly. Hence, the view that the President has to use his discretion when exercising power under Article 356 has received judicial recognition.

Theoretically it is evident that the emergency powers have to be exercised at the discretion of the President and not on the advice of the Council of Ministers. Thanks to judicial interpretation, however, as well as the views of numerous writers, the position seems to be quite different in practice. Indeed, D. D. Basu goes to the extent of saying that Article 352 is a function to be exercised as per the advice of the Council of Ministers.<sup>34</sup>

### Conclusion

Does the President have any discretionary powers? A study of the powers of the President makes it abundantly clear that most of the powers conferred on the President under the Constitution of India are discretionary in nature. Words and phrases such as “pleasure”, “if the President is satisfied”, “if the President is of the opinion”, “with the previous consent of the President”, “the President may by order determine”, “as he may deem necessary”, etc., imply that the President has discretion in a number of matters.

It is to be noted that what we have is neither the “cabinet” form of government prevalent in England, nor the Presidential form adopted in the United States. India has a unique system of government, which vests equal power in the three branches maintained in equilibrium by an effective system of checks and balances.

However, while interpreting the provisions of the Constitution, the judiciary has consistently held that India follows the “cabinet” system of government, with the President acting as a mere figurehead on the advice of the Council of Ministers. It has held that British conventions have to be followed. This clearly reflects a flawed understanding of the Constitution. It is to be noted, however, that any interpretation carried to an extreme would achieve absurd results. Thus, applying the alternative interpretation suggested in this article, it would be possible to use *Dinesh Chandra v. Chaudhary Charan Singh*<sup>35</sup>, to argue that “pleasure” could be

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33 AIR 1994 SC 1918, 1976.

34 D. D. Basu, *Shorter Constitution of India*, 1171 (1994).

35 AIR 1980 Del 114.

interpreted in Article 75(2) to mean that the President can dismiss any minister at will. Following *S. P. Anand v. H. D. Deve Gowda*<sup>36</sup>, it could then be said that since “Minister” also includes the Prime Minister, the President can dismiss the Prime Minister at will.

Of course, this sort of interpretation is absurd and upsets the delicate balance wrought by the Constitution. It is unlikely to find acceptance among elected representatives because it vests potentially dangerous powers in the President. The prevailing situation is exactly the opposite. Because of a flawed interpretation of the Constitution, power that the Constitution expressly vests in the President is usurped by the Council of Ministers, using Article 74.

The President of the Constituent Assembly, Dr. Rajendra Prasad, realised the extent of power vested in the President and attempted to use it, but was prevented from doing so by Nehru, who using M. C. Setalvad’s interpretation that India had a “Cabinet” form of government, ensured that the President was virtually powerless. Dr. Rajendra Prasad’s actions reveal an understanding of Presidential powers as discretionary.

Finally, Article 361 would have been considered unnecessary if the President did not have discretionary powers. If the President were not expected to exercise his powers personally, the framers of the Constitution would have considered the immunity granted to him by Article 361, unnecessary. Such immunity would have been given to the Council of Ministers instead.

The President has a great deal of power vested in him. In some respects, he is more powerful than the American President. That power has remained in theory and has rarely been put into practice. It is imperative that the President plays an assertive role and respects the provisions of the Constitution. That is not only his duty, but also his solemn obligation.